



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



In the matter of:)
)
) ISCR Case No. 10-07613
)
Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esquire, Department Counsel
For Applicant: Christopher Graham, Esquire

October 17, 2011

Decision

O'BRIEN, Rita C., Administrative Judge:

Based on a review of the pleadings, testimony, and exhibits, I conclude that Applicant has mitigated the security concerns related to personal conduct. Accordingly, his request for a security clearance is granted.

Statement of the Case

Applicant requested a security clearance by submitting an Electronic Questionnaire for Investigations Processing (e-QIP), signed on September 25, 2009. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request.

¹ Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

On May 16, 2011, DOHA issued to Applicant a Statement of Reasons (SOR) that specified the basis for its decision: security concerns addressed in the Directive under Guideline E of the Adjudicative Guidelines (AG).² Applicant signed his notarized Answer on June 2, 2011. Applicant admitted the single allegation under Guideline E, Personal Conduct. Department Counsel was prepared to proceed on June 28, 2011, and the case was assigned to me on July 5, 2011. DOHA issued a Notice of Hearing on August 15, 2011, and I convened the hearing as scheduled on September 8, 2011. The Government offered two exhibits, which I admitted as Government Exhibits (GE) 1 and 2. Applicant testified, presented the testimony of two witnesses, and offered six exhibits, which I admitted as Applicant Exhibits (AE) A through F. At Applicant's request, I held the record open to allow him to submit additional documentation. He timely submitted one document, which I admitted as AE G. DOHA received the transcript (Tr.) on September 16, 2011.

Findings of Fact

Applicant's admission in response to the SOR is incorporated as a finding of fact. After a thorough review of the pleadings, Applicant's response to the SOR, and the record evidence, I make the following additional findings of fact.

Applicant is 49 years old and married, with two daughters, 24 and 25 years of age. He is currently pursuing a master's degree, which he expects to complete in 2013. Following completion of his bachelor's degree in 1984, he joined the U.S. Army. Applicant held a secret security clearance since 1984 and a top secret security clearance with sensitive compartmented information (SCI) access since 1989. As a junior officer, Applicant worked in intelligence. He served in Operation Desert Shield/Desert Storm in Iraq, as well as in Haiti, Kosovo, and a second tour in Iraq. As a civilian federal employee, he has worked in Iraq and Afghanistan as part of the war on terror. He received the Bronze Star in the first Iraq war and the Defense Meritorious Service Medal. He was honorably discharged in 2004. (GE 1, 2; AE F; Tr. 29-31)

Applicant transitioned to civil service employment. From 2004 to 2007, he was a division chief at a federal agency. In 2007, he became chief of operations in the same agency. He was recognized for exceptional performance in intelligence in 1997 and 2003, and received the Director's Award of Excellence in 2008. He was terminated in 2009 for violating the Hatch Act. He began working for a defense contractor in December 2009, and currently holds the position of program manager. His 2010-2011 performance evaluation shows that he rated "Exceeds" or "Frequently Exceeds" in all performance categories. (GE 1; AE F; Tr. 27-29, 45)

² Adjudication of this case is controlled by the Adjudicative Guidelines implemented by the Department of Defense on September 1, 2006.

As chief of the office of operations, Applicant held weekly staff meetings with numerous people including his subordinates. The group of approximately 20 people usually had casual discussions about topics such as sporting events and televised talent shows before the meeting started. Applicant had often polled people about who they thought would win contests such as the Super Bowl or American Idol. The national presidential election was approaching. Applicant's agency had television sets in most rooms, broadcasting information about the upcoming election, and discussions often focused on the elections. (GE 2; AE C; Tr. 32-36, 43, 47-51)

In October 2008, before one meeting began, Applicant began a discussion of the upcoming election and candidates. He told the group that he liked candidate A's vice-presidential running mate, that he intended to vote for candidate A, and that he did not like candidate B's performance or running mate. He then asked those who intended to vote for candidate A to raise their hands, and he also raised his hand. He asked those who planned to vote for candidate B to raise their hands, and he did not raise his hand. Applicant then told the employees that the agency allowed several hours administrative leave to vote, and he encouraged them to take advantage of this leave and to vote for whichever candidate they preferred. He testified that he did not tell anyone how to vote. His goal was to ensure everyone was aware of the agency's policy to allow all types of employees—federal, military, and contractor—time to vote, and to encourage them to do so. (GE 2; AE C; Tr. 32-36, 43, 58)

An employee who attended the meeting filed a complaint that Applicant had violated the Hatch Act.³ The Office of Special Counsel (OSC) found that Applicant had violated the Hatch Act. OSC planned to bar Applicant from future employment with federal agencies or federal contractors. On his attorney's advice, Applicant agreed to a settlement that barred him from federal employment, but permitted employment with defense contractors. (AE G; Tr. 36-39)

During his security interview, Applicant stated he made a random comment to no one in particular that he might vote for candidate A. He testified that, in his security interview, he was summarizing what had happened. Applicant disclosed on his security clearance application that he had violated the Hatch Act, and that he had signed a settlement with the OSC. (GE 1, 2)

When Applicant was hired by the federal agency, in approximately September 2004, he received an ethics briefing that included three slides about the Hatch Act. As part of the OSC investigation, Applicant reviewed the training he had during his tenure

³ It appears from a Merit Systems Protection Board decision offered by Applicant (AE G) that one of Applicant's subordinates reported Applicant's violation. However, Applicant testified that he was unsure who reported the violation. The agency had initiated termination proceedings against the subordinate, and he appealed that action, alleging, *inter alia*, that he was being terminated as reprisal for reporting Applicant's Hatch Act violation. I will not consider this exhibit, because I do not consider the identity of the person who initiated the charge to be relevant.

at the federal agency. He confirmed that between 2004 and 2008, he did receive additional ethics training, but no further training about the Hatch Act. (Tr. 44-45, 60-62)

While the matter with OSC was pending, Applicant was prohibited from conversing with some staff members. He testified that, other than those personnel, he “apologized verbally to almost everyone on my staff.” After leaving the agency, Applicant wrote to the agency director to apologize for his actions. He also testified that, since being terminated, he has been careful to “engage in no political discussion whatsoever.” Also, as part of a home business helping customers to write resumes for federal employment, he advises them about the Hatch Act, and cautions them to be conscious of its requirements so they can avoid his mistake. (GE 2; AE E; Tr. 39-41, 54)

Applicant's first witness has held a top secret clearance with SCI access for 35 years. He has known him for approximately six years, including while they were both division directors at the agency from which Applicant was terminated. He describes Applicant as professional and loyal, and recommended him for a security clearance. Applicant's second witness was his subordinate at the federal agency where the incident occurred. He attended the meeting and remembers that Applicant was talking about the election, and stressing the importance of voting. He stated that Applicant had mentioned in a light-hearted way who he thought he would vote for, asked who else intended to vote for that candidate, and then noted that the rest would probably vote the other way. He then again explained the importance of voting, no matter which candidate they chose. He testified that Applicant did not tell anyone at the meeting how they should vote. He noted that Applicant now refuses to talk about any political matters, even with friends. (Tr. 19-25, 63-71)

Applicant submitted two character reference letters. His current supervisor, the company's vice president and division manager, held high positions in the intelligence community for three decades. He describes Applicant as having the highest integrity, and notes that he trusts Applicant because of his good judgment and sound decisions. An Army general who worked with Applicant noted that he trusted Applicant with the most sensitive issues and information. He described Applicant as “one of the finest intelligence officers I have worked with in my 33 years in the U.S. Army.” (AE A, B)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the AG.⁴ Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the Guidelines, commonly referred to as the “whole-person” concept. The presence or absence of a disqualifying or mitigating condition does not determine a conclusion for or against an applicant. However, specific applicable guidelines are followed whenever a case can be measured

⁴ Directive. 6.3.

against them, as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guideline E.

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest⁵ for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case.

Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁶ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring that each applicant possesses the judgment, reliability, and trustworthiness to protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government.⁷

Analysis

Guideline E, Personal Conduct

The security concern under the personal conduct guideline is that

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 ¶ 15)

Applicant violated the Hatch Act when he talked with employees and subordinates at his workplace, during duty hours, about an upcoming national election, and indicated which candidate he intended to choose. Under the settlement reached with OSC, Applicant was terminated from his job, and barred from future federal

⁵ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁶ See *Egan*, 484 U.S. at 528, 531.

⁷ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

employment. Applicant's behavior demonstrated questionable judgment, and AG ¶ 16 applies:

(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...

(2) ...inappropriate behavior in the workplace...

The following mitigating conditions under AG ¶ 17 are relevant:

(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 offense was certainly not minor, as he violated a federal law. However, it was infrequent, as the evidence shows a single occurrence. Weighing his long history of holding a top level security clearance and special access, and the three years that have passed without incident since this event, I conclude that the offense does not cast doubt on his current trustworthiness or reliability. AG ¶ 17(c) applies. Applicant apologized to the staff members at the meeting, and to the director of the federal agency where he worked at the time. He also disclosed the termination on his security clearance application. He is not subject to exploitation in regard to his termination. Applicant acknowledged his violation and is now acutely aware of Hatch Act requirements. He has taken the lesson of this event to heart, and foregoes all public political discussion. His past conduct is unlikely to recur. AG ¶ 17(d) and (e) apply.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all

the relevant circumstances. I have evaluated the facts presented and have applied the appropriate adjudicative factors under the cited guidelines. I have also reviewed the record before me in the context of the following whole-person factors listed in 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under the cited guideline, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant engaged in a political discussion in the workplace, with co-workers and subordinates, which included disclosing his own preference in a national election, and asking for their preferences in that election. His conduct is prohibited by law. As a result, he was terminated from his position, and barred from future federal employment. As Applicant's training regarding the Hatch Act consisted of three slides presented four years before the incident, I do not find that his action showed a disregard for rules, but a lack of sufficient training, and a display of poor judgment. Applicant was candid in admitting his termination in his security clearance application, and apologized to his superior and his subordinates. The serious consequences of his acts have impressed upon him the care he must take in his interactions with subordinates, and he is now committed to avoiding any similar inappropriate political discussions in the future. The event occurred three years ago, and there is no record evidence of similar conduct or poor judgment since. On the contrary, his performance evaluation, witness testimony, and character references indicate outstanding performance.

For all these reasons, I conclude Applicant has mitigated the cited security concern. A fair and commonsense assessment of the available information bearing on Applicant's suitability for a security clearance shows he has satisfied the doubts raised under the guideline for personal conduct.

Formal Findings

Formal findings on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph 1, Guideline E: FOR APPLICANT

Subparagraph 1.a For Applicant

Conclusion

In light of the foregoing, it is clearly consistent with the national interest to allow Applicant access to classified information. Applicant's request for a security clearance is granted.

RITA C. O'BRIEN
Administrative Judge