



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



In the matter of:)	
)	
)	ISCR Case No. 10-07088
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: David Hayes, Esq., Department Counsel
For Applicant: Phillip Cave, Esq.

June 15, 2011

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline E, Personal Conduct. Applicant's eligibility for a security clearance is denied.

Statement of the Case

On March 21, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing 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 Department of Defense on September 1, 2006.

In an undated answer to the SOR, Applicant requested a hearing before an administrative judge. The case was assigned to me on April 13, 2011. DOHA issued a Notice of Hearing on April 28, 2011. I convened the hearing as scheduled on June 1,

2011. The Government offered exhibits (GE) 1 and 2, which were admitted into evidence without objection. Applicant offered exhibits (AE) A and B. They were admitted into evidence without objections. DOHA received the hearing transcript (Tr.) on June 8, 2011.

Findings of Fact

Applicant denied SOR allegation ¶ 1.a and admitted ¶1.b. His admissions are included in the findings of facts. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is 28 years old. He is not married and has no children. He has been employed by his present employer, a federal contractor, for about two years. Before then he worked for another contractor. He has held a secret security clearance for about three years.¹

Applicant completed a security clearance application on February 4, 2010, at the request of his employer, so he could upgrade his secret security clearance to a top secret security clearance. As part of the background investigation he was interviewed by a government investigator (GI) on March 17, 2010. He provided information that he had attended college from September 2000 to December 2005. When specifically asked if he experienced any suspensions, expulsions, or any other academic or non-academic difficulties while in attendance, he answered "No." When asked if there were any records that might be reviewed or any persons that would offer information which would tend to contradict anything that he told the investigator during the interview, he responded that he was not aware of anything to the best of his knowledge.²

In February 2001, Applicant received a written counseling from the Associate Dean of Students for violating the university's responsible computing policy. Applicant admitted he committed this violation, but did not disclose it to the GI when asked. He stated he did not recall the violation when he was asked and had blocked out his college experience. Applicant's testimony was not believable.³

In May 2003, Applicant was accused of academic dishonesty for cheating on an exam in violation of the University's Code of Conduct. In June 2003, he had a hearing before the Undergraduate Student Judicial System committee. He pled not guilty to the offense and was found guilty. He appealed the decision. His appeal was 19 pages long and included photographs. The appeal was denied. In July 2003, Applicant was placed on a deferred suspension from the university until the spring semester of 2004. He initially received the grade "X/F" for the course, which means failure due to academic

¹ Tr. 20, 31.

² Tr. 29.

³ Tr. 56-57, 63-67.

dishonesty, but was allowed to submit a petition to remove the “X” designation, upon completion of a non-credit seminar on academic integrity. He took the course from September 2003 through December 2003 and completed it. Applicant did not disclose this information to the GI even though he was specifically asked if he had any academic difficulties. When asked later during another interview, he told the GI that he could not recall what punishment he received. His explanation for failing to disclose this information was that he did not recall this incident and he had totally blocked out of his mind his college experience. Applicant’s testimony was not believable.⁴

To complete an English paper at college in February 2004, Applicant was required to provide photocopies of the source material for the paper. He tore the source material pages out of library books he had obtained from the university library, and submitted the pages as his source material because he could not find a working copy machine to make copies. When asked by his professor about where he obtained the hard copies of the source materials, he said he obtained them from books purchased online, which was false. He also said that he did not have the books because they were stolen or possibly at his parents’ house. In May 2004, he had a judicial hearing for violating the misuse of property and false information policies of the University’s Code of Conduct. He was found guilty at the hearing. He appealed the ruling in June 2004. His appeal was denied in July 2004, and Applicant was suspended from the university and banned from its campus until the first summer session of 2005. He received the suspension through the Undergraduate Student Judicial System. When asked at his hearing why he did not disclose this information to the GI, he stated he had totally blocked his college experience from his mind and did not recall it. He stated he did not recall saying he had purchased the books. He did not recall saying the books had been stolen. He stated he possibly said they were at his parents’ house. He did not recall that he appealed the judicial committee’s decision. He did not recall if he pled guilty at the judicial hearing. Applicant’s testimony was not believable.⁵

On May 14, 2010, Applicant was contacted by the GI for a follow-up interview. He did not volunteer the information about his past school suspensions and violations, but when specifically asked by the GI, he then acknowledged them. He stated he completely forgot about the incidences. When asked how he could forget about the incidents, he stated that he never brought it up to others because it made him look bad, so he forgot about it. He disputed this statement in his interrogatory stating that this was not an accurate account “of the meaning I was attempting to convey.” He confirmed in his interrogatory that he “simply forgot about these events since they occurred many years ago, and I did not have to recall, recount, discuss or revisit the events since the time of occurrence till now.”⁶ He explained he blocked out the time from 2000 to 2005. Applicant also stated in his interrogatory that “these incidents occurred when I was 19,

⁴ Tr. 54-56, 60-64.

⁵ Tr. 39-53, 68.

⁶ GE 2.

20, and 21 years of age. I feel I am a vastly different person than I was then.” He stated his past actions really have not hindered his life and at the time it was not a big deal.⁷

Applicant explained at his hearing that he “more or less” forgot about all of these incidences. He looked at college as one big block of time and stated “nothing really jogged my memory” when he was asked about his college experiences. He reiterated at his hearing that he forgot about all of the above events and continued to maintain that position. When talking with the GI he did not recall any the issues that arose during college.⁸

Applicant stated he is a changed person from when he was in college. He stated that, back then, he was immature and did not take life seriously. He feels he learned a lesson.⁹

Applicant provided numerous character letters. He is considered honest and truthful and has a reputation for being so. He is considered an asset to his company. He is organized, punctual, and follows the rules when it involves safeguarding classified material. I also considered Applicant’s performance evaluation.¹⁰

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.

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

⁷ Tr. 36-39, 49-50, 57-60, 69-70.

⁸ Tr. 34-39.

⁹ Tr. 27-28.

¹⁰ AE A, B.

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, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel and has the ultimate burden of persuasion as to obtaining a favorable clearance 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. The following disqualifying conditions are potentially applicable:

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other government representative;

(d) 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 properly safeguard protected information. This includes but is not limited to consideration of: . . . (3) a pattern of dishonesty or rule violations; and

(e) 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.

I have considered the above disqualifying conditions and carefully considered all of the evidence presented. I conclude all of them apply. Applicant knowingly, deliberately, and repeatedly lied to the GI when asked if he had any past suspensions, expulsions, academic, or non-academic issues while at school. He continued to lie throughout his hearing. He engaged in a pattern of dishonest conduct and rule violations while attending college, to include cheating and misuse of university property. I find all of the above disqualifying conditions apply.

The guideline notes several conditions that could mitigate security concerns under AG ¶ 17. The following are potentially applicable:

(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's deliberate falsifications to the GI are serious and reflect directly on his reliability, trustworthiness, and judgment. His conduct of cheating on an exam and misuse of university property are not minor and cast doubt on his reliability, trustworthiness, and judgment. AG ¶ 17(a) does not apply. He does not acknowledge his behavior nor has he sought counseling to change his behavior. Instead, he continued his course of conduct during his hearing by providing false statements. Applicant has a long history of dishonest conduct and falsifications. His conduct during

college shows he repeatedly violated the school's honor code. He cheated on an exam; he tore pages out of library books to complete a paper and then lied about it. He was counseled and suspended from college for his actions. He knowingly and deliberately lied to a GI during his background investigation when he denied he had any issues during college. There is no evidence to conclude that his behavior is unlikely to recur. His college transgressions involve rules violations, false statements, and cheating. He continued his dishonest conduct by providing false statements to the GI. He then continued to extend his dishonest conduct by providing false statements at his hearing, which shows he has not taken positive steps to reduce his vulnerability or that he acknowledged his behavior and has taken steps to change it.¹¹ The evidence supports that he has a long pattern of dishonesty and rules violations which he continues to lie about. I find 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.

I considered the potentially disqualifying and mitigating 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 28 years old and has been steadily employed since he graduated from college in 2005. His performance evaluation reflects a valued and successful employee. He lied to a GI during his background interview when he was specifically asked if he had suspensions, expulsions, or other academic or non-academic problems in college. It is unfathomable that Applicant did not recall he was suspended from college for an academic year after receiving a hearing and appealing the findings based on his actions of tearing pages from school library books and then lying about it. It is not believable that he did not

¹¹ I did not consider his false statements at his hearing for disqualifying purposes, but I did consider when analyzing the whole-person and considering Applicant's credibility.

recall being accused of cheating, going before a judicial board, appealing its decision, and then taking a semester-long seminar to have removed from his transcript the “X” from his “F” grade. Unfortunately during his hearing, Applicant continued to provide false statements and repeatedly lied. Although he stated that he is a vastly different person today than he was in college and his past conduct has not hindered him, sadly that is not true. His dishonest behavior continued throughout his hearing. He claims the conduct happened so long ago and he blocked it from his memory, which is not believable. Applicant has a long history of being dishonest and untrustworthy. I am not convinced that he would be honest if he was confronted by any investigator about security issues. Overall, the record evidence leaves me with serious questions and doubts about Applicant’s eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the Personal Conduct security concern.

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 (1)-(3):	Against Applicant
Subparagraph 1.b:	Against Applicant

Conclusion

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