



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



In the matter of:)
)
) ISCR Case No. 10-11019
)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Esq., Department Counsel
For Applicant: Edward O. Lear, Esq.

December 7, 2011

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant is a 54-year-old employee of a defense contractor. Applicant has not mitigated the Personal Conduct security concerns related to: his use of a fabricated social security number while employed by a government contractor and as a civilian employee of the Air Force; his termination from his Air Force position in 2004; his failure to return government equipment after his termination by the Air Force; and his 2006 criminal charge of Impersonating an Officer. Eligibility for access to classified information is denied.

Statement of the Case

On June 16, 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. The action was taken under Executive Order (EO) 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.

Applicant answered the SOR on July 30, 2011, and requested a hearing before an administrative judge in the instant matter. The case was assigned to me on October 5, 2011. DOHA issued a notice of hearing on October 13, 2011, and the hearing was convened as scheduled on November 1, 2011. The Government offered Exhibits (GEs) 1 through 5. GE 1, GE 2, GE 4, and GE 5 were admitted without objection. GE 3 was admitted over the objection of Applicant's counsel. The Applicant offered Exhibit (AE) A, which was admitted without objection, and testified on his own behalf. The record was left open until November 15, 2011, for the Applicant to submit additional documentation. He presented two documents, marked AE B and AE C. Department Counsel submitted no objection and AE B and AE C were admitted. DOHA received the transcript of the hearing (Tr.) on November 16, 2011.

Procedural Rulings

At the hearing on November 1, 2011, Department Counsel made a motion to amend the SOR, by striking ¶ 1.f., pursuant to Directive ¶ E3.1.17. Applicant had no objections to the amendment and the motion to amend was granted. (Tr. 10-11.)

Applicant's counsel objected to the admission of GE 3 on the grounds that it was hearsay. I overruled that objection because it fell within the exceptions to the hearsay rule under Federal Rule of Evidence (FRE) 803(6) and 803(8). (Tr. 22-23.)

Findings of Fact

Applicant admitted SOR allegations 1.a through 1.c, and 1.e, with qualifications. He denied allegation 1.d. (Answer.) After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is a 54-year-old employee of a defense contractor. He has worked for his current employer since 2007. He also worked for another government contractor from 1988 through 1998 and as a government employee for the Air Force from 1998 through 2004. Applicant was married twice. He has one child from his first marriage. Approximately 30-days before the hearing, his second wife filed for divorce. (Tr. 34, 40-44, 76-78; GE 1; GE 2; GE 5.)

Applicant admits he was born in Belize and entered the United States illegally in the mid-1980's. He obtained a position with a U.S. government contractor in 1988, while still an illegal immigrant. At the time he was hired, he provided his employer with a false social security card. Applicant claims that in 1991 he married his second wife, and he was able to obtain a green card after his marriage.¹ (Tr. 54, 76-78; GE 1; GE 2; GE 5.)

In 1998, the contract held by his employer was terminated but Applicant was offered a position as a government employee with the Air Force. Applicant continued to use a false social security number after he became a government employee through his termination in 2004. He became a U.S. citizen on July 25, 2003. (Tr. 55-57; AE B.)

¹ Records reflect his spouse became a U.S. citizen in July 2000. (GE 1.)

Applicant indicated in his Answer: "My social security number was corrected after 2 years of my employment with the DOD; in or about (approximately) 2000; however, I failed to notify DOD of the correction." (Answer.) However, at hearing, he testified:

I was working for [government contractor], and I know it was poor judgment for me, I had provided a false Social Security Number and I had been working with them. After so many years, I tried to rectify it, which I did, because I decided, you know, that's not an honest thing to do. So, I knew that whatever option I took, it would have serious consequences; but nevertheless, I wanted to reflect as being honest and sincere person. So, I decided to rectify it." (Tr. 40.)

He also testified that he corrected his social security number with the Department of Defense two years after he became employed by the Air Force because, "I thought it was the right thing to do. I wanted to be - - I really wanted to be honest and demonstrate honesty, regardless of the expense of what it would possibly cost me." (Tr. 44.) He indicated that when he corrected his social security number in 2000 he was, "Not under an order or directive. I just thought that it was the most honorable thing to do, particularly, if I would like to remain here in the United States and make my way of living." (Tr. 45.) He added, "I knew it was a tremendous risk, but I thought about it and I says [sic], you know, this is what - - this is the right thing to do, and I didn't want to deviate from that." (Tr. 45.)

Further, in cross examination, he indicated:

Q: Okay. So, then what 2000, is that your testimony now, that is when you finally provided the Department of Air Force with the right number?

A: Yes, sir. I did that provide them [sic] just before I took off to go to the training; but, for some reason I still kept on advising them of the situation which, again, like I said, it was a part of my lack of judgment to do so.

Q: Okay. When you say you were advising the situation, does that mean you weren't giving them your social security number until 2000?

A: Yes sir. That's correct. Under the new social security number. (Tr. 57-58.)

In spite of his adamant testimony that he did the right thing in 2000 by confessing his fraudulent use of a social security number to the U.S. Government, he later admitted that he never made this disclosure:

Q: Can you visually walk me through how you corrected your Social Security Number?

A: I didn't have - - well, once I got my legal document, at that time, then I came from [another state] and that's when I was being terminated. So I never had the opportunity to supply it to the Department of Defense.

Q: Oh, so, you never corrected it?

A: No.

Q: I thought you told us earlier that you had and that was why you were - - you showed the extra step to correct it and then you were remorseful. You didn't correct it?

A: I don't think I did correct it, Your Honor. (Tr. 82-83.)

Applicant worked for the Air Force until he was terminated in 2004. He was terminated because he failed written exams, which he was required to pass for his position. Initially, Applicant only disclosed in his security questionnaires that he was terminated because he could not focus on his training due to his wife's debilitating and chronic illness at the time of the training. Applicant explained at hearing that he failed the exams due to the stress caring for his wife who was being treated for breast cancer. (Tr. 46-48, GE 3; GE 4; GE 5.)

When Applicant was terminated from his position with the Air Force, he failed to return the government equipment with which he had been entrusted. A letter from the Department of the Air Force indicated that Applicant "never returned any of the government-owned and issued equipment that [he] received." Applicant contends that he did return the equipment. He testified that he would never have received his last paycheck if he did not return the equipment. He claims he got his last paycheck and therefore, the requirement to relinquish all government equipment upon his termination was satisfied. (Tr. 46-47; GE1; GE 2; GE 3; GE 4.)

In approximately August 2006, Applicant was charged with Impersonating an Officer. He explained that he was involved in a car accident and when he requested the other driver's information, the driver refused. He quoted the penal code requiring the driver to provide the information and the other driver inquired if he was a cop. Applicant testified that he explained to the other driver that "I'm not an officer, but I kind of know the laws about things like this." Despite Applicant's assertion that "an [city] Judge had ascertain [sic], that there was no merits and validity to the allegations," court records reflect that the prosecutor "was unable to locate the witness" so the case was dismissed. (Tr. 48; GE 1; GE 4; AE C.)

Applicant presented his most recent performance evaluation. It demonstrates that Applicant meets expectations or exceeds expectations in all of the criteria used to assess his work performance. (AE A.)

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 and mitigating conditions, 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, administrative judges apply the guidelines 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.

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 the applicant or proven by Department Counsel." The applicant 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 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 EO 10865 provides that adverse 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

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

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 official government representative; 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, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Applicant admits to the falsification of his social security number from 1988 through 2004. He deliberately provided the false social security number to a government contractor and then to the Air Force with the intent to conceal that he had entered the United States illegally. He continued to deceive the government even after becoming a U.S. citizen. Further, his termination, failure to return government equipment, and criminal charges reflect poorly on Applicant's character. The evidence shows that Applicant has made contradictory statements to the government concerning relevant facts in this case. Applicant has not shown himself to be trustworthy and could be vulnerable to exploitation, manipulation, or duress. The Government has established sufficient concern under AG ¶ 16(b) and 16(e) to disqualify Applicant from possessing a clearance.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(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; and

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

Applicant's disqualifying personal conduct is unmitigated. He falsified his social security number from 1988 through 2004. Contrary to his false testimony at the hearing that in 2000 he corrected his false social security number, he failed to provide his correct social security number until he was hired by another government contractor in 2007. His efforts to correct his social security number were neither prompt nor in good faith. Further, he has not proven himself reliable or worthy of the government's trust. His propensity to make self-serving statements casts doubt on his reliability, trustworthiness and judgment. He has not met his burden to establish his past poor conduct displayed in falsifying his social security number, the circumstances surrounding his termination from government employment, his failure to return government equipment, and his criminal incident no longer reflect poor judgment. He has not shown sufficient steps to reduce or eliminate vulnerability to exploitation. AG ¶¶ 17(a), 17(c), 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 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 the facts and circumstances surrounding this case. I have incorporated my comments under Guideline E in my whole-person analysis.

Applicant has performed successfully at work, receiving good ratings. However, his deliberately dishonest conduct indicates a lack of judgment and trustworthiness, and raises doubts as to whether he understands what is required of those who hold security clearances. He is a mature individual who is accountable for his voluntary choices, and failed to demonstrate either rehabilitation or reduced potential for pressure, coercion, exploitation, or duress.

Overall, the record evidence fails to overcome the doubts raised about Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from the cited adjudicative 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.:	Against Applicant
Subparagraph 1.c.:	Against Applicant
Subparagraph 1.d.:	Against Applicant
Subparagraph 1.e.:	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.

Jennifer I. Goldstein
Administrative Judge