



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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-----) ISCR Case No. 10-06089
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)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: Amy C. Broderick, *Esquire*

June 25, 2013

Decision

MOGUL, Martin H., Administrative Judge:

The Department of Defense (DoD) issued an undated Statement of Reasons (SOR) detailing the security concerns under Guidelines E and J for Applicant. 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 after September 1, 2006.

On July 5, 2012, Applicant replied to the SOR (RSOR) in writing, and he requested a hearing before an Administrative Judge. The case was assigned to this Administrative Judge on September 4, 2012. DOHA issued a notice of hearing on September 4, 2012, and the hearing was scheduled on October 10, 2012. The hearing was initially continued at the request of Applicant's counsel because Applicant was scheduled to be deployed outside of the United States. I then set the hearing for January 15, 2013, but Applicant was not set to return to the United States until after February 10, 2013. I thereafter set the hearing for February 20, 2013, but Department Counsel requested a continuance because his witnesses would not be available on that date. I then set the hearing for February 28, 2013, and I convened the hearing as scheduled on that date.

At the hearing, the Government offered Exhibits 1 through 8, which were received without objection. Department Counsel requested that I take official notice of a State Penal Code Section, which has been entered into evidence as Exhibit 8, and which I have done. Two witnesses also testified on behalf of the Government. Applicant testified on his own behalf and submitted Exhibits A through E, which were also received without objection. One additional witness also testified on behalf of Applicant. DOHA received the transcript of the hearing (Tr) on March 11, 2013. Based upon a review of the pleadings, exhibits, and the testimony of Applicant and the additional witnesses, eligibility for access to classified information is denied.

Findings of Fact

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the following findings of fact:

Applicant is 37 years old. He is not married, and he has no children. Applicant received a Bachelor of Science degree in 2002. He is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Paragraph 1 (Guideline E - Personal Conduct)

The SOR alleges in this paragraph that Applicant is ineligible for clearance because he exhibited conduct involving questionable judgement, lack of candor, dishonesty or unwillingness to comply with rules and regulations.

1.a. The SOR alleges that Applicant was terminated from his place of employment on or about February 27, 2009, after an investigation by the employer determined that Applicant had submitted at least 34 fraudulent invoices for reimbursement, totaling approximately \$9,959.50, from 2006 through 2009. Applicant denied this allegation in his RSOR.

Paragraph 2 (Guideline J - Criminal Conduct)

The SOR alleges that Applicant engaged in criminal conduct.

2.a. The SOR alleges that the conduct alleged in paragraph 1, above constitutes criminal conduct. Applicant denied this allegation in his RSOR.

Government Witness 1

Government Witness 1 (GW1) is a part owner and president of the company that is the former employer of Applicant. He also was in the United States Air Force from 1976 to 1996. GW1 started the company, which now has 62 employees, in 2003. GW1 hired Applicant in 2005 to work for GW1's company. GW1 testified that he authorizes his employees, who have a pilot's license like Applicant, to take five hours a month or 60 hours a year to continue practicing flying, for which they are reimbursed.

Additionally, he allows each employee to have an annual \$5,000 budget to be used for advanced training or education.

On March 8, 2009, GW1 created a Memo for Record concerning Applicant. (Exhibit 3.) GW1 testified about the incident that is the subject of this clearance hearing based upon that memorandum. GW1 wrote in his memorandum, and confirmed during testimony, that on February 20, 2009, he and his wife (GW2), who is the Vice President of their company, and also does some of the accounting and bookkeeping, went to the work site to correct and review some of the employees expense reports, including Applicant's. The corrections were done on a regular basis. GW2 spoke to Applicant to correct one of his expense reports from 2008. Applicant returned within 30 minutes with a new report, stating that he had the original voucher in his desk.

This aroused some suspicion in GW2, so on the next day, February 21, 2009, GW1 and GW2 began reviewing Applicant's previous expense reports. They noted that all of the 2008 invoices for flying time, submitted by Applicant and upon which he was paid by the company, had the same invoice number, 04707, and were copies of the same original invoice. This was extremely unusual, as the standard procedure was to use a different invoice with a different number for each separate flight.

On February 23, 2009, GW1 met with the manager of the flight club where Applicant did his flying. GW1 noted that the flight club had no record of the flights, upon which the invoices were based. The only transaction they could verify was Applicant's dues from the flight club.

On February 24, 2009, GW1 and GW2 returned again to the flight club to compare additional invoices from 2006 and 2007. They attempted to verify 44 additional expense reports and invoices from Applicant, but they could only verify one invoice that had a corresponding record of a flight from the flight club. The flight club had no record of the other 43 flights.

GW1 also reviewed Applicant's most recent transaction, which was claimed in February 14, 2009, for a particular aircraft. The manager of the flight club, who consulted with GW1, had no recollection of Applicant being at the flight club during the entire month of February 2009. Additionally, the chief flight instructor, with whom Applicant claimed he had flown, had no record of the flights. Finally, the aircraft that Applicant claimed he had flown had been unavailable for flight because of maintenance from January 15, 2009 through the date of inquiry of February 24, 2009.

After GW1 consulted with his attorney, Applicant was terminated from his employment on February 27, 2009. Because of the advice of counsel, GW1 had no discussion with Applicant about what he found, and he did not attempt to collect all of the overpayment based on fraud he had made to Applicant. An attorney actually conducted the termination, since GW1's company had never terminated an employee before. Applicant received a final payment and was informed that he had to return all Government property still in his possession.

GW1 testified that he was extremely disappointed in Applicant's conduct because he believed they were providing Applicant with such a good career opportunity. He also

testified that Applicant admitted he had committed the fraudulent act as described above to another former employee of GW1. (Tr at 24-63.)

Exhibit 3 includes a memorandum from the former employee of GW1's company and friend of Applicant, dated April 19, 2009, and referred to in GW1's testimony. In the memorandum, this person wrote that Applicant confirmed to him in text and by telephone conversation that Applicant submitted vouchers for companion trainers even when he did not fly. This employee also confirmed in his memorandum that he showed GW1 the text from Applicant that confirmed Applicant's conduct.

Government Witness 2

As reviewed above, GW2 is the wife of GW1 and the Vice President of the company that was the former employer of Applicant. GW2 confirmed the testimony of GW1 that she was the person who was initially suspicious when Applicant told her that he had the original invoice number 04707 from the flight club after he made the corrections on one of the expense reports. She and her husband met with the manager of the flight club but there was no record of the flights that Applicant claimed to have taken, and for which he submitted vouchers and expense reports.

GW2 confirmed that she had lodged a protest to keep Applicant from collecting unemployment compensation, since Applicant wrote on his unemployment application that the position he held had been eliminated, which she argued was not correct. She was pleased when he could not collect the unemployment compensation because he had been terminated for cause from his employment, rather than his position being eliminated. (Tr at 64-99.)

Applicant's Testimony

Applicant is currently employed as a pilot/mechanic. Applicant testified that when he was employed by his previous employer he was approved to fly at the flight club for a maximum of five hours a month, and he also was allowed \$5,000 a year for advanced education. He confirmed that he did use blank copies of the same receipt, and he would fill them in based on what he had done, and submit them. He contended that he did not use the original receipt because he may have split the fee with another pilot or have another pilot's name on the receipt, so he could not submit the original receipt. Applicant contended that he received approval from GW1 to consolidate several receipts on to one receipt, although he never received written authorization. Applicant claimed that he reviewed his log book, in which he maintains a record of all of his hours flying, and that he never submitted a voucher for reimbursement for time that he did not fly. (Tr at 110-174.)

Exhibit C includes copies of pages from Applicant's flight log book. The pages include headings for the "Type of Piloting Time" and "Remarks and Endorsements." All of the information in the flight log book is handwritten, and many of the notations are illegible. Exhibit D includes highlights and explanations of Applicant's entries into his flight log handbook, including his notation for "ST," which represents Split Time when he would have shared the cost of the flight with another pilot.

Applicant Witness

Applicant Witness (AW) has been a friend of Applicant for 17 or 18 years. They met in college when they were both learning to fly. He has known Applicant socially, but never worked with him. AW responded to questions about Applicant's reliability and trustworthiness as "excellent." He described Applicant as a "loyal, outstanding person." (Tr at 177-183.)

Government Witness 1 Rebuttal

In rebuttal, GW1 testified that the Government required original invoices or receipts when they conducted audits, which were fairly extensive. Therefore, he could not recollect ever giving Applicant authorization to use a receipt for more than one flight or on more than one expense voucher. He also reiterated that when he went to the flight club, he tried to match the date of the flights on the vouchers to see if airplanes at the flight club, which were identified on the vouchers, actually flew on those dates. With the exception of one flight, the flight club had no record of the identified planes being flown on the days cited on the vouchers. (Tr at 189-195.)

Mitigation

Applicant submitted 14 character letters from individuals who have known him in different capacities. The letters were extremely laudatory. He was described as an "honest and trustworthy" individual. (Exhibit A1 through 14.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 over-arching 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 as to 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 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

Paragraph 1 (Guideline E - Personal Conduct)

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

Conduct involving questionable judgement, 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 Government alleges in this paragraph that Applicant is ineligible for clearance because he engaged in conduct that exhibited questionable judgement, dishonesty, unreliability, unwillingness to comply with rules and regulations, and untrustworthiness.

This case involves allegations made by GW1 and GW2, the president and vice-president of the company that was Applicant’s former employer, that Applicant submitted vouchers and expense reports for training flights that Applicant never took. Applicant was terminated from his employment because of this conduct. Applicant denied that he submitted false vouchers and he contended that each voucher that was submitted was for an actual training flight.

I find the testimony of GW1 and GW2 far more credible than that of Applicant for several reasons. GW1 and GW2 seemed to be completely surprised when they realized that Applicant had submitted the same voucher many times. Upon learning of the duplicate vouchers, they went to the flight club on more than one occasion to try to ascertain if Applicant had flown for each corresponding voucher. GW1's testimony was extremely credible that the records at the flight school did not show that flights had been taken on the days in question, with the exception of one flight. GW1 seemed to be genuinely disappointed in Applicant's conduct, in part because he seemed to have affection for Applicant before the discovery of his conduct and subsequent termination. I also find GW1's testimony reasonable that, because of Government audits, he would not have given approval to submit multiple receipts on one original voucher.

I find that the copy of the flight log book Applicant submitted in Exhibit C and the explanations in Exhibit D do not establish that the flights, for which Applicant submitted the duplicate vouchers, actually occurred. Exhibit C consisted only of handwritten notations by Applicant. No independent evidence was offered to validate or substantiate the notations or show that the flights were taken.

The guideline notes several conditions that could raise security concerns and could potentially apply in this case. With respect to Guideline E, I find that Applicant's conduct supports disqualifying condition ¶ 16(d) "a whole-person assessment of questionable judgement, untrustworthiness, unreliability" under this guideline. I do not find any mitigating condition under ¶ 17 is applicable. I therefore, resolve Guideline E against Applicant.

Paragraph 2 (Guideline J - Criminal Conduct)

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubt about a person's judgement, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

The guideline notes several conditions that could raise security concerns and could potentially apply in this case. With respect to Guideline J, I find that the Government has established that Applicant engaged in criminal conduct, by his multiple fraudulent submission of vouchers to his employer during the years 2006 to 2009, which I find to be a violation of the State Penal Code Section.

I find that ¶ 31(a), "a single serious crime or multiple lesser offenses," applies in this case. ¶ 31(c), "allegations or admissions of criminal conduct, regardless of whether the person was formally charged," is also applicable to this case. Because Applicant has failed to acknowledge his criminal conduct, I do not find any mitigating condition under ¶ 32 is applicable. Paragraph 2, Guideline J is found against Applicant.

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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Based on all of the reasons cited above as to why the disqualifying conditions apply and the mitigating conditions do not apply, I find that the record evidence leaves me with significant questions and doubts as to Applicant's eligibility and suitability for a security clearance under the whole-person concept. For all these reasons, I conclude Applicant has not mitigated the 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
Subparagraph 1.a.:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a.:	Against Applicant

Conclusion

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

Martin H. Mogul
Administrative Judge