



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



In the matter of:)
)
) ISCR Case No. 10-05684
)
Applicant for Security Clearance)

Appearances

For Government: Richard Stevens, Esq., Department Counsel
For Applicant: *Pro se*

07/10/2013

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline E, personal conduct. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On August 22, 2012, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing the security concerns under Guideline E. 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 DOD on September 1, 2006.

Applicant answered the SOR on November 14, 2012, December 7, 2012, and February 22, 2013. By separate correspondence dated September 19, 2012, he requested a hearing before an administrative judge. The case was assigned to me on April 16, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of

hearing on May 22, 2013. I convened the hearing as scheduled on June 11, 2013, by video teleconference. The Government offered exhibits (GE) 1 through 7, which were admitted into evidence without objection. Applicant testified and offered exhibits (AE) A and B, which were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on June 19, 2013.

Procedural Issues

Department Counsel moved to amend the SOR by withdrawing Paragraphs 1.h, 1.o, 1.p, 1.q, and 1.r. Department Counsel also amended Paragraph 1.s to correct a typographical error, changing the word “wit” to “with.” There were no objections and the motions were granted.¹

Findings of Fact

Applicant admitted all of the SOR allegations. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 49 years old. He is a high school graduate and has earned some college credits. He married in 1987 and has two grown children.

On December 23, 2000, Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP). Question 20 of the e-QIP required Applicant to disclose if in the past ten years he had been fired from a job; quit a job after told he would be fired; left a job by mutual agreement following allegations of misconduct; or left a job by mutual agreement following allegations of unsatisfactory performance; left a job for other reasons under unfavorable circumstances. Applicant answered “no.” In truth, Applicant had mutually agreed to resign from a job in July 2000, and had been terminated from a job in early 2000. Applicant was denied a security clearance in 2003 due to these omissions. In 2004, a hearing was conducted by an administrative judge from DOHA. Applicant’s denial of a security clearance due to these intentional omissions was affirmed by the administrative judge. Applicant continued to work for his employer at the time without a security clearance.²

Applicant acknowledged that he made a mistake by not being honest on his e-QIP. He stated he did not believe at the time that failing to disclose he had been terminated from a part-time job was serious. He explained he learned his lesson and suffered the consequences for his omission.³

Applicant claimed he learned in 2007 that he has dyslexia. He could not recall the name of the doctor who diagnosed him. He stated that he was told he had to learn

¹ Tr. 13-15.

² Tr. 27-28, 32, 54-56.

³ Tr. 27-28, 32-33, 59.

in a different way because of his disease. He stated he attended school for two months to learn the right way.⁴

On October 20, 2010, Applicant submitted an e-QIP. In response to Section 13c, which requested information about Applicant's employment record, he failed to disclose the derogatory information about his past work history.⁵ Specifically, he failed to disclose:

1.c: He received a letter of reprimand on October 15, 2010, for failing to report for duty without calling in.

1.d: He received a letter of reprimand on August 6, 2010, for reporting late for duty.

1.e: He received a letter of reprimand on October 27, 2006, for violating written rules, regulations, and policy by possessing non-work-related magazines and a compact disc while he was on post.

1.f: He received a letter of suspension on October 16, 2006, for failure to maintain or improperly wearing his uniform.

1.g: He received a letter of counseling on August 9, 2006, for violating written rules, regulations, and policy by laying his uniform hat on a counter while he was on post.

1.i: He received a letter of counseling on May 1, 2006, for violating written rules, regulations, and policy by improper conduct in "non medical calling off duty."

1.j: He received a memo for the record and verbal counseling on April 27, 2006, for violating written rules, regulations, and policy by having an unshaven face while on duty.

1.k: He received a memo for the record from his employer on April 12, 2006, for violating written rules, regulations, and policy by having his uniform shirt covered by a baseball jersey, and wearing no neck tie, while on duty.

1.l: He received a memo for the record on February 23, 2005, for violating written rules, regulations, and policy by arriving late for duty.

1.n: He received a memo on October 30, 2003, from his employer for violating written rules, regulations, and policy by arriving late for duty.

⁴ Tr. 28-30, 45-46.

⁵ Tr. 56-57.

When interviewed by an Office of Personnel Management (OPM) investigator on June 9, 2011, he was asked the following: Were there any other written or verbal reprimands at his company including no call/show violations. Applicant answered “no” and failed to disclose the numerous violations listed above, until he was confronted with the violations by the investigator.

Applicant stated he did not deliberately or intentionally fail to disclose the requested information. He stated the reason he did not disclose the above derogatory employment information was because he was struggling with his dyslexia to complete the e-QIP and his “reading was not clear.” He also stated that he did not remember the numerous employment violations and infractions. He stated he believed the violations were outside of the seven-year reporting period. He stated he was rushed when he completed the e-QIP and his wife was not available to help him. He stated he was told the application was time sensitive. He stated he thought all of the violations occurred in 2003. When asked about why he did not disclose the incident that occurred on August 6, 2010, two months before he completed the e-QIP, and for which he received a letter of reprimand for reporting to duty late, he stated: “I might have overlooked it.” He stated he did not think to ask for help and he was embarrassed by his dyslexia. He did not explain how his dyslexia affected his memory. Applicant’s testimony is not believable or credible.⁶

Applicant has worked for his present employer since July 2010. Prior to this employment, he worked for the same employer from October 2000 to January 2007. He stated the company was downsizing and he was offered a transfer to a different division. He elected not to transfer and instead chose to work with his wife. He worked with her until February 2009, when he was hired by a company and remained there until he started with his present employer.⁷

Applicant provided a certificate he received for bravery in April 2013 and a copy of his transcripts from a college he attended. He stated that he is an outstanding employee and has not had any recent infractions. He acknowledged he has problems filling out paperwork.⁸

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 are used in evaluating an applicant’s eligibility for access to classified information.

⁶ Tr. 29, 34-53, 58-63.

⁷ Tr. 32-34, 53, 63-64.

⁸ Tr. 30; AE B.

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 not drawn 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, 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 and 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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 expresses the security concern pertaining 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 be disqualifying. I have specifically considered:

- (a) 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; and
- (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 intentionally and deliberately failed to disclose any of his derogatory employment history on his e-QIP. When questioned by the OPM investigator, Applicant deliberately lied when he answered “no” about whether he had any other written or verbal reprimands from his employer including no call/no show violations. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered the following mitigating conditions under AG ¶ 17:

- (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; and

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

Applicant had a security clearance hearing in 2003 and was found to have intentionally failed to disclose information on his e-QIP. He was on notice of the importance of being completely truthful when submitting an e-QIP. He provided several explanations for why he failed to disclose all of his derogatory employment history. None of them are credible. Applicant had an employment violation as recently as two months before he completed his e-QIP and did not disclose the matter. He stated he has dyslexia and difficulty reading. This does not explain how he could conclude that his violations were outside the seven-year time period. When questioned by the OPM investigator, Applicant again was untruthful. Applicant has an established pattern of dishonesty. None of the above mitigating conditions 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 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 conditions in light of all the facts and circumstances surrounding this case. 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.

Applicant is 49 years old. He was recognized for bravery by his employer. However, Applicant lied on his e-QIP in 2000 and again in 2010, by failing to disclose any of his numerous employment problems. His actions were intentional and deliberate and reflect a pattern of dishonest behavior. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate the security concerns arising under the personal conduct guideline.

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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraphs 1.c-1.g:	Against Applicant
Subparagraph 1.h:	Withdrawn
Subparagraphs 1.i-1.l:	Against Applicant
Subparagraph 1.m:	For Applicant
Subparagraph 1.n:	Against Applicant
Subparagraphs 1.o-1.r:	Withdrawn
Subparagraph 1.s:	Against Applicant

Conclusions

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 a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge