



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



In the matter of:)
)
) ISCR Case No. 09-03370
)
Applicant for Security Clearance)

Appearances

For Government: William T. O’Neil, Esquire, Department Counsel
For Applicant: Eric A. Eisen, Esquire

June 9, 2011

Decision

O’BRIEN, Rita C., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated the security concerns raised under the guideline for personal conduct. Accordingly, his request for a security clearance is denied.

Statement of the Case

On June 30, 2010, DOHA issued to Applicant a Statement of Reasons (SOR) listing concerns under Guideline E (Personal Conduct) of the Adjudicative Guidelines (AG). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry*, as amended; DoD Directive 5220.6 (Directive), as amended; and the Adjudicative Guidelines (AG) implemented by the Department of Defense on September 1, 2006.

Applicant signed his notarized Answer on July 7, 2010, in which he admitted allegation 1.a, and denied allegations 1.b through 1.e. He also requested a hearing before an administrative judge. The case was assigned to me on December 23, 2010.

DOHA issued a Notice of Hearing on January 7, 2011. I convened the hearing as scheduled on January 26, 2011.

The Government offered four exhibits, which I marked and admitted as Government Exhibits (GE) 1 through 4. Applicant testified and presented one witness. He also offered seven exhibits, marked and admitted as Applicant Exhibits (AE) A through G.

Procedural Matters

Prior to the hearing, by memorandum dated December 3, 2010, the Government amended the SOR by replacing allegations 1.a and 1.b with reworded versions. Applicant answered the amended SOR on December 14, 2010. He admitted the reworded allegation 1.a., and denied the reworded allegation 1.b. The reworded versions read as follows:

1.a. You attempted to use countermeasures to modify the results of a May 2001 polygraph examination with another Government agency.

1.b. You attempted to use countermeasures to modify the results of multiple 2003 polygraph examinations with another Government agency.

Findings of Fact

Applicant's admission to allegation 1.a is incorporated as a finding of fact. After a thorough review of the pleadings and the record evidence, I make the following additional findings of fact.

Applicant is a 59-year-old employee of a defense contractor. He received a bachelor's degree in 1974 in mechanical engineering. He married the same year and has two children, 28 and 31 years old. He was granted his first security clearance in 1984. In 1985, he started his own company, and was employed as a spacecraft test engineer for a federal agency, working as an independent contractor. In the early 1990s, he held a top secret clearance with access to sensitive compartmented information (SCI). His SCI access was revoked in 2004, and his security clearance suspended in 2006. (GE 1; Tr. 51-63)

Applicant participated in three polygraph examinations performed by a government agency (AGA): May 2001, June 2002, and December 2003. He was notified one week before the May 2001 polygraph examination. His government-employee co-workers had undergone polygraphs, and he discussed them with his co-workers. They had received pre-briefings before their polygraphs about the scope of the test, but Applicant did not. He did not request a pre-briefing. He researched the topic of polygraphs online for one to two hours in the week before his first examination. In his statement of February 2009, he notes that other than that one time, he did not conduct

“any further research on the polygraph test or how to defeat it.” (GE 2; Tr. 63-68, 97, 151-153, 160)

Applicant was concerned about whether several events in his past would present a problem during his first polygraph, including his drug use during college in the early 1970s. (Tr. 63-68) He was also concerned about events that might have been considered breaches of classified information: (1) In 1991, he was working at the site of a satellite launch. He brought his family to the local area, which was permitted. He could not inform them of the time of the launch because it was classified. But on the night of the launch, he told his wife to stay up late and keep the children up. Applicant was concerned that this disclosure might have been considered a security breach; (2) In 1993, Applicant was working on classified launches. He disclosed to his wife and brother that he was working on a classified launch when he called them to say he was safe after an accident occurred at the launch site. He did not inform his company of these disclosures. Applicant admitted at the hearing that he was concerned enough about these events that he tried to manipulate the test results of his first polygraph. (GE 2, 3; Tr. 68-73, 79-82, 129-132, 155)

In his February 2009 statement, Applicant said, “Due to these concerns, during the first polygraph test I tried to give the examiner a stronger reaction during the control questions. I thought that it might help me get through the test without having to discuss the concerns.” During the control-question phase of the first polygraph examination, Applicant had been instructed to lie to a question, so that the examiner could record a baseline signal that would indicate falsification. Applicant testified that he believed his body would not give an appropriate signal because he was so agitated. Therefore, when he answered the control question, he tensed his leg muscles in order to produce a strong signal. The polygrapher asked Applicant if he was trying to control his breathing or otherwise manipulate the test results. Applicant admitted what he had done. The test continued, and Applicant disclosed the incidents that he had been concerned about. He testified that, other than the control question, he answered truthfully on all the subsequent questions, and that he had no intention of lying. In 2009, he stated, “The reason I did not pass the first test was my use of countermeasures over my prior behavior and not understanding the scope of the test.” He also noted in a February 24, 2009 statement, “I have not, in any way, tried to alter the outcome of any polygraph that I have taken since the first one.” (GE 2, 3; Tr. 74-82, 105-108, 158)

Since about 1980, Applicant has practiced special breathing techniques as part of a relaxation method that helped with his high blood pressure. In his February 2009 statement, he said he might have received bad polygraph test results because he was giving involuntary responses to a stressful situation. He testified that he felt tense during his first polygraph examination, and “... [I] was probably trying to control my breathing.” (GE 2, 3; Tr. 74-82, 105-108)

Department Counsel asked Applicant about his manipulation during the first polygraph:

Q So, in worrying about that question coming up along the line on the polygraph, you started to manipulate the results early so that if you had to lie during the polygraph about the drug use, it couldn't be detected. Was that the plan?

A Well, just the control question one, yes.

Q Right. And that's your understanding of – that's the purpose of manipulating the control questions is so that later on when they ask you a question whether you think it's relevant or not, they can't tell whether you're lying or not if you've skewed the results during the control questions.

A Right. Yes.

Q Is it fair to say, then, that when you went into this polygraph examination, your primary motivation was to come out with a passing score?

A Yes. (Tr. 123-124)

In October 2001, Applicant had a four-hour non-polygraph interview. He told the interviewer that he was concerned about a sensitive lifestyle issue. He disclosed the issue, and the interviewer told him it was not a security concern, though he understood why Applicant might think it was. Applicant denies that he was providing irrelevant information in this exchange, as alleged in the SOR. He testified that he was trying to inform the interviewer of anything that might be a security concern.¹ (Tr. 83-86)

In June or July 2002, Applicant had his second polygraph interview. He was tense and short of breath. He testified that he had a "startle reaction" to questions that began with a hard syllable such as "Did you ever..." but no reaction to those that started with soft syllables, such as "Have you ever..." Applicant denies that he tried to manipulate the results of this polygraph. During the test, he disclosed that he met a British couple during a November 2001 vacation. The couple had stayed at his home on April 6 through 12, 2002. In late April 2002, Applicant informed his company that he met them, and also disclosed the April 2002 visit. He had not disclosed his initial meeting with the couple, which had occurred five months earlier, because his security clearance was being transferred from one company to another, and he "wasn't exactly sure where my clearance was in the process." Applicant visited the same British couple when he completed a business trip to London in November 2002. He submitted pre-departure

¹ This incident is alleged in the SOR as occurring in 2002, but Applicant clarified that it happened in October 2001. (Tr. 85)

and post-departure forms to his security officer regarding that trip. (GE 2, 3, 4; AE A, B; Tr. 86-97, 143-150, 153-155)

Applicant had another non-polygraph interview in August 2003, with two interviewers over four hours. It focused on his delay in reporting his contact with the British couple, and his failure to inform the examiner in May 2001 of the sensitive lifestyle issue, which had turned out not to be a security concern. (GE 2; Tr. 99-101, 143-150)

Applicant's last polygraph occurred in December 2003.² He was nervous and short of breath. He did not experience "startle reactions" to the questions during this examination. He testified that he did not intentionally control his breathing, but felt "...somewhat conscious of my breathing." In his February 2009 statement, Applicant said he was conflicted when the polygrapher told him that during the test he would be asked about personal use of government assets. Applicant sometimes used his government computer to read material such as news reports, so he was concerned, even though such uses were allowed by his agency. Applicant denies he tried to manipulate the results of the third polygraph, but his anxiety about the question may have caused a reaction to any similar-sounding question. In October 2004, Applicant's access to SCI was revoked by AGA for intentional manipulation of polygraph results in 2001, 2002, and 2003; misleading an interviewer by discussing irrelevant lifestyle issues; unreported disclosures of classified information; and unreported foreign contacts. (GE 2; Tr. 97-104)

Applicant's witness at the hearing has had almost daily professional contact with Applicant for about 30 years. He has taken several polygraphs. He was pre-briefed as to what would be covered before he took his first polygraph. Although he and Applicant usually worked in unclassified environments, he has no reason to doubt Applicant's ability to protect classified information. Several co-workers and close friends submitted character references. Most have known Applicant for 15 to almost 30 years. He is described as a "man of great character" and integrity, who is dependable, loyal, conscientious, and honest. He is dedicated to his job and his family. He is a recognized expert in his field, who is respected in his community. (AE C-G; Tr. 25-50)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the AG.³ Decisions must also consider the "whole-person" factors listed in ¶ 2(a) of the Guidelines.

² The SOR alleges that Applicant underwent multiple polygraph examinations in 2003, but Applicant clarified at the hearing that he had only one examination in 2003. (Tr. 97)

³ Directive at § 6.3.

The presence or absence of a disqualifying or mitigating condition does not determine a conclusion for or against an applicant. However, specific applicable guidelines are followed whenever a case can be measured against them as they represent policy governing the grant or denial of access to classified information. In this case, the pleadings and the information presented require consideration of the security concerns and adjudicative factors addressed under Guideline E (Personal Conduct).

A security clearance decision is intended only to resolve the questions of whether it is clearly consistent with the national interest⁴ for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁵ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or his own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government.⁶

Analysis

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern about 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 Guideline E allegations implicate the following disqualifying condition under AG ¶ 16:

⁴ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁵ See *Egan*, 484 U.S. at 528, 531.

⁶ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (1) untrustworthy or unreliable behavior....

Applicant's conduct during the 2001 polygraph examination with AGA raises concerns under AG ¶ 16(d). In the 1990s and early 2000s, Applicant disclosed classified information to his family, failed to timely report contacts with foreign nationals, and interfered with a polygraph examination. Applicant held a security clearance during these events. His conduct demonstrates untrustworthiness and unwillingness to comply with rules. AG ¶ 16(d) applies.

In SOR ¶ 1.b., the Government alleges that Applicant used countermeasures during his polygraph examination in 2003. It relies on a letter from AGA in which an adjudicator states that Applicant used countermeasures during that test. Applicant denies that he used countermeasures at any time other than in his 2001 polygraph. As the record contains only the adjudicator's unsupported statement, and no other independent evidence showing that Applicant tried to circumvent the 2003 polygraph, I find for Applicant on SOR ¶ 1.b.

During a non-polygraph interview in 2001, Applicant discussed a sensitive lifestyle issue with the investigator. He thought it might be a security concern; however, the interviewer informed him that it was not. Applicant was disclosing a possible security concern, and was not intentionally providing irrelevant information. AG ¶ 16(c) does not apply to this disclosure. I find for the Applicant in regard to SOR ¶ 1.e.

Under AG ¶ 17, the following mitigating conditions are relevant:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

(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.

Applicant's adherence to regulations regarding protecting classified information has not been perfect. In 1991, he disclosed, in general terms, the time of a launch, which was classified. In 1993, he disclosed that he was involved in a classified launch. In 2002, he let five months pass before he informed his security officer that he had met

and befriended foreign nationals. The 1990s events might have been mitigated by distance in time. However, when considered with Applicant's conduct during his 2001 polygraph examination, they contribute to a pattern of willingness to ignore security rules.

Applicant admits that he deliberately tensed his leg muscles during a 2001 polygraph examination in order to manipulate the results. Only after being confronted by the examiner did he admit his actions. Before the test, he also consciously engaged in internet research to learn how to defeat polygraph examinations. These events occurred 9 to 10 years ago; however, the gravity of Applicant's conduct outweighs the distance in time. Although he did not receive a polygraph pre-briefing, as his Government co-workers did, a pre-briefing was not necessary to inform Applicant that he was expected to cooperate during the test. Applicant knew or should have known that such behavior was prohibited. It cannot be considered minor or insignificant, because it constitutes interference with a Government investigation, and goes to the heart of the security clearance process. Applicant's actions reflect poorly on his judgment and trustworthiness. AG ¶ 17 (a) and (c) do not apply.

Whole-Person Analysis

Under the whole-person concept, an administrative judge must evaluate the Applicant's security eligibility 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) 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under the cited guideline, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant deliberately manipulated his behavior to influence the results of a polygraph examination. He chose his own desire to "pass" the polygraph examination over the Government's need for honesty. Given his many years of service to the United States, the quality of his work, and the high praise of his friends and co-workers, it is unfortunate that he chose to try to circumvent the process. However, such behavior

raises serious questions about his reliability, judgment, and trustworthiness, especially in light of the fact that he held a top secret security clearance with SCI access at the time. The Government must be able to rely on security clearance holders to place its need for trustworthy behavior above their own interests.

Overall, Applicant's conduct raises doubt on his suitability for access to classified information. The record evidence fails to satisfy these doubts, which must be resolved in favor of the national security. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from the cited adjudicative guideline.

Formal Findings

Paragraph 1, Guideline E	AGAINST APPLICANT
Subparagraph 1.a.	Against Applicant
Subparagraph 1.b.	For Applicant
Subparagraphs 1.c. and 1.d.	Against Applicant
Subparagraph 1.e.	For Applicant

Conclusion

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

RITA C. O'BRIEN
Administrative Judge