



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



In the matter of:)	
)	
)	ISCR Case No. 09-07213
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Paul DeLaney, Esq., Department Counsel
For Applicant: *Pro Se*

March 31, 2010

Decision

HEINY, Claude R., Administrative Judge:

In 2007, Applicant wrongfully obtained an access badge, which allowed him access to the United States Embassy in Baghdad. He was also aware another person had obtained a similar access badge. Applicant has rebutted or mitigated the government's security concerns under personal conduct. Clearance is granted.

Statement of the Case

Applicant contests the Defense Department's (DoD) 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 Statement of Reasons (SOR) on January 11, 2010, detailing security concerns under personal conduct.

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 effective within the DoD on September 1, 2006.

On January 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 February 24, 2010. The FORM contained 7 attachments (Items). On March 2, 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 March 15, 2010, Applicant's response to the FORM was received. Department Counsel did not object to the material. Applicant's response was admitted into the record. On March 19, 2010, I was assigned the case.

Findings of Fact

In Applicant's Answer to the SOR, he admits the factual allegations in the SOR. Applicant's admissions to the SOR allegations are incorporated herein. After a thorough review of the record, pleadings, and exhibits, I make the following findings of fact:

Applicant is a 46-year-old logistics specialist who has worked for a defense contractor since January 2009, and is seeking to obtain a security clearance. In July 2006, Applicant retired from the Marine Corps as a lieutenant colonel with 22 years of service. (Item 5) From January 2004 through April 2005, he had been stationed in Iraq as an advisor to the Iraqi Army.

In 2006, Applicant began working on construction projects in Iraq as a project program manager. (Item 7) In July 2006, while traveling to his work site, he was shot in the leg during an ambush and medivaced to a military hospital in Germany. (Item 6) In December 2006, he returned to Baghdad where he met a retired Marine Corps master sergeant working for a DoD security contractor involved in convoy and escort security. (Item 7, p. 1) Applicant knew this individual when both were assigned as Marine Corps advisors to the Iraqi army. Both were working in the Green Zone. A coworker of the retired master sergeant made identification (ID) cards and access badges for their company. That individual made Applicant an access badge allowing him access to the U.S. Embassy grounds for six months. Applicant believes the access badges were the same badges issued to all employees working for the DoD security contractor.

Although the other individual never asked for money, Applicant gave the individual \$50 for doing him the favor of providing him the badge. The badge allowed Applicant to use the gym, swimming pool, dining facilities, and attend entertainment events at the Embassy. (Item 5, page 49 of 53, Item 6, Item 7) Applicant knew he was unauthorized to have the card because he was not working for the same defense contractor as his friend. (Item 6) Applicant used the card to use the Embassy's recreation area. In June or July 2007, shortly after the access badge expired, Applicant shredded it. (Item 7) In May 2007, Applicant left Iraq and went to Afghanistan. In January 2008, he returned to Iraq working for a Lebanese company operated by American citizens.

Applicant was aware the former master sergeant helped a Lebanese contractor obtain a similar badge. Applicant, the former master sergeant, and the Lebanese contractor had met in 2004 when they all worked at the same Iraqi military base. The contractor was working on several contracts with the Iraqi military. (Item 7, p. 3) The Lebanese contractor obtained the badge so he could carry a weapon while traveling to different construction sites in Iraq. People were being killed on the roads daily and also kidnapped at gunpoint. (Answer to FORM) Being attacked traveling to job sites was not uncommon. Applicant failed to report that he knew the Lebanese contractor had obtained the badge.

An investigation into access badges started when the Lebanese contractor was stopped entering the Green Zone with his expired access badge. (Item 7) The retired master sergeant was terminated from his DoD security contractor job for providing the access badges. When questioned during the investigation, Applicant disclosed all he knew about the badges and the other contractor having a badge. The former master sergeant was terminated from his employment for his conduct.

Applicant realizes his conduct was wrong and he is extremely sorry for the damage caused by his action. He takes full responsibility for his conduct. (Answer to FORM) In his August 2009 statement, Applicant says, "I definitely made a poor decision and understand that I must live with the consequences of that decision." (Item 6, p. 3-4) Applicant asks that his previous service be taken into consideration.

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 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 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

Guideline E, Personal Conduct

The Directive sets out various factors relevant to an applicant’s personal conduct that may be potentially disqualifying. Revised 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.

AG ¶ 16 describes conditions that could raise a security concern and may potentially be disqualifying. The applicable conditions are :

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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

(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: . . . (3) a pattern of dishonesty or rule violations.

For a six month period ending in June or July 2007, Applicant wrongfully possessed an access badge granting him access to the U.S. Embassy compound and knew a Lebanese contractor possessed similar access. Applicant's judgment and reliability were questionable. Applicant exercised poor judgment, lack of candor, and dishonesty. He was unwilling to comply with rules and regulations. To his credit, he fully explained his involvement, but only when an investigation had already started and he was questioned about the access badges. AG ¶ 16(c) applies. Although this was a rule violation and Applicant was not authorized to have the access badge, it was not a "pattern" of dishonesty or rule violations . AG ¶ 16(d)(3) does not apply.

Applicant realizes his conduct was wrong and he is extremely sorry for the damage caused by his action. He takes full responsibility for his conduct. (Answer to FORM)

AG ¶ 17 provides conditions that could mitigate security concerns:

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

(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;

(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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

AG ¶ 17(a) and AG ¶ 17(b) do not apply because falsification was not alleged. AG ¶ 17(c) does not apply because the conduct was not minor. In this case, the illegally obtained badges did not cause a security incident, but potentially such a breach of security could have resulted in severe consequences.

AG ¶ 17(d) has limited application. Applicant has acknowledged his guilt and acknowledged his behavior was inappropriate. However, there is no indication as to positive steps he has taken to eliminate the inappropriate behavior. AG ¶ 17(e) does not apply because vulnerability was not alleged. AG ¶ 17(f) does not apply because the information was substantiated and AG ¶ 17(g) does not apply because Applicant was not alleged to have associated with persons involved in criminal activity.

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 had a former colleague get him an access badge so he could use the gym, pool, and recreational area at the Embassy. This was wrong. He also knew a civilian contractor had a similar access

badge allowing him to carry a weapon when traveling to and from construction sites. Applicant's knowledge about the other contractor having a badge and not reporting it was also wrong. This inappropriate conduct is balanced against Applicant's past service to his country.

Applicant deserves substantial credit for his service in Southwest Asia at various times from 2004 through 2008. Applicant spent 22 years in the Marine Corps, retiring as a lieutenant colonel. In 2004 and 2005, he was in Iraq training the Iraqi military. He has demonstrated his loyalty, patriotism, and trustworthiness through his service to the DoD through his active duty service and as a contractor. He has served more than four years in combat zones in Iraq and Afghanistan on active duty and as a contractor. He has risked his life to support DoD missions in those countries.

In July 2006, while performing his service as a contractor, Applicant's convoy was ambushed and he was shot in the leg. Four months later, he was out of the hospital and returned to Iraq to continue his duties as a contractor. He served not only in Iraq, but also in Afghanistan in support of the DoD mission. His security clearance application does not list any other reportable incidents involving illegal drugs, alcohol, the police or courts.

Overall, the record evidence leaves me without 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 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: 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.

CLAUDE R. HEINY II
Administrative Judge