



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-09163
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: Brian E. Kaveney, Esquire

September 15, 2010

Decision

MOGUL, Martin H., Administrative Judge:

On August 24, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline E for Applicant. 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 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.

On September 21, 2009, Applicant, through counsel, replied to the SOR (RSOR) in writing, and he requested a hearing before an Administrative Judge. The case was assigned to this Administrative Judge on December 1, 2009. DOHA issued a notice of hearing on January 14, 2010, and I convened the hearing as scheduled on February 18, 2010. The Government offered Exhibits 1 through 3, which were received without objection. Applicant testified on his own behalf and submitted Exhibits A through III, which were also admitted without objection. Six additional witnesses testified on behalf of Applicant. DOHA received the transcript of the hearing (Tr) on March 1, 2010. Based

upon a review of the case file, pleadings, exhibits, and the testimony of Applicant and his witnesses, eligibility for access to classified information is granted.

Findings of Fact

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the following findings of fact:

Applicant is 73 years old. He is a widower, and he has one adult child and two adult stepchildren. Applicant is employed by a defense contractor in an Engineering position, and he has held a DoD security clearance since approximately 1960. He seeks to retain a DoD security clearance in connection with his employment in the defense sector.

Paragraph 1 (Guideline E, Personal Conduct)

1.a. It is alleged in the SOR that in approximately 1983, Applicant gave proprietary documents from his employer at the time to a liaison from the Israeli Consulate, without permission or knowledge of his employer. In his RSOR, Applicant admitted that he "gave one document to a liaison from the Israeli Consulate."

At the hearing Applicant testified that early in 1983 he was planning a trip to Israel, and he was considering the possibility of moving to Israel to reside there. He contacted the Israeli consulate to inquire about employment possibilities, and he received the named of a technical liaison with whom he spoke on the phone. The liaison told him that he would welcome any information that the Applicant could provide about his work. Applicant testified that he told this man that he would never reveal classified information, which he never did, but a few weeks later he did provide to the man an unclassified proprietary document that described a top level research project in which his employer was engaged. Applicant estimated that the document was 20 to 25 pages, and Applicant stated that he did not consider that he was doing anything to harm the United States, since the document was not classified, and because Israel was a customer of his employer and a close ally of the United States. (Tr at 37-40.) Applicant ultimately decided not to move to Israel, and he has had no contact with any Israeli representative since 1983. (Tr at 49-50.)

1.b. Applicant executed a DoD Personnel Security Questionnaire, DD Form 398 on October 10, 1994. (Exhibit 2.) The SOR alleges that Applicant falsified material facts in response to question 14. (d) which asks, "Have you ever had any contact with a foreign government, its establishments (e.g., embassies, consulates, or its representatives) whether inside or outside the U.S. other than on official U.S. Government business?" Applicant answered "No" to this question. It is alleged in the SOR that he should have included the contact with the Israeli consulate in approximately 1983, as alleged in subparagraph 1.a., above. Applicant admitted this allegation in his RSOR and when he testified. He conceded that he should have disclosed this information on the questionnaire. (Tr at 40.)

1.c. Applicant executed a Security Clearance Application (SCA), Standard Form 86, on February 18, 2000. (Exhibit 1.) The SOR alleges that Applicant falsified material facts in response to question 7.c. which asks, "Have you ever had any contact with a foreign government, its establishments (e.g., embassies or consulates) or its representatives, whether inside or outside the U.S. other than on official U.S. Government business?" Applicant answered "No" to this question. It is alleged in the SOR that he should have included the contact with the Israeli consulate in approximately 1983, as alleged in subparagraph 1.a., above. Applicant admitted this allegation in his RSOR and when he testified. He also conceded that he should have disclosed this information on the SCA. (Tr at 40.)

Applicant testified that he was given a polygraph in 2000, and during that test he was asked whether he ever had contact with a representative of a foreign country. He initially denied that he had, but then he admitted that he previously had contact with a foreign representative. Applicant stated that his initial denial was because he was embarrassed as he had never done anything like this before, and he was not sure how it would affect his security clearance. (Tr at 44-45.)

Applicant testified that following his first polygraph in 2000, he resolved to scrupulously comply with all security requirements, and since that time he has. (Tr at 45.) In 2001, he was given another polygraph, and this time he revealed all the foreign contact information without reservation. In 2005, when Applicant completed another SCA, he revealed his contact with the Israeli Consulate representative. (Tr at 41-43.) Exhibit HHH is a copy of the 2005 SCA, which establishes that Applicant did inform the Government that he had contact with the Israeli Consulate in 1983. Additionally, Applicant revealed his foreign contact during a 2008 OPM interview (Exhibit III), to all of the witnesses who testified at the hearing, and to all of the individuals who provided affidavits that have been entered into evidence. (Exhibits A through U.)

Applicant averred that during his almost 50 years of holding a security clearance, this was the only situation in which he was less than completely candid with any of his employers or the United States Government. Also during that period, the only other incident he could cite in which his security was questioned occurred in 1970, when Applicant entered his work space in the morning. He was informed by a security guard, who left a note, informing him that he had failed to secure his safe on the previous night. (Tr at 45-46.)

At 73 years of age, Applicant stated that he has the financial means to retire, but he still feels that he has a lot to contribute, as he is "very interested in national defense and doing what I can for the country." (Tr at 47.)

Mitigation

In addition to Applicant, six individuals testified on his behalf. They included his direct supervisor, Witness 1, whose resume is Exhibit A, and who also offered an affidavit into evidence. (Exhibit B.) Exhibits RR, SS, and TT are Performance Appraisals that she prepared for Applicant. About Applicant she testified, "I trust him

absolutely 100 percent.” (Tr at 105.) The next witness was Applicant’s former supervisor from 1996 to 2000, Witness 2, and his resume is Exhibit C. Exhibit D is an affidavit he submitted. Exhibits OO, PP, and QQ are Performance Appraisals that he prepared for Applicant. He described Applicant as a “top notch” performer with “unswerving integrity and attention to detail. (Tr at 123-130.) The third witness had worked in aerospace for 40 years, Witness 3, who was a corporate senior vice president, when Applicant worked for him. Exhibit E is his resume and Exhibit F is his affidavit. Witness 3 has known Applicant since 1975, and he indicated that he has “never had the slightest reason to question his character.” (Tr at 148.) He also stated that he believed Applicant is remorseful for his conduct that is the subject of the SOR. (Tr at 153-154.)

The fourth witness is a retired United States Air Force Colonel, now president of a technology company, Witness 4. Exhibit I is the resume of Witness 4, and Exhibit J is his affidavit. He also submitted three letters. (Exhibits L, M, and N.) Witness 4 indicated that he has complete confidence in Applicant, and he does not believe the conduct that is the subject of the SOR will reoccur. (Tr at 172.) The fifth witness is a college professor, who is Applicant’s next door neighbor, and who described Applicant as a good friend. Exhibit G is the resume and Exhibit H is an affidavit submitted by Witness 5. This witness testified that Applicant expressed his deep remorse to him, and it was clear that such conduct would never occur again. He described him as an “extremely trustworthy and conscientious person.” (Tr at 182-183.) The sixth and final witness is the Cantor from Applicant’s synagogue, who has known Applicant for 20 years. Exhibit S is an affidavit from Witness 6. This witness testified that he and Applicant have become friends as Applicant is a member of the choir from their synagogue. He described Applicant as someone with exemplary character, who is esteemed and revered at their synagogue. (Tr at 188-191.)

Applicant also submitted several positive character letters from individuals who did not testify at the hearing. (Exhibits Q, R, T, and U.) They all wrote in extremely positive terms about him. This included a letter from Applicant’s Rabbi, who wrote that it was his fervent belief that Applicant is “reliable, trustworthy and a man who exercises good judgement and calm consideration in all things.” (Exhibit U.)

Finally, Applicant submitted a great number of awards that he has earned, exhibiting positive recognition that Applicant has received during his career. (Exhibits V through JJ).

Policies

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 commonsense 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." 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).

Analysis

Guideline E, Personal Conduct

With respect to Guideline E, the evidence has established that Applicant committed conduct that could be considered to involve questionable judgement, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, because of his supplying an individual from a foreign Government with a proprietary document, and also for failing to honestly identify this act on Government Security Applications.

The Government relies heavily on the honesty and integrity of individuals seeking access to our nation's secrets. If such an individual intentionally falsifies material facts, it is extremely difficult to conclude that he nevertheless possesses the judgment, and honesty necessary for an individual given a clearance.

In reviewing the disqualifying conditions under Guideline E, I conclude that because of Applicant's "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire" that ¶ 16(a) applies against Applicant.

I have also considered that Applicant's initial transgression occurred in 1983, 27 years ago, and the subsequent furnishing of misleading information occurred in 1994 and 2000, 16 and 10 years ago. Based on Applicant credible testimony at the hearing and the very laudatory testimony of the witness that appeared for Applicant, plus his subsequent incidents of being truthful, I find that Applicant is extremely remorseful, and it is highly unlikely that any such conduct would ever occur again. I find mitigating condition ¶ 17(c) can be applied as "so much time has passed" and "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 judgement." I therefore, resolve Guideline E for Applicant.

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) the 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. Based on all of the reasons cited above as to why the mitigating conditions apply, considered together with the very long and successful career of Applicant, and the extremely positive testimony of the esteemed witnesses that appeared on Applicant's behalf, I find that the record evidence leaves me with no significant questions or doubts as to Applicant's eligibility and suitability for a security clearance under the whole-person concept. For all these reasons, I conclude Applicant has mitigated the security concerns.

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: FOR APPLICANT

Subparagraphs 1.a. - 1.c.: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Martin H. Mogul
Administrative Judge