



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



In the matter of:)	
)	
)	ISCR Case No. 10-02476
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: *Pro se*

January 31, 2011

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the case file, pleadings, and exhibits, I conclude that Applicant failed to rebut or mitigate the Government's security concerns under the personal conduct adjudicative guideline. His eligibility for a security clearance is denied.

Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP) on August 31, 2009. On June 25, 2010, the Defense Office of Hearings and Appeals (DOHA) issued 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 for SORs issued after September 1, 2006.

On July 26, 2010, Applicant answered the SOR in writing and requested that his case be determined on the record in lieu of a hearing. On October 17, 2010, the

Government compiled its File of Relevant Material (FORM). The FORM contained documents identified as Items 1 through 7.¹ By letter dated October 18, 2010, DOHA forwarded a copy of the FORM to Applicant, with instructions to submit any additional information or objections within 30 days of receipt. Applicant received the FORM on November 2, 2010. His response was due on December 2, 2010. Applicant did not file any additional information within the required time period. On December 23, 2010, DOHA assigned the case to me for a decision.

Findings of Fact

The SOR contains one allegation of disqualifying conduct under AG E, Personal Conduct (SOR ¶ 1.a.). In his Answer to the SOR, Applicant admitted the allegation. I admit Applicant's admission as a finding of fact. (Item 1; Item 3.)

Applicant is 25 years old, never married, and employed by a government contractor as a software engineer. He completed four years of college study and was awarded a bachelor's degree in 2008. He has worked for his present employer since June 2008. (Item 4.)

The SOR alleged that in August 2009, Applicant was denied program access eligibility by another government agency because he had provided inaccurate and untruthful information about his past drug use and, in a polygraph examination, attempted to conceal drug use and other information by intentionally using breathing countermeasures. In response to the SOR, Applicant admitted the allegation. In response to DOHA interrogatories, Applicant provided a letter, dated August 31, 2009, from the other government agency in which it denied him access eligibility for the conduct specified in SOR allegation 1.a. The letter corroborated the Government's allegation. Applicant provided no evidence to rebut or mitigate the allegation. (Item 1; Item 5 at 4-6.)

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 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 applicants 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.

¹As Item 7, the Government offered for administrative notice copies of the Directive and the adjudicative guidelines.

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the 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.

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. . . ." 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 that an 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

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(b) and AG ¶ 16(e). 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." AG ¶ 16(e) reads, in pertinent part: "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"

AG ¶¶ 17(b) and 17(e) provide conditions that could mitigate security concerns in this case. AG ¶ 17(b) reads: "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." AG ¶ 17(e) reads: "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress."

Applicant failed to provide information to establish that either AG ¶ 17(b) or AG ¶ 17(e) is applicable to the facts in his case.

Whole-Person Concept

Under the whole-person concept, an 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

