



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



In the matter of:)	
)	
)	ISCR Case No. 08-10425
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Ray T. Blank, Jr., Esq., Department Counsel
For Applicant: *Pro Se*

August 16, 2010

Decision

HEINY, Claude R., Administrative Judge:

In March 2008, Applicant completed an Electronic Questionnaires for Investigations Processing (e-QIP). In response to section 11, relating to his employment activities, he failed to list he had been employed for more than 30 years with the Drug Enforcement Agency (DEA), or that he left his job after being given the choice to resign or be terminated. Applicant failed to rebut or mitigate the security concerns under personal conduct. Clearance denied.

Statement of the Case

Applicant contests the Defense Department's intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a

¹ 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).

Statement of Reasons (SOR) on January 8, 2010, detailing security concerns under personal conduct.

On February 26, 2010, Applicant answered the SOR and elected to have the matter decided without a hearing. Department Counsel submitted the Government's case in a File of Relevant Material (FORM), dated March 31, 2010. The FORM contained 11 attachments. On April 29, 2010, Applicant received a copy of the FORM, along with notice of his opportunity to file objections and submit material to refute, extenuate, or mitigate the potentially disqualifying conditions.

On May 5, 2010, Applicant responded to the FORM. Department Counsel did not object to the material and Applicant's response was admitted into the record. On June 4, 2010, I was assigned the case.

Motion to Amend SOR

In the FORM, Department Counsel moved to amend the SOR by adding an additional paragraph to ¶ 1, alleging Applicant falsified his response to Section 22 for failing to indicate on his March 2008 SF-86 that he had left a part-time job after his employer was notified by the IRS of a garnishment action. In Applicant's response to the FORM, he stated he did not understand what Department Counsel had proposed. The Motion to Amend the SOR is granted, but for the reasons later described in this decision, I find for Applicant on this allegation.

Findings of Fact

In Applicant's Answer to the SOR, he denied the factual allegations of the SOR. He admitted he was told by the DEA that "they were going to fire me unless I resigned." (Item 2) After a thorough review of the record, pleadings, and exhibits, I make the following findings of fact:

Applicant is a 64-year-old security officer who works for a defense contractor and is seeking to obtain a security clearance. Applicant is a Marine Corps veteran of the Viet Nam conflict. (Answer to FORM, Item 4)

Applicant was employed with the DEA from 1968 through November 2005 as a property manager. (Items 7, 11) In May 1999, Applicant was suspended for five days due to conduct unbecoming a DEA employee. Applicant sent an email to the individual in charge of payroll stating if he was not paid for the hours he had worked that Applicant had friends in New York who would visit the individual. (Item 2) Applicant asserted this was a joke, but it was taken as a threat. Applicant was immediately escorted out of the building and told not to return until told to do so. In March 2000, he was called back to work, given a five day suspension for poor judgment, and received a letter of reprimand. (Item 6)

Upon his return, Applicant's work performance was closely monitored. In 2005, he was told his work performance was unsatisfactory and he would be terminated unless he resigned. Applicant chose to retire. Applicant asserted, but failed to document, that he chose to retire because of "harassment retaliation by [his] unit chief after he was unsuccessful in getting [Applicant] out of the agency after doing all those negative things against me." (Item 2) In November 2005, Applicant stated he filed an Equal Employment Opportunity Commission (EEOC) complaint. (Item 11) The findings of the EEOC complaint are not part of the record of the FORM. Applicant asserted, had he chosen to contest his termination, he would have ultimately prevailed. (Answer to FORM)

In November 2005, Applicant completed an SF-86 and listed his employment with the DEA. (Item 1) He indicated he had been employed with the DEA since July 1972. He was working at DEA when this SF-86 was completed.

In March 2008, Applicant completed an SF-86. (Item 4) In section 11, Applicant listed various part-time security jobs Applicant held from September 1972 through March 2008. Some of the part-time jobs he listed were for less than two years. However, he did not list his DEA employment. The instructions for answering section 11 indicate Applicant was to show "all Federal civilian service, whether it occurred within the last 7 years or not." (Item 5)

Applicant answered "no" to question 22, employment record, which asked him if, during the previous seven years, he had been fired, quit, or left a job under unfavorable circumstances. (Item 4) The instructions for answering section 11 (Item 5) state:

Has any of the following happened to you in the last 7 years?

1. Fired from a job.
2. Quit a job after being told you'd be fired.
3. Left a job by mutual agreement following allegations of misconduct.
4. Left a job by mutual agreement following allegations of unsatisfactory performance.
5. Left a job for other reasons under unfavorable circumstances.

If you answered "Yes," provide a detailed entry for each occurrence to report.

In January 2009, in response to written interrogatories, Applicant asserted:

I was under the impression that if I choose (sic.) to retire then I did not have to state I left under unfavorable circumstances . . . However now I understand and see that I should have answered yes to the question that I left under unfavorable circumstances. (Item 6)

In June 2008, Applicant had a personal subject interview with an Office of Personnel Management (OPM) investigator. Applicant was asked about his employment with DEA, his finances, and any discrepancies on his March 2008 SF-86. He informed the investigator of the email he sent, the disciplinary action he received, and that he was told his work was unsatisfactory in 2005, and would be terminated if he did not resign. (Item 7)

In September 2007, Applicant resigned from his part-time job after the IRS presented his employer with a Notice of Levy on Wages, Salary, and Other Income. As a secured security facility, his employer was required to forward this information to the Defense Security Service. (Item 8)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered 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 overarching 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 about 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

Personal Conduct

Adjudicative Guideline (AG) ¶ 15 articulates the security concerns relating to personal conduct:

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.

The Personal Conduct Disqualifying Conditions under AG ¶ 16 are potentially applicable:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

Applicant deliberately failed to report his DEA employment and his termination in response to question in Section 11 on his March 2008 security clearance application. Applicant was told he would be fired for poor duty performance if he did chose not to resign. The question in Section 22 clearly asks Applicant to lists if he left a job by mutual agreement following allegations of unsatisfactory performance. He should have reported the circumstances surrounding his leaving the DEA after thirty plus years. In fact, Applicant now acknowledges he should have answered the form differently.

Applicant's false answer on his SF 86 and his response during his OPM interview concerning his thirty plus years with the DEA and the circumstances surrounding his leaving that Federal employment tends to show questionable judgment, unreliability, and a lack of trustworthiness. ¶ 16 (a) applies.

Applicant's explanation rings hollow. His explanation was not credible to explain his failure to disclose his more than thirty years of employment. Applicant disclosed part-time jobs starting in 1972 and disclosed some part-time jobs which lasted only two years. A person does not list part-time jobs of two years and unintentionally forget a federal service job of more than thirty years. His assertion that he was not being deceptive is unpersuasive.

With thirty plus years in Federal service, Applicant would have completed numerous security questionnaires. He provided a copy of one page of his November 15, 2005 SF-86 where he listed his DEA employment. I note that when he completed this SF-86 he was still working for the DEA and had not yet been terminated. I find Applicant deliberately falsified his answer to questions in Section 11 and 22 of his March 2008 security clearance application.

None of the mitigating conditions related to personal conduct apply. Applicant did not make a prompt, good-faith effort to correct the omission, concealment, or falsification before being confronted with the facts (AG ¶ 17(a)). There was no refusal or failure to cooperate. AG ¶ 17(b) "the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully," does not apply.

The offense is not minor; Applicant left his job with the DEA after more than thirty years after being told he would be terminated if he did not resign. AG ¶ 17(c) "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" does not apply. Applicant acknowledged his employment when questioned by the OPM investigator. There is no indication his answers to the SF-86 were caused by stress or factors beyond his control. AG ¶ 17(d) "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" does not apply.

AG ¶ 17(e) "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress" has limited application. He did inform the OPM investigator of his employment and the factors surrounding his leaving the DEA, thereby reducing his vulnerability. AG ¶ 17(f) "the information was

unsubstantiated or from a source of questionable reliability” does not apply because the information was substantiated.

Applicant’s failure to disclose his employment history and adverse termination demonstrates a lack of candor required of public trust personnel. The government has an interest in examining all relevant and material adverse information about an Applicant before making a public trust decision. The government relies on applicants to truthfully disclose that adverse information in a timely fashion, not when it is perceived to be prudent or convenient. Further, an applicant’s willingness to report adverse information about himself provides some indication of his willingness to report inadvertent violations or other concerns in the future, something the government relies on to perform damage assessments and limit the compromise of sensitive information. Applicant’s conduct suggests he is willing to put his personal needs ahead of legitimate government interests. I resolve Guideline E against Applicant.

In September 2007, Applicant quit a part-time job. His employer had received a Notice of Levy on Wages, Salary, and Other Income from the IRS. His decision to stop working meets none of the criteria listed in Section 22 of his SF-86 that would require him to report this termination on an SF 86. He was not fired from the job, told he would be fired, left following misconduct, left following allegations of unsatisfactory performance, or left under unfavorable circumstances. It is true his employer had a duty to report the garnishment to the DSS, but his employer’s obligation to report the garnishment does not mean Applicant’s choice to leave was due to unfavorable circumstances. I find for Applicant as to this allegation.

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 relevant 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. Applicant was sufficiently mature when he completed his March 2008 SF-86 and chose not to reveal his employment with the DEA or the factors surrounding his leaving. His explanation for doing so was unpersuasive.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant did not 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, Personal Conduct:	AGAINST APPLICANT
Subparagraph 1.a-1d:	Against Applicant
Additional added subparagraph:	For 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 grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

CLAUDE R. HEINY II
Administrative Judge