



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



In the matter of:)
)
) ISCR Case No. 09-01197
)
)
Applicant for Security Clearance)

Appearances

For Government: Braden Murphy, Esq., Department Counsel
For Applicant: *Pro Se*

October 14, 2009

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant mitigated the government’s security concerns under Guideline E, Personal Conduct. Applicant’s eligibility for a security clearance is granted.

On June 2, 2009, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, Personal Conduct. 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 answered the SOR in writing on June 9, 2009, and requested a hearing before an administrative judge. The case was assigned to me on August 13, 2009. DOHA issued a Notice of Hearing on August 18, 2009. I convened the hearing as scheduled on September 16, 2009. The government offered Exhibits (GE) 1 through 6.

Applicant did not object and they were admitted. Applicant testified and offered Exhibits (AE) A through C, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on September 22, 2009.

Findings of Fact

Applicant denied the SOR allegations. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 27 years old. He is employed by a federal contractor (Company C) as a deputy program manager. He is not married. He held various jobs in sales from 2000 to 2004. In April 2004, he was hired by Company A as a linguist. In May 2004, he deployed to Afghanistan and held an interim security clearance. He was granted a Secret clearance in September 2004. He served in Afghanistan, except for some leave periods, until his contract ended in October 2005, when he ceased employment with Company A.¹

Applicant began employment with Company B in October 2005. He was directed to report to the Naval Base to board a flight to Afghanistan. Everyone manifested on the flight was directed to a prepositioning area. Navy personnel at the staging area asked Applicant his name, social security number, and date of birth, which he provided. The information was checked against a list with names that had been approved for the flight. His picture was taken and he was issued a badge by the Navy with his photograph, the last four digits of his social security number, and a "#3" in the corner of the badge. He did not ask any questions about the badge or its access parameters. He was attached to a special operations unit.²

While in Afghanistan, Applicant conducted most of his work on the air base and also took frequent trips to the field. He was not barred from entering any area. He stated sometime in October or November 2005, the counterintelligence (CI) officer whom he knew, noticed Applicant's badge. He asked him how he got the badge, and Applicant told him it was issued to him at the U.S. Naval Base before he left the country. The badge gave him access to Top Secret information. Applicant was unaware of the access level. The CI officer investigated and determined Applicant should have been issued a badge at the Secret clearance level. Upon learning this from the CI officer, he turned in the Top Secret badge and was issued a Secret badge. The CI officer launched an investigation as to how Applicant received the badge. Applicant was interviewed and the investigators looked into where he had been granted access. Applicant credibly testified that he did not go to classified areas unless directed to do so by a superior, and it was usually to pick up mail or do some other type of errand. In December 2005, he went home on leave and intended on returning. He was informed that the Task Force did not want him back and he was barred from the base due to the badge incident. No

¹ Tr. 33, 44-48. Applicant served in Afghanistan from May 2004 to December 2005, working for two different employers. He returned to the U.S. for leave three times.

² Tr. 25, 41, 48-54.

further explanation was provided. He did not think his clearance was revoked, but was only downgraded from a Top Secret to a Secret clearance. Applicant's testimony was corroborated by the Army colonel he worked for in Afghanistan. There is no evidence that Applicant illegally or fraudulently obtained the badge.³

Applicant has worked for Company C since May 2007. He was applying for a job with Company D and did not want them to know that he was working for Company C, because they are competitors. He was concerned about hurting his employment opportunity with Company D, and he needed to continue his employment with Company C, so he could pay his bills until he got a new job. In his sworn affidavit, he admitted he intentionally omitted his employment with Company C from his security clearance application (SCA) that he completed in August 2007. He admitted filling out the SCA was daunting. He stated he was conflicted and confused at the time. When he was interviewed by an investigator from the Office of Personnel Management (OPM) he provided honest and accurate statements and acknowledged he should have listed Company C. He did not intend to deceive the government by failing to list Company C as his employer.⁴ I found his testimony credible.

When completing the SCA for Company D, Applicant was instructed by their security officer to list Company D as his current employer, even though it was not accurate because he had not yet been hired.⁵ He stated at his hearing that he believed it was an industry-wide practice to list the company with whom you were seeking employment when completing the SCA. He followed Company D's instructions.⁶

An Army colonel who was interviewed as part of Applicant's background investigation provided the following information. Applicant served in Afghanistan as a linguist and interpreter. He was considered a team player and was an action officer on special projects. The colonel had daily contact with him and they worked in a hut with other men. Applicant and the colonel were in constant contact. Applicant often worked outside of the scope of his contract. Applicant assisted with computer and information technology and administration. He would help with computer problems. His expertise was the equivalent to the work of four or five people.⁷

The colonel also commented that Applicant had been issued a badge and while in the U.S., he was "read on" by the special unit in [the U.S.] to receive a badge prior to his departure for Afghanistan. He confirmed that Applicant had a "need to know" and was issued a Top Secret clearance, even though he was only cleared for a Secret clearance. The colonel confirmed that the different entities in Afghanistan were aware of

³ Tr. 53-61; AE C.

⁴ Tr. 64-86.

⁵ GE 1 and 2.

⁶ Tr. 23-25.

⁷ AE C.

the “badge situation,” that is that Applicant had the improper badge with him in Afghanistan. The colonel stated he brought up the issue, but nothing was done about it. Applicant went to planning meetings in Afghanistan with the colonel and would represent him when he could not attend. These meetings were at the secret level.⁸

The colonel stated that Applicant is an upstanding young man, and he would trust him with his life. He commented that Applicant is loyal to the U.S. and cannot be blackmailed.⁹

Applicant provided a character letter from a different Army colonel. He stated Applicant is an exceptional young man and a proven performer with a superb work ethic. He considers Applicant a proven warrior who is able to function in stressful situations. Applicant served in Afghanistan as an interpreter against the most difficult targets. Due to personnel losses, the colonel needed to call upon Applicant to assist him in moving critical supplies to forward units. Applicant quickly and eagerly took on this new challenge. The colonel stated: “He not only accomplished the mission better than any military supply specialist before him, but he eventually excelled in building a reputation in the logistical network as someone who was able to acquire and move critical supplies in and out of the most difficult areas. I would work with [Applicant] anytime, anywhere.”¹⁰

Applicant has worked on the front lines in Afghanistan and acquired an expertise in the region and with the language. He was involved in sensitive missions and detentions of high valued targets and terrorist organizations. He also has worked as an undercover operator in classified missions.¹¹

Applicant was going through some stressful periods when he returned from Afghanistan. He had a period of unemployment and his wedding engagement was called off. He stated he did not have post-traumatic stress disorder, but he was feeling guilty about leaving his unit in Afghanistan. He found it difficult to transition back to a normal life in the U.S. and felt a period of decompression.¹²

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

⁸ *Id.*

⁹ *Id.*

¹⁰ AE B.

¹¹ Tr. 81-83; AE B.

¹² Tr. 98-100.

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 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, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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

AG ¶ 15 expresses the security concern pertaining 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. I have specifically considered the following:

(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; and

(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.

Applicant admitted he intentionally did not list his present employer on his SCA because he was applying for a job with a competitor and did not want his employer to know. Per the direction of the security officer of the company where he was applying for a job, he listed them as his current employer, which was not accurate. I find disqualifying condition (a) applies.

I have considered all of the evidence regarding Applicant's use of a security badge that was issued to him before deploying to Afghanistan. I found Applicant's testimony credible and it was corroborated by the Army colonel who served with him. There is no evidence Applicant fraudulently or through misrepresentations obtained the badge. Applicant was issued a badge that gave him access to Top Secret information. A mistake was made by someone when they issued Applicant the badge with Top Secret access. He was unaware of the access level until the CI officer brought it to his attention. He may have had access to areas he should not have, but his badge authorized him access to those areas. He cannot be held accountable for potentially accessing areas where his badge authorized him to be. Accountability lies with those who gave him the badge in the first place. I find no disqualifying conditions apply to these facts.

I have considered all of the mitigating conditions under AG ¶ 17 and especially considered the following:

(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;

(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; and

(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.

Applicant was instructed by the security officer of Company D to list Company D as his present employer. He complied. I find mitigating condition (b) applies.

Applicant intentionally did not list his present employer on his SCA because he did not want his potential employer to learn he was already employed by a competitor. He credibly testified that this was not something he was trying to conceal from the government, but that is what happened. He fully cooperated with the OPM investigator and provided the relevant information. He acknowledged that he should have provided the information on his SCA. Although I find that Applicant did intentionally fail to provide accurate information, thereby falsifying his SCA, I find that it happened under unique circumstances and that it is unlikely to recur. I also find that he has acknowledged his actions and has a better understanding of the process. He was dealing with several stressors in his life at the time. The action was not minor, but his behavior was an aberration and unlikely to recur. I find under the circumstances mitigating conditions (c) and (d) apply.

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. Applicant was mistakenly issued a security badge that gave him Top Secret access. There is no evidence that he obtained this badge fraudulently or exploited the use of the badge. He went to Afghanistan and served his unit as directed. When the mistake was discovered, he returned the badge and was issued the correct one. The record does not provide any evidence that Applicant did anything wrong. A mistake was made by the officials issuing the badge, not by Applicant. When completing his SCA, Applicant intentionally did not list his current employer because he did not want his prospective employer to know he was working for a competitor. This may be a common practice when seeking new job opportunities, but it does not excuse his failure to comply with the requirements of a SCA. Applicant's intent was not to conceal the information from the government, but to conceal it from his prospective employer. At the direction of the security officer for Company D, he listed them as his current employer, which was not correct. Applicant was deployed to Afghanistan under harsh conditions and completed assignments that he could have refused because he was serving as a civilian contractor. Instead, he completed the assignments so the overall missions could be accomplished. His commanders have attested to his service. His unique skills have allowed him to assist in important operations. I have carefully considered Applicant's actions and find they occurred under unique circumstances and are unlikely to recur. Overall, the record evidence leaves me with no questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under the guideline for 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:	FOR APPLICANT
Subparagraphs 1.a-1.b:	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.

Carol G. Ricciardello
Administrative Judge