



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



In the matter of:)	
)	
)	ISCR Case No. 10-03759
)	
Applicant for Security Clearance)	

Appearances

For Government: Robert J. Kilmartin, Esquire, Department Counsel
For Applicant: *Pro se*

05/08/2012

Decision

CREAN, Thomas M., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Statement of the Case

On October 26, 2009, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to continue a security clearance required for a position with a defense contractor. The Defense Office of Hearings and Appeals (DOHA) could not make the preliminary affirmative findings required to continue the security clearance. On September 28, 2011, DOHA issued a Statement of Reasons (SOR) to Applicant detailing security concerns for personal conduct under Guideline E. These actions were 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). Applicant acknowledged receipt of the SOR on October 12, 2011.

Applicant answered the SOR on October 26, 2011. He admitted the four allegations under Guideline E of providing false information to criminal investigators and that he was barred from the Iraqi theater of operations. He requested a hearing before an administrative judge. Department Counsel was prepared to proceed on November 22, 2011. The case was assigned to me on February 27, 2012. DOHA issued a Notice of Hearing on February 27, 2012, for a hearing on March 19, 2012. Applicant discussed the hearing date with Department Counsel before February 27, 2012, and he received the actual Notice of Hearing on March 5, 2012. Applicant waived the 15 days notice of hearing requirement. I convened the hearing as scheduled. The Government offered four exhibits, which I marked and admitted into the record without objections as Government exhibits (Gov. Ex.) 1 through 4. Applicant testified. DOHA received the transcript of the hearing (Tr.) on March 27, 2012.

Findings of Fact

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact. Applicant admitted the four allegations under personal conduct guideline. His admissions are included in my findings of fact.

Applicant is a 37-year-old high school graduate. He married in 1998 and divorced in June 2005. He remarried in December 2006. He has two children from his first marriage, and one from his second marriage as well as a stepson. He has been a field service representative for a defense contractor since June 2009. He also was a field service manager for a different defense contractor in Iraq and at locations in the United States from 2005 until 2009. He served on active duty in the Army for seven years from April 1998 until May 2005. He received an honorable discharge. (Tr. 9-13; Gov. Ex. 1, e-QIP, dated October 26-2009)

In 2008, Applicant was employed by a defense contractor as a field service representative in Iraq. In the area where he worked, there was a power generator that was not working. His company received from the Army a new generator making the old unserviceable generator excess. The unserviceable generator was prepared for return to the appropriate Defense Reutilization Management Office for proper disposal. Before the generator was turned in, a foreign national employed at Applicant's location by another company asked Applicant if he could have the generator. He told Applicant that some of his friends could fix the generator and make it serviceable. Applicant states that he asked a military supervisor if he could give the generator to the foreign national. Since it was not included in the property book of any government unit, Applicant states he was told he could give it to the foreign national. (Tr. 13-19, 26-28; Gov. Ex. 3, Applicant's Affidavit, dated December 6, 2008)

A few days after he gave the foreign national the generator, the foreign national told Applicant there was a dispute among his friends as to who owned the generator. He asked Applicant to sign a hand receipt to show the generator was properly transferred to a certain individual. Applicant filled out and signed the hand receipt to resolve the dispute over the ownership of the generator. Applicant stated he had the authority to

complete and sign the hand receipt because he was an employee of the company that had control of the generator. Applicant did not know or remember the name on the hand receipt. (Tr. 19-23; Gov. Ex. 3, Applicant's Affidavit, dated December 6, 2008)

A few days later, the foreign national gave Applicant \$350 for the generator. Applicant stated he had not expected to receive money for the generator, but he accepted it since it was excess property. When first questioned about the generator and money by criminal investigators, Applicant denied knowing that the generator was government property and denied that he received money for it from the foreign national. He did not think he did anything wrong since the generator did not belong to anyone. He maintains that the generator was not government property. In his initial interview with criminal investigators, Applicant denied that the generator was government property and that he received money for it. However in a subsequent interview with criminal investigators, Applicant admitted the generator was Government property and that he received money for it. (Gov. Ex. 3, Affidavit, dated December 6, 2008) He again admitted to the criminal investigators that he was not completely honest when he denied that he did not received money for the generator. (Gov. Ex. 4, Statement, dated December 11, 2008) He was then barred from serving in the Iraq theatre of operations because he gave the generator to the foreign national, accepted money for it, and lied to criminal investigators. (Tr. 23-26, 28-34) In a later affidavit, Applicant admitted accepting the money from the foreign national. (Gov. Ex. 2, Affidavit, dated February 8, 2011)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the AG lists 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 for obtaining 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 protect classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Analysis

Personal Conduct

A security concern is raised because conduct involving questionable judgment, untrustworthiness, unreliability, 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 ¶ 15) Personal conduct is always a security concern because it asks the central question does the person’s past conduct justify confidence the person can be entrusted to properly safeguard classified information. The security clearance system depends on the individual providing correct and accurate information. If a person conceals or provides false information, the security clearance process cannot function properly to ensure that granting access to classified information is in the best interest of the U. S. Government.

Applicant admitted he provided false information and a false statement to criminal investigators concerning his conduct in selling a government-owned generator to foreign national and accepting money for it. This raises a security concern under Personal Conduct Disqualifying Condition AG ¶ 16(b) (deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative). Applicant denies that he intentionally provided false information to the investigator. Applicant’s statements are not credible and I find that he intentionally provided false information to criminal investigators. I find that Applicant’s testimony at the hearing was not credible and that he was deliberately vague about his actions so as to minimize his intentional falsifications to criminal investigators.

I considered Personal Conduct Mitigating Conditions AG ¶ 17(a) (the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; AG ¶ (17(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); and AG ¶17(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). These mitigating conditions do not apply. Applicant lied to criminal investigators about the generator and accepting money for the transfer. Later, when confronted again by the criminal investigators with the correct fact and information, he admitted receiving the money. The transfer of government equipment to foreign nationals, particularly in a war zone, is a serious criminal offense. The offense is recent, happening only three years ago. Applicant did not acknowledge his criminal action until confronted with the correct facts by criminal investigators. There is insufficient evidence to conclude that Applicant, when confronted with the same scenario, would not provide false and misleading information. I do find for Applicant as to SOR 1.d. The correct action was taken within the theater command by barring Applicant from the theater for his actions. This is an established fact and not a security concern. Applicant has not mitigated the security concerns for personal conduct raised in SOR 1.a, 1.b, and 1.c. Applicant intentionally provided false information to government investigators about his involvement in the transfer of government equipment. He continued to minimize his involvement. His statements and testimony lacks credibility.

Whole-Person Analysis

Under the whole-person concept, the administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the circumstances. An 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 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 lied to criminal investigators about his role in giving government equipment to a foreign national and receiving money for the item. He did not acknowledge his actions until confronted with the facts by the criminal investigators. His lack of candor raises questions about his reliability, untrustworthiness, and ability to protect classified information. His behavior raises questions about whether he will properly handle, manage, and safeguard classified information. The record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the personal conduct security concerns.

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 - 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

THOMAS M. CREAN
Administrative Judge