



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



In the matter of:)
)
) ISCR Case No. 09-04023
)
)
Applicant for Security Clearance)

Appearances

For Government: Francisco J. Mendez, Jr., Esq., Department Counsel
For Applicant: Jon L. Roberts, Esq.

January 31, 2011

Decision

COACHER, Robert E., Administrative Judge:

The evidence fails to establish some disqualifying conduct and Applicant mitigated the remaining security concerns under Guideline E, Personal Conduct. Applicant's eligibility for a security clearance is granted.

Statement of the Case

On April 16, 2010, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, Personal Conduct. DOHA acted 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), effective within the Department of Defense after September 1, 2006.

Applicant answered the SOR on May 13, 2010, and requested a hearing before an administrative judge. The case was assigned to me on September 7, 2010. DOHA issued a notice of hearing on September 10, 2010, with a hearing date of September 15, 2010. The hearing was held as scheduled. The Government offered Exhibits (GE) 1 through 12, which were admitted. Department Counsel's exhibit index was marked as Hearing Exhibit (HE) I. Applicant testified, presented three witnesses, and offered exhibits (AE) A-K that were admitted without any objections. DOHA received the hearing transcript (Tr.) on September 21, 2010.

Findings of Fact

In Applicant's answer to the SOR, he admitted ¶¶ 1.a, 1.b, and 1.c (partially). After a thorough and careful review of the pleadings, testimony, and exhibits, I make the following findings of fact.

Applicant is 33 years old. He is married and has no children. He has worked for his current employer, a defense contractor, since February 2009. Prior to his current employment, he worked for defense contractor since 2007. He holds a Master of Arts degree and has received advanced language training. He served in the Navy from 1997 to 2001 and held a top secret security clearance. He received an honorable discharge.¹

Applicant's conduct raised in the SOR includes: (1) traveling to Cuba in 2001 without the proper authorization from the United States government (SOR ¶ 1.a); (2) traveling to western China (Tibet) in 2002 without obtaining a permit (SOR ¶ 1.b); and, (3) involvement in an altercation while traveling in Egypt in 2003 (SOR ¶ 1.c).

Applicant admits to traveling to Cuba without proper authorization. In 2001, he had just separated from the Navy and traveled to South America. While he was in Honduras he decided to go to Cuba. He stayed in Cuba approximately two weeks. While he was there he did tourist activities. He did not make any Cuban contacts and he does not have any financial dealings with Cuba. He knows that current United States policy requires permission to enter Cuba and he agrees with that policy. He does not plan on going back to Cuba. He has always reported his travels to Cuba on all security clearance paperwork. He understands that he was wrong by not first obtaining official United States government approval before entering Cuba.²

In May 2002, Applicant visited China on vacation. He also went to western China, otherwise known as Tibet. Although he did not have a permit when he entered Tibet, he followed the advice of a widely known tour book called, *Lonely Planet: Tibet*. Pursuant to that advice, he entered Tibet, and voluntarily appeared at a police station where he advised the police of his presence. He then obtained a permit to enter Tibet after paying a \$40 "fine". He was not arrested or otherwise detained by Chinese officials during his

¹ Tr. at 93-99; GE 1; AE G.

² Tr. at 100-104; GE 2, 5, 10, 12.

stay in Tibet. He has never concealed his trip to Tibet and always listed it on his security clearance questionnaire forms.³

From June 2003 to June 2004, Applicant was studying abroad in Egypt. While there, he was at a bar and asked a girl to dance with him. She refused and walked away. At that time, someone approached the Applicant from behind and hit him. The bar was on a rooftop and Applicant almost fell off. Applicant was beaten by his attacker. During this altercation, the attacker's cell phone fell out of his pocket. Applicant picked it up. Later, after the parties were separated, Applicant left the bar and was out by the ocean when he remembered the cell phone. He took it out of his pocket and threw it in the ocean. The next day, Applicant was contacted by the local police who asked him to pay for a new cell phone for the attacker. Applicant did so. He was not arrested. He threw the cell phone away because he was angry for being hit without provocation. He has never concealed this information on any security clearance related form.⁴

Several coworkers/supervisors submitted character letters for the Applicant. Additionally, three witnesses testified to Applicant's good character. Applicant is held in high regard for his professional work and his reputation for honesty, trustworthiness, and dependability.⁵

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used 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

³ Tr. at 106-112; Answer to SOR, exhibit 15, p. 12; AE H.

⁴ Tr. at 114-117; Answer to SOR, exhibit 15, p. 11.

⁵ Tr. at 43-87; Answer to SOR.

decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

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 to obtain 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 that an applicant may deliberately or inadvertently fail to 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 for 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 in this case. The following disqualifying conditions are potentially applicable:

(d) credible adverse information that is not explicitly covered under any other guideline and may not be 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; 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, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Applicant's admitted unauthorized trip to Cuba calls into question his judgment and created a vulnerability to exploitation. AG ¶ 16(d) and (e) apply to SOR ¶ 1a.

I found Applicant's explanation concerning his entry into Tibet credible. He entered the area based upon the advice of a travel book. The Chinese officials treated his entry as a routine administrative matter with no other ramifications. Therefore, the evidence does not support any personal conduct disqualifying conditions for SOR ¶ 1.b and AG ¶¶ 16(d) and (e) do not apply.

I also found Applicant's testimony credible concerning the events surrounding the bar fight allegation stated in SOR ¶ 1.c. Applicant was an innocent bystander when he was attacked by someone in the bar. Certainly, he should have used better judgment when he threw the attacker's cell phone in the ocean, but his reaction was understandable under the circumstances. AG ¶¶ 16(d) and (e) do not apply to SOR ¶ 1.c.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and especially considered the following:

(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 trip to Cuba was nine years ago. He made no Cuban contacts and he understands the United States policy towards Cuba. He does not plan on returning to Cuba. I find that sufficient time has passed to mitigate his actions. Additionally, because Applicant was forthright about his travels, his reliability, trustworthiness and good judgment are not in question. AG ¶ 17(c) applies.

No disqualifying conditions were established by the government concerning SOR ¶¶ 1.b and 1.c, nonetheless, I also find, that had a disqualifying condition been established for those allegations, sufficient time has passed to mitigate the conduct alleged. Applicant's reliability, trustworthiness and good judgment are not in question.

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. I considered Applicant's age when he engaged in the conduct, and the passage of time since the acts. Additionally, I considered his military service, his current work environment and the strong recommendation he received from coworkers regarding Applicant's reliability and trustworthiness. Applicant met his burden and provided sufficient evidence to mitigate the security concerns.

Overall the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under Guideline E, 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.c:	For Applicant

Conclusion

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

Robert E. Coacher
Administrative Judge