



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



In the matter of:)
)
) ISCR Case No. 09-05663
)
)
Applicant for Security Clearance)

Appearances

For Government: Francisco Mendez, Esquire, Department Counsel

For Applicant: *Pro se*

November 30, 2010

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the case file, pleadings, testimony, and exhibits, I conclude that Applicant failed to rebut or mitigate the Government's security concerns under Guideline E, Personal Conduct, and the whole-person analysis. His eligibility for a security clearance is denied.

Applicant completed and signed a security clearance application (SF-86) on September 27, 2006. On March 8, 2010, the Defense Office of Hearings and Appeals (DOHA) issued 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 adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

On April 14, 2010, Applicant answered the SOR in writing and requested a hearing before an administrative judge. The case was assigned to me on August 20,

2010. Applicant and Department Counsel agreed to a hearing, and on October 18, 2010, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government called one witness and introduced eleven exhibits, which were marked Ex. 1 through 11 and admitted without objection. Applicant testified, called no witnesses, and introduced no exhibits. DOHA received the transcript (Tr.) of the hearing on October 27, 2010.

Procedural Matters

The Government moved to restyle the caption in the case to include Applicant's middle name. Applicant did not object, and the caption was restyled accordingly. (Tr. 8-9.)

Findings of Fact

The SOR contains five allegations under AG E, Personal Conduct (SOR ¶¶ 1.a. through 1.e.). Applicant denied, in general, that the conduct alleged on the SOR demonstrated questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, thereby raising questions about his reliability, trustworthiness, and ability to protect classified information. SOR ¶ 1.a. alleged that Applicant was terminated by an employer in June 2003. SOR ¶ 1.b. alleged that Applicant failed to list his June 2003 job termination on the SF-86 he completed and signed on September 27, 2006. (SOR; Answer to SOR.)

SOR ¶ 1.c. alleged that Applicant failed to disclose the June 2003 termination to an Office of Personnel Management (OPM) investigator during his security clearance interview on June 26, 2007, until after he was confronted by the investigator. SOR ¶ 1.d. alleged that in about September 2007, Applicant was denied a security clearance by another government agency for failure to provide truthful answers on his security clearance application and during his interview with an authorized OPM investigator. SOR ¶ 1.e. alleged that Applicant falsified material facts on his September 27, 2006, security clearance application when, in response to Section 22, he deliberately failed to disclose that he had been terminated by his employer in June 2003. In his answer to the SOR, Applicant admitted the allegations at SOR ¶¶ 1.a., 1.b., and 1.d. He denied the SOR allegations at ¶¶ 1.c. and 1.e. Applicant's admissions are entered as findings of fact. (SOR; Answer to SOR.)

Applicant, who is 49 years old, is married and the father of two sons, aged 20 and 16. He earned an undergraduate degree in business administration in 1985. During his undergraduate years, Applicant was enrolled for an unspecified time in the Reserve Officer Training Corps (ROTC) and was awarded a security clearance in 1983. He did not serve on active duty. In 1992, Applicant was awarded a Master of Arts in Business Administration. He is currently employed as a business developer. (Ex. 1 at 9-10; Tr. 51-54.)

From 1996 until June 2003, Applicant was employed as a territory sales manager by a manufacturing business. He excelled in his work, which included providing discount incentives to distributors who promoted and sold the products manufactured by his employer. In 2001 and 2002, his employer ranked him first among 56 territory sales managers. He was responsible for documenting and keeping track of how much of the employer's product was sold by each of several hundred clients in his territory. Applicant was authorized to approve invoices for receipt of financial incentives submitted by distributors, jobbers, or retailers. (Ex. 2; Ex. 3, 11-13; Tr. 55-57.)

In response to DOHA interrogatories, Applicant acknowledged that, as the result of an allegation made by his employer, he was the subject of an inquiry by the Federal Bureau of Investigation (FBI) in October 2005. Applicant's employer alleged that Applicant colluded with one of the distributors in his territory to receive kickbacks by inflating the distributor's promotion numbers. Applicant denied the allegation and stated that no charges resulted from the FBI inquiry. His employer fired him in June 2003. Applicant felt that his employer had wronged him and that the firing had no merit. (Ex. 2 at 3; Ex. 3.)

From October 2005 until September 2007, Applicant was employed by three government contractors to conduct background investigations for a federal agency. Applicant initially completed an SF-86 in 2005. On that form he denied being fired from a job. In April 2006, Applicant again completed an SF-86 after he was hired to work as a full-time contract investigator. Section 22 on the SF-86 asked the following question about Applicant's employment record:

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?

Applicant responded "No" to each of the five questions in Section 22. (Ex. 1 at 28; Ex. 3 at 9; Tr. 54-55, 81.)

On June 26, 2007, Applicant was interviewed under oath by an authorized investigator from the U.S. Office of Personnel Management (OPM). The investigator appeared as a Government witness and affirmed the facts in her report of investigation. In her testimony, the investigator stated that in her interview with Applicant she had asked him three times to explain why he left his employment in June 2003. Applicant

responded that the company where he was employed was in turmoil over a leveraged buyout and he therefore left the company and started his own business. Applicant further told the investigator that he left the company under favorable terms. He stated that since the company was no longer in existence, he could not speculate whether he would be eligible for rehire. (Ex. 2 at 1; Tr. 25-26.)

The investigator then asked Applicant more about the circumstances associated with leaving his job in June 2003. She asked him if he gave notice, if the employer raised issues or concerns about Applicant's behavior or conduct, if he had any personality conflicts with the employer, or if he had been accused or suspected of any questionable, improper, or unethical behavior. Applicant responded by repeating his previous assertions that he had left under favorable circumstances to start his own business. (Ex. 2 at 1; Tr. 27-30.)

The investigator then asked Applicant about the FBI inquiry in 2005. He stated that he could not recall the specific questions or concerns raised by the FBI investigators. After two attempts by the OPM investigator to elicit information about how the FBI investigation was related to his conduct or behavior, Applicant speculated that the FBI was concerned about information Applicant provided to his employer about a distributor's inventory or promotion count. (Ex. 2 at 2.)

At the end of the interview, after the investigator had attempted several times to ascertain from Applicant specific information about why he left his job, Applicant admitted that his employer had given him a written notice of termination in June 2003. The investigator asked him several times why he had been fired. Applicant was unable to recall when he had been fired. Finally, he acknowledged to the investigator that his firing "had something to do with inventory accounting." He further stated that he believed he had done nothing wrong. He stated that his employer was looking for a way to terminate his employment. Applicant stated that he believed he had been wronged by his employer. He further stated that he did not mention his termination because he did not want to call attention to it and "was not going to take a hit for something that was unjust, frivolous, and without merit."¹ (Ex. 2 at 3; Tr. 30-31.)

In September 2007, the federal agency informed Applicant of its final decision to remove him as a contract investigator. The agency informed Applicant that he was removed, in part, because he falsified his 2006 SF-86 by failing to report he had been terminated from a job in 2003. The agency also noted that Applicant failed to acknowledge the termination during a security interview until the matter was raised by an investigator. Applicant denied that his failure to report the firing constituted wrongdoing. (Ex. 1; Ex. 8; Tr. 54-60.)

In April 2009, Applicant took a position as a security officer with a government contractor, which sponsored him for a security clearance. He completed an SF-86 on

¹ The OPM investigator who interviewed Applicant in June 2007 testified that she quoted Applicant directly in her June 26, 2007, report of investigation. (Tr. 30-31.)

April 22, 2009. In response to Section 13C on the SF-86, Applicant admitted being fired from a job in June 2003. In explanation, he asserted that allegations of wrongdoing by his former employer were false and without merit. (Ex. 11 at 19.)

The OPM investigator did not obtain and review Applicant's personnel file before interviewing him in June 2007. Applicant claimed that he had worked in the private sector for many years and was not familiar with how the security clearance process worked. He stated that he answered "No" to questions in Section 22 because he believed that if he admitted he had been fired, he would also be admitting to allegations of wrongdoing. He also acknowledged that when he completed his SF-86 in 2006, he had been working as a contract investigator for the Government for approximately one year. He claimed he did not answer the investigator's inquiries about his job status in June 2003, because the investigator did not ask him directly if he had been fired from the job. He stated that if the investigator had asked him directly if he had been fired by his employer in June 2003, he would have answered, "Yes." (Tr. 33, 59-62, 65, 74.)

Applicant provided a letter of character reference from a neighbor and friend who worked in employment security. The individual stated that he believed Applicant to possess good character and to be an "honest and trustworthy patriot." (Ex. 3 at 17.)

Applicant stated that he was not given enough time to review his 2006 SF-86 before he resubmitted it. Applicant acknowledged that he made a mistake by not admitting on his 2006 SF-86 that he had been fired from a job in June 2003. (Tr. 75-77, 81.)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant Applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

When evaluating an applicant's suitability for a security clearance, an 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 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, the administrative judge applies these guidelines 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 in seeking 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 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

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern:

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.

Applicant's personal conduct raises security concerns under AG ¶¶ 16(a) and 16(b). AG ¶ 16(a) reads: "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." AG ¶ 16(b) reads: "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative."

Applicant denied SOR ¶ 1.c., which alleged that in a security clearance interview he failed to disclose his termination from a job in June 2003. The OPM investigator who interviewed Applicant provided credible testimony to establish the Government's prima facie case in allegation 1.c. Applicant provided no credible evidence to rebut or mitigate the allegation. Applicant also denied SOR allegation 1.e., which alleged deliberate falsification of his SF-86.²

Applicant is educated in and knowledgeable about business and business practices. He holds a Bachelor of Science degree in Business Administration and a Master of Science degree in Business Administration. He worked in private business and was fired from a job in 2003. Beginning in 2005, Applicant worked as a contract investigator for a federal agency. His job as an investigator was to interview candidates for federal employment and obtain information about issues in their backgrounds that might raise trustworthiness concerns. As a contract investigator, Applicant was aware of the importance of telling the truth to the Government, and he was also familiar with the security significance of questions on the SF-86.

When he completed and certified his SF-86 in September 2006, Applicant concealed the fact that he had been fired from a job in June 2003 when he answered "No" to the questions in Section 22. In June 2007, when he was interviewed by an authorized OPM investigator, he told her that he had left the job under favorable circumstances. He continued to dissemble about being fired despite repeated questions from the OPM investigator. After repeated denials, he finally admitted that he had been

² The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)). See *a/so* ISCR Case No. 08-05637 at 3 (App. Bd. Sept. 9, 2010) (noting an applicant's level of education and other experiences are part of entirety-of-the-record evaluation as to whether a failure to disclose past-due debts on a security clearance application was deliberate.)

fired, but only after he had been confronted by the investigator with facts that convinced him that further denials were not credible. At his hearing, he denied dissembling and stated that he would have admitted being fired from his job if the investigator had asked him directly. Further, he blamed his employer for the firing and stated that he believed the firing was not justified.

In his answer to the SOR, Applicant denied deliberately falsifying his answers to questions in Section 22 on the SF-86 he executed in September 2006. At his hearing, he admitted that he had been fired and should have answered “Yes” when asked in Section 22 if he had been fired from a job in the previous seven years. He explained his false answer by asserting that he did not have enough time to review his SF-86 before submitting it to his employer. Applicant’s explanation was not credible, and he failed to provide a credible reason for failing to inform the Government that he had been fired.

AG ¶ 17 provides two conditions that could mitigate security concerns in this case:

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

(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;

No one advised Applicant to provide false information on his SF-86 or to an OPM investigator. Therefore, AG ¶ 17(b) does not apply. I thoroughly reviewed the documentary and testimonial evidence in this case. I observed Applicant carefully, and I noted his demeanor and how he responded to questions about his answers to the five questions in Section 22 and his interview with an OPM investigator in June 2007. I also listened carefully to his responses to questions posed during his security clearance hearing in order to assess his credibility and state of mind. I conclude that there is sufficient record evidence to conclude that Applicant’s “No” responses to questions in Section 22 and his statements to the OPM investigator that he had left his position under favorable circumstances were willful and deliberate falsifications. I conclude that none of the Guideline E mitigating conditions applies to the facts alleged at SOR ¶¶ 1.c. and 1.e.

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 have incorporated my comments under Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a mature adult of 49 years. He is educated and experienced in business and business practices. As a contract investigator, he was aware that being fired from a job can raise security concerns. He also knew that failure to provide truthful and candid answers during the employment investigation process would raise concerns about his reliability and trustworthiness.

Applicant was not a credible witness. While he admitted he had failed to provide full, frank, and truthful answers to the OPM investigator, he also stated he would have told the truth to the OPM investigator if she had asked him directly if he had been fired. He stated that he would have admitted he had been fired in response to questions in Section 22 if he had had more time to review his answers. He blamed his employer for firing him and stated that his termination was without merit. I believe Applicant did in fact provide the information reported by the OPM investigator in her summary of Applicant's personal subject interview on June 26, 2007.

The false information Applicant provided on his SF-86 and in his interview with an OPM investigator is recent and serious. He has not taken responsibility for his failure to be candid about his work record. He failed to establish that his dishonesty and lack of candor would not recur, raising ongoing concerns about his judgment, trustworthiness, and reliability.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. Accordingly, I conclude, after a careful review of the facts of his case, the personal conduct adjudicative guideline, and the whole-person analysis, that Applicant failed to 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, Guideline E: AGAINST APPLICANT

Subparagraphs 1.a. through 1.e.: Against 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.

Joan Caton Anthony
Administrative Judge