



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 07-06550
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Eric H. Borgstrom, Esq. Department Counsel
For Applicant: Glenn P. Schillo, Esq.

March 28, 2008

Decision

FOREMAN, LeRoy F., Administrative Judge:

Applicant submitted his security clearance application on January 10, 2006. On October 17, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines E (Personal Conduct) and F (Financial Considerations). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), 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.

Applicant acknowledged receipt of the SOR on October 25, 2007; answered it on November 16, 2007; and requested a decision on the record without a hearing. DOHA received his answer on November 19, 2007. On December 7, 2007, Department Counsel requested a hearing in accordance with Directive ¶ E3.1.8, and was ready to proceed on December 27, 2007. The case was assigned to me on January 2, 2008. DOHA issued a notice of hearing on January 18, 2008, scheduling the hearing for

February 12, 2008. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 10 were admitted in evidence without objection. Applicant testified on his own behalf and submitted Applicant's Exhibits (AX) A through O, which were admitted without objection. The record closed on February 12, 2008. DOHA received the transcript of the hearing (Tr.) on February 21, 2008. Eligibility for access to classified information is denied.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegation in SOR ¶ 1.a (6). At the hearing, he admitted all the allegations in the SOR. His admissions in his answer to the SOR and at the hearing are incorporated in my findings of fact. I make the following findings:

Applicant is a 60-year-old consultant for a federal contractor. He has worked for his current employer since June 2003. He served as an officer in the U.S. Army Reserve from April 1970 to November 1996, retiring as a lieutenant colonel (Tr. 40).

Applicant is married and has a 12-year-old daughter (Tr. 63). He received bachelor's degrees in metallurgical engineering and chemistry in 1970, a master's degree in materials science in 1971, a degree equivalent to a master's degree in business administration in 1977, and a doctorate in materials science and engineering in 1978.

Applicant received a clearance in May 1990. His employer sponsored his application for access to sensitive compartmented information (SCI) in March 2004 (GX 4). His application for SCI eligibility was denied in March 2005 (GX 3). This denial of access was alleged in SOR ¶¶ 1.a, and the basis for the denial was the conduct alleged in SOR ¶¶ 1.a (1) through 1.a (6). He appealed the denial of SCI eligibility (GX 5, 6, and 7). His appeal was denied in June 2005 (GX 8).

Applicant's work is time sensitive, involves extensive travel, and requires long work days (Tr. 72-73). From about October 1996 through June 1999, Applicant worked as a self-employed consultant. From July 1999 to October 2001, he worked as a full-time employee of a consulting firm. From October 2001 to June 2003, he worked out of his home for a consulting firm. During all three periods involving three different employers, Applicant claimed reimbursement for more than his actual travel expenses. He would claim more than he spent for a meal because no receipt was required for less than \$20. He would claim more miles driven to the airport than actual mileage, overstate the amount of tolls paid, and overstate the cost of gasoline for a rental car (GX 4 at 1). He explained to security investigators that he did not consider his claims for meals, gasoline and tolls fraudulent, because he worked long hours, did not take time for formal meals, claimed less for gasoline than rental agencies would charge for gasoline, and incurred numerous unreimbursed incidental expenses (GX 6 at 2).

About once a year, Applicant used frequent flier miles to fly to a client site and then charged his employer the cost of the tickets. On two occasions, in September 2004 and November 2004, he purchased airline tickets for duty travel, used his personal vehicle to drive to the duty locations, and then claimed and received reimbursement for the cost of air travel (Tr. 77-78). He did not consider his conduct employee theft because he frequently saved his employers money by flying on weekends, flying through airline hubs rather than non-stop, and driving to more distant airports to benefit from lower fares (GX 6 at 3). At the hearing, he admitted the factual allegations and attributed them to his "subjective rationalization" of his conduct (Tr. 108-11).

During calendar years 2006 and 2007, Applicant intentionally forfeited vacation hours and holiday pay in an effort reimburse his employer for his false claims for reimbursement. By his calculations, he returned 34 hours at \$77.65 per hour in 2006 and 44.5 hours at \$80 per hour in 2007 (AX M). As of the date of the hearing, Applicant's employers were not aware of his false claims for reimbursement or his reimbursement procedure (Tr. 71, 88). Applicant believes he would be "considered for termination" if his employer knew about his fraudulent claims for reimbursement (Tr. 89).

At some time after initiation of Applicant's SCI application and the ensuing polygraph examination, Applicant consulted with a lawyer and an accountant and received advice about the proper method of accounting for his expenses. Based on that advice, he changed his methodology and now keeps accurate records and files accurate reimbursement vouchers (Tr. 85-86).

For about 15 years, Applicant claimed charitable deductions for cash donations to his church of \$100 per week when he actually donated \$10-\$15 weekly. He claimed clothing donations of \$475 for clothing worth less than \$100, and claimed business expenses for which he was fully reimbursed by his employer (GX 4 at 2; Tr. 90-91). He made the same false claims in his 2006 federal income tax return, even though he knew his false tax returns were one of the reasons his application for a SCI clearance was denied (Tr. 91, 99). He testified he inflated his charitable deductions to compensate himself for the expenses of maintaining a home office. He also testified he was advised by an accountant that deductions for a home office were more likely to be audited than charitable contributions (Tr. 91-93).

Applicant submitted ten letters of recommendation from colleagues and supervisors (AX C-L). All the letters describe him as honest, dedicated, loyal, trustworthy, dependable, and a person of high integrity and moral standards. The letters were written at Applicant's request (Tr. 58). He testified none of the letter writers were aware of his false tax returns and only one, submitted by a fellow Army Reserve officer (AX K), was aware of his false reimbursement vouchers (Tr. 95).

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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.

Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the

facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline E, Personal Conduct

The SOR alleges Applicant’s application for SCI access was denied for submitting fraudulent travel vouchers to three separate employers from October 1996 to June 2003 (SOR ¶¶ 1.a (1), (2), and (4)); using frequent flyer mileage to obtain airline tickets and then submitting reimbursement vouchers for the tickets (SOR ¶ 1.a (3)); cashing in airline tickets paid for by his employer, driving to his destination, and keeping the refunds for the airline tickets (SOR ¶ 1.a (5)); and filing fraudulent federal income tax returns by inflating his charitable contributions and claiming business expenses for which he was reimbursed (SOR ¶ 1.a (6)).

The security concern relating to Guideline E is set out in AG ¶ 15 in pertinent part as follows: “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.” Potentially disqualifying conditions under this guideline include “deliberately providing false or misleading information concerning relevant facts to an employer”; “a pattern of dishonesty or rule violations”; and “personal conduct, or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person’s personal, professional, or community standing.” AG ¶¶ 16(b), (d)(3), and (e). Applicant’s false reimbursement vouchers, his concealment of his conduct from his employer, his vulnerability to being terminated for his dishonesty, and the damage disclosure of this conduct would cause to his professional and community standing raise all three of these potentially disqualifying conditions.

Since the government produced substantial evidence to raise the disqualifying conditions above, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns raised by false or misleading answers to an employer may be mitigated by showing that “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.” AG ¶ 17(a). This mitigating condition is not established because Applicant has not informed his employers of his false reimbursement vouchers.

Security concerns also may be mitigated if “the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.” AG ¶ 17(c). This is a compound mitigating condition, with three disjunctive prongs and one conjunctive prong. It may be established by showing the conduct was minor, long ago, infrequent, or occurred under unique circumstances. If any of these disjunctive prongs are established, the mitigating condition is not fully established unless the conduct “does not cast doubt on the individual's current reliability, trustworthiness, or good judgment.”

Some of Applicant's inflated travel vouchers, considered separately, may have been minor thefts. Each fraudulent tax return was a misdemeanor under 26 U.S.C. § 7207. However, the amounts involved in the airline tickets were significant. Thus, I conclude the first prong (“so minor”) is not established. The second prong (“so much time has passed”) also is not established because his fraudulent conduct continued through tax year 2006. The third prong (“so infrequent”) is not established because of his multiple fraudulent acts. His 15-year track record of fraud casts doubt on his current reliability, trustworthiness, and good judgment. I conclude AG ¶ 17(c) is not established.

Security concerns under this guideline may be mitigated if “the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.” AG ¶ 17(d). Applicant received legal advice long before he received the SOR. He continued to rationalize and justify his behavior in his answer to the SOR. He finally acknowledged his behavior at the hearing. He has not established that his fraudulent behavior is “unlikely to recur, because he continued to file fraudulent tax returns even after they cost him his opportunity for a SCI clearance. I conclude AG ¶ 17(d) is not established.

Finally, security concerns may be mitigated if “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.” AG ¶ 17(e). Applicant admitted he has not told his employer about his fraudulent behavior and he acknowledged that it could cost him his job. Moreover, disclosure of his fraudulent conduct would damage his professional and community standing. I conclude AG ¶ 17(e) is not established. None of the other enumerated mitigating conditions under this guideline are established.

Guideline F, Financial Considerations

The SOR alleges that the same conduct alleged under Guideline E also raises security concerns under this guideline. The security concern under this guideline is set out in AG ¶ 18 in pertinent part as follows:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to

abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information.

A disqualifying condition under this guideline may be raised by "deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust." AG ¶ 19(d). Applicant's fraudulent travel vouchers raise this disqualifying condition.

A disqualifying condition also may be raised by "failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same. AG ¶ 19(f). Evidence that Applicant claimed false charitable contributions for 15 years on his federal income tax returns raises this disqualifying condition.

Security concerns based on financial conduct can be mitigated by showing that "the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment." AG ¶ 20(a). Like AG ¶ 17(c) under Guideline E, this is a compound mitigating condition, with three disjunctive prongs and one conjunctive prong.

The first prong ("so long ago") is not established, because Applicant continued to file fraudulent tax returns through tax year 2006. The second prong ("so infrequent") is not established because of his numerous fraudulent tax returns. The third prong ("occurred under such circumstances that it is unlikely to recur") is not established, because his fraud occurred during routine filing of tax returns and travel vouchers. Finally, his fraudulent travel claims, and fraudulent tax returns over a 15-year period, continuing even after he knew the denial of his SCI application was based on part on his fraudulent tax returns, preclude a finding that it is unlikely to recur and cast doubt on his current reliability, trustworthiness, and good judgment. I conclude AG ¶ 20(a) is not established.

Security concerns under this guideline also can be mitigated by showing that "the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control." AG ¶ 20(c). Applicant received counseling from a lawyer and an accountant, but he continued to file fraudulent returns. I conclude AG ¶ 20(c) is not established.

Whole Person Concept

Under the whole person concept, an 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. An 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 common sense judgment based upon careful consideration of the guidelines and the whole person concept. Some of the factors in AG ¶ 2(a) were addressed above, but some warrant additional comment.

Applicant is a mature, intelligent, exceptionally well-educated adult. He served as an officer in the Army reserve for twenty years. However, his history of fraudulent conduct suggests a propensity to violate rules for personal convenience and to rationalize his violations. He is highly regarded by many colleagues and friends; however, all but one of those who submitted statements on his behalf were unaware of his behavior. To this day, he has not been candid with his employer.

After weighing the disqualifying and mitigating conditions under Guidelines E and F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on financial considerations and personal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

Formal Findings

I make the following formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25 of Enclosure 3:

Paragraph 1, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraphs 1.a (1)-(6):	Against Applicant
Paragraph 2, Guideline F (Financial Considerations):	AGAINST APPLICANT
Subparagraph 2.a:	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 eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge