



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 10-01306

Appearances

For Government: Gregg A. Cervi, Esquire, Department Counsel
For Applicant: *Pro se*

08/06/2012

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding personal conduct. Eligibility for a security clearance and access to classified information is denied.

Statement of the Case

On March 20, 2009, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing version of a Security Clearance Application (e-QIP).¹ On an unspecified date, the Defense Office of Hearings and Appeals (DOHA) issued him a set of interrogatories. He responded to the interrogatories on September 15, 2010.² On March 7, 2012, DOHA issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December

¹ Item 5 (e-QIP), dated March 20, 2009.

² Item 6 (Applicant's Answers to Interrogatories, dated September 15, 2010).

29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive, effective September 1, 2006. The SOR alleged security concerns under Guideline E (personal conduct), and detailed reasons why DOHA was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant acknowledged receipt of the SOR on March 22, 2012. In a sworn statement, dated April 9, 2012, Applicant responded to the SOR allegations and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM) was provided to Applicant on May 24, 2012, and he was afforded an opportunity, within a period of 30 days after receipt of the FORM, to file objections and submit material in refutation, extenuation, or mitigation. Applicant received the FORM on June 7, 2012, but as of July 27, 2012, he had not submitted any materials. The case was assigned to me on July 31, 2012.

Findings of Fact

In his Answer to the SOR, Applicant admitted the sole factual allegation pertaining to personal conduct (¶ 1.a. of the SOR). Those admissions are incorporated herein as findings of fact.

Applicant is a 62-year-old employee of a defense contractor, currently serving as a program architect. He earned a bachelor's degree in business administration in 1972. He has not served in the U.S. military. He was previously employed in positions both as a civil servant and a contractor. He was a management analyst from 1972 until 1973; and a director of integrated scheduling from 1982 until 2008. He joined his present employer in 2009. Applicant was unemployed from November 2008 until January 2009. His employment record from 1973 until 1982 has not been described. Applicant was married to his first wife in 1972, and divorced in 1980. They have one daughter, born in 1972. He married his current wife in 1986.

In 1990, Applicant was granted a top secret security clearance, and in 2002, he was granted access to sensitive compartmented information.

Personal Conduct

In October 2008, Applicant's employer conducted an investigation and it was determined that Applicant had been using his corporate credit card for personal use since 2005. At that time, his annual salary was \$140,000. The charges prior to December 2007 were repaid. From December 2007 until July 2008, Applicant had used the corporate credit card for \$36,370 in personal expenses.³ As a result, Applicant was discharged in November 2008.⁴ Because of his over 26 years of service with his employer, he was permitted to retire in lieu of discharge.

³ Item 7 (Employee Corrective Action Memo, dated November 11, 2008), at 1.

⁴ Item 7, *supra* note 3, at 1.

In March 2009, when Applicant completed his e-QIP, he added the following comment to his acknowledgement regarding his misuse of his corporate credit card:⁵

I misused my company credit card several times over the period of one year. In Jan 2008 I had to give up my home rather than have a foreclosure . . . due to my inability to pay my increased mortgage payment of \$9,400.00 per month. . . .

In June 2009, during his Office of Personnel Management (OPM) personal subject interview, Applicant modified his earlier explanation and added:⁶

In 01/2008 [Applicant] and his wife lost their home to a quick sale to avoid foreclosure. In 08/2006 [Applicant] and his wife refinanced their mortgage on their home to an adjustable rate mortgage. In mid-2007 [Applicant's] monthly mortgage payment went up from \$3,670.00 to \$8,800.00 a month. This increase made it very difficult for [Applicant] to make his monthly payment. [Applicant] and his wife put the house up for sale but they were not successful in selling the home. They fell behind in their monthly mortgage payments which caused the bank to start foreclosure proceedings. This forced [Applicant] and his wife to move out of the house. At this time [Applicant] and his wife moved into a hotel [Applicant] started to use his company credit card to pay the hotel bill. At first he was able to pay off the credit card on a monthly basis but eventually it got out of hand.

The misuse of the credit card came to the attention of [the employer] and [Applicant] was called in. [Applicant] explained to management what had happened to his home and that was the reason for the misuse of the credit card. [The employer] requested [Applicant] to immediately retire which [Applicant] did. Arrangements were made for [Applicant] to re-pay [the employer] the \$20,000.00. An agreement contract was drawn up and starting 06/2009 [Applicant] is re-paying [the employer] \$1,000.00 per month for 20 months.

In his Answer to the SOR, Applicant admitted the allegation and added: "Under stress by losing my house. I will not ever do that again."⁷

⁵ Item 5, *supra* note 1, at 43.

⁶ Item 6 (Personal Subject Interview, dated June 23, 2009), at 1, attached to Applicant's Answers to Interrogatories.

⁷ Item 4 (Applicant's Answer to the SOR, dated April 9, 2012).

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.”⁸ 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. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.”⁹

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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. 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 meaningful decision.

In the decision-making process, facts must be established by “substantial evidence.”¹⁰ The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government’s case. The burden of disproving a mitigating condition never shifts to the Government.¹¹

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This

⁸ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

⁹ Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

¹⁰ “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “Substantial evidence” is “more than a scintilla but less than a preponderance.” *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

¹¹ *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

relationship transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 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. Furthermore, “security clearance determinations should err, if they must, on the side of denials.”¹²

Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”¹³ Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. 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.

Analysis

Guideline E, Personal Conduct

The security concern relating to the guideline for personal conduct is set out in AG ¶ 15:

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 notes several conditions that could raise security concerns. Under AG ¶ 16(d), it is potentially disqualifying if there is:

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

¹² *Egan*, 484 U.S. at 531

¹³ See Exec. Or. 10865 § 7.

properly safeguard protected information. This includes but is not limited to consideration of: . . . (3) a pattern of dishonesty or rule violations; (4) evidence of significant misuse of Government or other employer's time or resources.

Security concerns may also be raised under AG ¶ 16(e) if there is:

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 had been misusing his corporate credit card for personal use since 2005, and while the charges prior to December 2007 were repaid, during the period from December 2007 until July 2008, Applicant had continued to use the corporate credit card for \$36,370 in personal expenses. His actions in misusing the corporate credit card and the employer's resources were violations of corporate policy and justification for his termination-forced retirement after over 26 years of service. Applicant's repeated misuse of the corporate credit card is well documented. AG ¶¶ 16(d) and 16(e) have been established.

The guidelines also include examples of conditions that could mitigate security concerns arising from personal conduct. AG ¶ 17(c) may apply if:

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.

Also, AG ¶ 17(d) may apply if:

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.

Similarly, AG ¶ 17(e) may apply if "*the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.*"

Applicant's misuse of his corporate credit card ceased upon his termination-forced retirement in November 2008. The offenses were not minor and the behavior was not infrequent. While Applicant has acknowledged some of the behavior, he has repeatedly attempted to minimize what he had done in terms of duration and frequency. There has been no evidence offered to indicate Applicant had ever obtained counseling to change his behavior, and learn from it. While he has attributed his actions to financial stress caused by the loss of his home, and contends it will never happen again, Applicant has not offered evidence to reflect what positive steps he has taken to

alleviate the stressors, circumstances, or factors that caused him to misuse the corporate credit card. Applicant's past behavior and current attitude do cast doubt on his reliability, trustworthiness, and good judgment. AG ¶¶ 17(c) only partially applies due to the passage of time, but AG ¶¶ 17(d) and 17(e) do not 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.

There is some evidence in favor of mitigating Applicant's conduct. He had a significant period of honorable employment with the employer in question before he started to misuse the corporate credit card. Once his misuse was uncovered, Applicant started repaying the debt such misuse had caused. His behavior ceased upon his termination-forced retirement in November 2008 – nearly four years ago.

The disqualifying evidence under the whole-person concept is substantial. Applicant has an extensive multi-year history of corporate credit card misuse. Also significant are his repeated attempts to conceal his far greater period and frequency of misuse. Applicant's statement in his e-QIP was false, for in professing a limited misuse over only a one-year period, he attempted to conceal his far greater period and frequency of misuse. During his OPM interview, Applicant again mischaracterized the period and frequency of his misuse. Applicant's misuse of the corporate credit card and his subsequent, repeated lack of candor are troublesome. Four years have passed since Applicant's misuse of the corporate credit card, and that factor has been considered in his favor. However, the disqualifying evidence outweighs that factor. Taken together, his conduct over the years, and his current lack of candor, vitiate any other mitigation. See AG ¶¶ 2(a)(1) through 2(a)(9).

Overall, the record evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the

