



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 10-07709
)
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

02/29/2012

Decision

WHITE, David M., Administrative Judge:

Applicant falsely denied, and failed to disclose, the existence of his foreign-citizen wife and daughter on his security clearance application and during his first security interview. Resulting security concerns were not mitigated. Based on a review of the pleadings and exhibits, eligibility for access to classified information is denied.

Applicant submitted a security clearance application (SF 86) on November 8, 2009.¹ On August 8, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline E (Personal Conduct).² 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 promulgated by the President on December 29, 2005, and effective within the Department of Defense after September 1, 2006.

¹Item 5.

²Item 1.

Applicant answered the SOR in writing on August 29, 2011, and requested that his case be decided by an administrative judge on the written record without a hearing.³ Department Counsel submitted the Government's written case on September 19, 2011. A complete copy of the File of Relevant Material (FORM)⁴ was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM.

Applicant signed the document acknowledging receipt of his copy of the FORM on October 3, 2011, and returned it to DOHA. He provided no further response to the FORM within the 30-day period, did not request additional time to respond, and expressed no objection to my consideration of the evidence submitted by Department Counsel. I received the case assignment on December 9, 2011.

Findings of Fact

Applicant is a 48-year-old employee of a defense contractor, where he started working as a mechanic in May 2005. He works in support of U.S. forces in a Middle East country. He is a high school graduate and earned an associate's degree in 1985. He and his first wife divorced in 1998, after nine years of marriage during which his 20-year-old daughter was born. He served in the Army for more than 12 years before receiving an Honorable discharge in May 1998. He held a security clearance during his Army service.⁵

In his response to the SOR, Applicant admitted the truth of the factual allegations in SOR ¶¶ 1.a through 1.c, with amplifying comments explaining those admissions.⁶ Applicant's admissions, including those made in response to DOHA interrogatories,⁷ are incorporated into the following findings of fact.

Applicant is married to a citizen of a Southeast Asian country. They had a child together in September 2008, and were married a year later during a visit to her home country in September 2009. Their child was also born in, and is a citizen of, that Southeast Asian country. Applicant, his wife, and their child reside together in the Middle East country where he works.⁸

³Item 4.

⁴The Government submitted seven Items in support of the SOR allegations.

⁵Item 5.

⁶Item 4.

⁷Items 6 and 7.

⁸Items 6 and 7.

When Applicant completed his SF 86 in November 2009, he claimed in § 17 that his marital status was, "Divorced." He marked both §§ 17A (Current Spouse) and 17C (Cohabitant) as, "Not Applicable," despite the fact that he had recently married and lived with his wife and child. He listed only his then 18-year-old daughter as a child in § 18 (Relatives), not listing his 1-year-old, and listed his first wife's parents as his mother-in-law and father-in-law, not listing his current in-laws. In § 19 he was asked to disclose if he had, "any close and/or continuing contact with foreign nationals within the last 7 years with whom you, your spouse, or your cohabitant are bound by affection, influence, and/or obligation?" He answered, "No."⁹

Applicant was interviewed by an investigator from the Office of Personnel Management (OPM) on May 18, 2010, during a visit to the United States. He admitted traveling to the Southeast Asian country in September 2009 for eight to ten days, but said the visit was to tour the country for rest and relaxation and that he traveled there alone. He told the OPM investigator that he had, "no foreign ties, friendships, loyalty, affection, or obligation to anyone from any foreign country. . . . [and] no continuing or personal contacts or foreign relatives residing outside or inside the United States."¹⁰

On May 23, 2010, a Sunday evening before the morning that he returned to the Middle East country where he works, Applicant contacted the OPM investigator by telephone and volunteered that he had a wife and child who were foreign citizens and lived with him. He said he and his wife were planning to divorce soon because they were not able to get along. He apologized and said the reason he concealed the existence of his wife and child during his prior interview was due to their pending divorce and his not wanting her to cause any problems with his security clearance. Since they were not getting along, he did not know what she would say or do. His wife was planning to return to her home country with the child to live with her mother.¹¹

On July 8 and 9, 2010, the investigator and Applicant again spoke by telephone to discuss his foreign family members. Applicant described his wife's parents, two brothers, and sister, all of whom are citizens of the same Southeast Asian country. Applicant said that he did not list his foreign marriage or other foreign relatives on his SF 86, "due to feeling it was [sic] necessary." He said he was trying to keep the marriage going, but was not sure what the future may bring. He also said that, among his American relatives, only his aunt knew about his foreign marriage because he was not sure what problems his ex-spouse would cause and he wanted to wait until his elder daughter turned 19 to tell her.¹²

⁹Item 5.

¹⁰Items 6 and 7.

¹¹Items 6 and 7.

¹²Items 6 and 7.

On July 11, 2011, Applicant confirmed the accuracy of the OPM investigator's summary of his interview statements. He further added that he and his wife were "getting along and making it work." He said that he told his ex-wife and elder daughter of the existence of his marriage and younger daughter, and everyone was getting along well.¹³

In his written response to the SOR, Applicant amplified his admissions to the truth of the SOR allegations. He, for the first time, claimed that he completed his SF 86 with a group of people in a classroom, and he told the people "instructing" them that he had a foreign wife and child but had not yet been to the embassy to apply for green cards. He said that he was told if he could not claim them on his taxes not to put them down, so he did not. He said that this explanation might sound crazy, and he might have misunderstood, but this was his recollection.¹⁴

Applicant provided no evidence concerning the quality of his professional performance, the level of responsibility his duties entail, or his track record with respect to handling sensitive information and observation of security procedures. He submitted no character references or other evidence tending to establish good judgment, trustworthiness, or reliability. I was unable to evaluate his credibility, demeanor, or character in person since he elected to have his case decided without a hearing.

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 adjudicative guidelines list potentially disqualifying conditions (DCs) and mitigating conditions (MCs), which are to be 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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 the national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based

¹³Item 7.

¹⁴Item 4.

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, “[t]he 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.” Section 7 of Executive Order 10865 provides: “[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

A person applying for access to classified information seeks to enter 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.

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 potentially disqualifying conditions established by the evidence in this case are:

(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.

In November 2009, Applicant falsified his marital status on his SF 86 by claiming that his marital status was divorced, and that he did not have a current spouse, two months after marrying his foreign-national wife. He also falsely omitted the existence of his then one-year-old daughter on that security clearance application. He subsequently admitted that the falsifications were deliberate, and intended to conceal their existence, because he was having marital problems and did not know what his foreign wife would say or do to cause problems with his security clearance. His other answers on the SF 86, affirmatively denying that he had a cohabitant or any close or continuing contact with a foreign national during the last 7 years, confirm that his intention was to deceive the Government about his foreign family members. Even if he believed that his foreign marriage did not technically qualify his wife as a current spouse, their relationship should clearly have been disclosed in response to those questions. DC 16(a) is fully supported by his false denials and omissions concerning his wife and daughter on the SF 86.

Security concerns under DC 16(b) are also established. On May 18, 2010, Applicant lied to the OPM investigator by stating that he had, “no foreign ties, friendships, loyalty, affection, or obligation to anyone from any foreign country. . . . [and] no continuing or personal contacts or foreign relatives residing outside or inside the United States.”

Other than a self-serving statement in his SOR response that his falsifications were just “following directions,” Applicant offered no evidence that would tend to support any mitigating condition under Guideline E. After careful review of the record, I find that none of them apply. His correction of the concealment and falsification was neither prompt nor made in good faith, particularly in view of his recent attempt to justify his actions. His assertion that “instructors” told him not to disclose his foreign family members is not credible, and is contradicted by his earlier explanation that he was concerned his wife would cause problems with his clearance. Moreover, his other answers on the SF 86 denying foreign contacts, and during the interview claiming that he visited his wife’s country for tourism traveling by himself, evidence his intent to deceive on both occasions. These are not minor offenses, and they are recent. His “following directions” excuse precludes findings that he acknowledges the behavior, that recurrence is unlikely, or that his trustworthiness is no longer in doubt.

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 and mitigating conditions in light of all pertinent facts and circumstances. Applicant is an accountable adult, who is responsible for his voluntary choices and deceitful conduct that underlie the security concerns expressed in the SOR. His falsifications go to the heart of the security clearance process, and were made in order to conceal what he knew to be potentially disqualifying information. He offered no evidence of rehabilitation, or responsible conduct in other areas of his life. He finally told his first wife and elder daughter about his foreign family, after concealing it for almost two years, but his susceptibility to falsifying material information to avoid potential pressure, coercion, or duress remains undiminished.

Overall, the record evidence leaves me with substantial doubt as to Applicant's present eligibility and suitability for a security clearance. He did not meet his burden to mitigate the security concerns arising from his personal conduct.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline E:	AGAINST APPLICANT
Subparagraphs 1.a through 1.c:	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 eligibility for a security clearance. Eligibility for access to classified information is denied.

DAVID M. WHITE
Administrative Judge