



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:

SSN: -----

Applicant for Security Clearance

)

)

)

)

)

)

ISCR Case No. 07-01466

Appearances

For Government: Allison O'Connell, Esquire, Department Counsel

For Applicant: *Pro Se*

January 18, 2008

Decision

RIVERA, Juan J., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on August 17, 2004. On July 24, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the Government's security concerns under Guideline E (Personal Conduct).¹

Applicant answered the SOR on September 17, 2007, and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on November 1, 2007, and I received the case assignment on November 6, 2007. That same day, I granted Applicant's request for a scheduling delay pending his receipt of the Government's investigation file which he had timely requested. After receipt of the

¹ The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

investigation file, on November 14, 2007, Applicant and Department Counsel agreed to a hearing date of December 5, 2007. DOHA issued a notice of hearing on November 26, 2007, and I convened the hearing as scheduled on December 5, 2007. The government offered exhibits (GE) 1 and 2, which were received without objection. Applicant testified on his own behalf and submitted exhibits (AE) 1 through 6, which were received without objection. DOHA received the transcript of the hearing (Tr.) on December 17, 2007. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural and Evidentiary Rulings

Notice

On November 14, 2007, Applicant agreed to a hearing date on December 5, 2007. The hearing notice was issued on November 26, 2007. At the hearing, I advised Applicant of his right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing. Applicant stated he was ready to proceed, that he had sufficient time to prepare for his hearing, and affirmatively waived his right to 15 days notice. (Tr. at 18.)

Findings of Fact

In his Answer to the SOR, dated September 17, 2007, Applicant denied all the SOR allegations. After a thorough review of all evidence of record, including his demeanor and testimony, I make the following findings of fact.

Applicant is a 60-year-old Senior Design Engineer. In 1972, he completed two bachelors' degrees, one in electrical engineering and computer science, the other in philosophy of science (epistemology). He has completed two masters' degrees. In 1984, he completed a master's in business administration, and in 1987, he completed a master's in computer science. Around 1989, he also participated in a PhD. program; however, he was unable to complete the program because of his job commitments (Tr. 5-6).

Applicant married his first wife in June 1970, and they were divorced in December 1973. He married his present wife in May 1974, and they have two adult children, ages 28 and 21. He has held the same job for the same defense contractor (albeit under different names) since 1993. He has had access to classified information at the top secret level since 1993 (Tr. 6). There is no evidence that Applicant has ever compromised classified information or that he has failed to comply with rules and regulations concerning the protection of classified information.

In 2004, Applicant submitted a security clearance application requesting an upgrade of his top secret security clearance to have access to secret compartmented information (SCI). His employer wanted Applicant qualified to handle possible future government contracts requiring SCI access. In June 2005, as part of the security clearance upgrade investigation process, Applicant underwent a lifestyle polygraph

examination and interview. During the interview, consistent with his answers to the DOHA interrogatories (GE 2), Applicant admitted that:

(1) Around 2002, he visited a store to have a duplicate key made. Irritated because of the time he had to wait for someone to cut the key and the long checkout lines, Applicant lost his patience and walked out of the store with the key without paying \$1.25 for it (GE 2).

At his hearing, Applicant modified his answer to the DOHA interrogatory. He testified he walked out of the store without paying for the key; however, he added that he did not keep the key, that he threw it in a garbage can located outside of the store (Tr. 75). He admitted he exercised bad judgment by losing his temper, leaving the store without paying for the key, and throwing the key in the garbage can (Tr. 44-45, 79).

(2) Around 2003, he visited a scuba diving shop. While shopping, he placed some of the smaller items he selected, including a set of scuba mask lenses, inside of his motorcycle helmet along with his gloves. Applicant claimed he paid for all the selected items, except for the scuba mask lenses (valued at approximately \$29). He claimed that, unintentionally, he failed to notice the lenses underneath of his gloves in the helmet, and did not pay for the lenses. He noticed the lenses when he tried to put on the gloves outside of the store. In his answer to the DOHA interrogatories, Applicant stated that rather than return to the store, "and more than a little embarrassed," he simply left without paying for the lenses (GE 2).

At his hearing, Applicant modified his answer to the DOHA interrogatory. He testified that he was too embarrassed to go back into the store to return or to pay for the lenses. Instead, he claimed he left the lenses on a ledge in the outside window of the store (Tr. 52). Applicant explained he is not a thief. He admitted he exercised bad judgment when he failed to return the lenses to the store.

(3) In 2004, Applicant purchased a set of patio furniture with a value around \$800. He also purchased one additional piece of matching furniture with a value around \$100 to go with the set of patio furniture. During the June 2005 interview, Applicant stated he reviewed the receipt at the store and immediately noticed he was not charged for the additional item (Tr. 86-87).

In his response to DOHA interrogatories, Applicant stated he did not review the receipt until he got home, and then it became clear to him that he had not been charged for the additional piece of furniture. He thought about driving back to the store to correct the cashier's mistake, however, he failed to do so and kept the furniture (GE 2).

At his hearing, Applicant testified he was never sure whether he had been charged for the additional piece of patio furniture. He said his wife believed he had paid for it.

(4) During his 2005 interview, Applicant told the polygraph interviewer that he had shoplifted approximately 20 times in the past 15 years. At his hearing, he explained that he had exaggerated the number of times he had shoplifted, and that he was pretty sure it was only about eight times (Tr. 150). He claimed he exaggerated his behavior during the interview for several reasons, i.e., to shock the interviewer, because he was angry with the interview process, and because he wanted to embellish his statements to please the interviewer (Tr. 102-107). He further told the interviewer he shoplifted because he did not want to waste his time waiting in line to pay for small items (Tr. 110).

At his hearing, Applicant explained that what he meant to say to the interviewer was that because he was buying small items in bulk (nuts, bolt, and washers), he could not guarantee that he had accurately reported to the cashiers all of the items he had selected for purchase.

(5) At his hearing, Applicant also admitted he had told the 2005 interviewer that he had shoplifted a \$1 part from a motorcycle shop's display. He testified, however, that he had not taken the part from the motorcycle shop display, but that he found the part in the ground outside of the motorcycle shop, and he took it knowing it was not his.

Applicant was questioned at his hearing about the contradictions between his hearing testimony and his answers to the DOHA interrogatories (which were consistent with the statements he made to the 2005 interviewer). He explained that when he answered the interrogatories he made sure his answers were consistent with the answers he provided to the 2005 interviewer. He further explained that during the 2005 interview, he was under a lot of stress, collapsed emotionally, and felt he could not explain his answers.

During the 2005 interview, the interviewer kept telling Applicant he was indicating deception. Applicant testified he felt compelled to continue searching his past behavior for incidents that could have been causing his deception. As a result, Applicant disclosed all the incidents alleged in the SOR. He believed it would not have been in his best interest to explain or mitigate his past questionable behavior. He averred he exaggerated his past behavior to please the interviewer (Tr. 64-70).

Applicant testified he has had an impeccable work record since 1993. He is a valued employee, and his excellent work performance and significant contributions have been recognized via excellence awards and letters of recognition (AE 1).

Policies

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information.²

² See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security."³ In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

³ *Egan, supra*, at 528, 531.

Analysis

Guideline E, Personal Conduct

Under Guideline E, the security concern is that conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. AG ¶ 15.

During the last 15 years, Applicant shoplifted at least eight times. These incidents included the taking of a duplicate key with an approximate value of \$1.25 in 2002; a set of scuba lenses with an approximate value of \$29 in 2003; and, his failure to accurately report to cashiers all the items he had selected for purchase. Additionally, he received and kept furniture he had not paid for. His actions show poor judgment, unreliability, dishonesty, and an unwillingness to comply with rules and regulations.

In 2005, Applicant provided a statement to a government interviewer describing the circumstance of his shoplifting and lack of judgment. In his April 2007 response to DOHA interrogatories, Applicant made certain his answers were consistent with the statements provided in 2005. At the hearing, Applicant recanted his answers to the interrogatories, and provided exculpatory information not provided either during his 2005 interview or in his answers to the DOHA interrogatories. Specifically, he claimed for the first time that he threw the key in a garbage can outside of the store; that he was too embarrassed to go back into the scuba shop to return or to pay for the lenses, but he left the lenses in a window ledge outside of the store; that he never reviewed his receipt his patio furniture receipt while in the store, and that he was now not certain whether he paid for the extra piece of furniture. I find Applicant's recantation and testimony not credible. He tried to deny responsibility for his past behavior and minimized his past questionable behavior.

Disqualifying Condition (DC) ¶ 16(c): "credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, and unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;" and DC ¶ 16(e): "personal conduct , or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing . . .", apply.

Applicant has held a top secret security clearance for approximately 14 years. Except for the alleged misconduct, there is no evidence that he has engaged in any other misconduct or questionable behavior. Based on the available evidence, except for

the shoplifting incidents, Applicant has been an upstanding husband, employee, and citizen. Moreover, there is also no evidence to suggest Applicant does not follow rules and regulations pertaining to the handling of classified information.

AG ¶ 17 lists seven conditions that could mitigate the personal conduct security concerns. After considering all the mitigating conditions, I find that none of the mitigating conditions apply to this case. I specifically considered AG ¶ 17(c), and find that although Applicant's offenses are indeed minor, his shoplifting forms a pattern of frequent behavior that is likely to recur, and it casts doubts on his reliability and good judgment. AG ¶ 17(d) is not applicable because Applicant has failed to take responsibility for his questionable behavior. At his hearing, Applicant recanted prior statements and minimized his behavior. His lack of candor, honesty, and credibility weigh against a finding that he has acknowledged his questionable behavior, and that he has taken positive steps to prevent its recurrence.

Concerning AG ¶ 17(e), Applicant failed to provide any evidence to show he has taken steps to reduce or eliminate his vulnerability to exploitation, manipulation, or duress. He presented no evidence to show his family, supervisors, co-workers, and friends are aware of his past questionable behavior. Applicant's recantation of his prior statements and his efforts to minimize his past behavior, coupled with his demeanor and testimony, convince me he is highly embarrassed and ashamed of his past behavior. As such, he is vulnerable to exploitation, manipulation, or duress to prevent embarrassment and ridicule.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a): "(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence." Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a mature, well educated man. He has been successful as a husband and father. He is considered a valued employee who has made significant contributions working for a defense contractor. He has held access to classified information at the top secret level for approximately 14

years. There is no evidence to show Applicant has ever compromised or caused others to compromise classified information.

Considering the totality of the circumstances in his case, Applicant's pattern of questionable behavior, coupled with his recantation, and his failure to provide truthful and candid answers at his hearing create doubts as to his judgment, reliability, and trustworthiness. I find that Applicant's recent lack of candor, honesty, and credibility undercut his claims of successful rehabilitation. Moreover, it shows Applicant is still potentially susceptible to pressure or coercion in order to cover his past questionable judgment and his embarrassing behavior.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising from his personal conduct.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline E:	AGAINST APPLICANT
---------------------------	-------------------

Subparagraphs 1.a-1.d:	Against Applicant
------------------------	-------------------

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to continue Applicant's security clearance. Eligibility for access to classified information is denied.

JUAN J. RIVERA
Administrative Judge