



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



In the matter of:)
)
) ISCR Case No. 11-03901
)
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: *Pro se*

November 10, 2011

Decision

COACHER, Robert E., Administrative Judge:

The evidence fails to establish some disqualifying conduct and Applicant mitigated the remaining security concerns under Guideline E, Personal Conduct. Applicant's eligibility for a security clearance is granted.

Statement of the Case

On May 31, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, Personal Conduct. DOHA acted 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 after September 1, 2006.

Applicant answered the SOR on June 17, 2011, and requested a hearing before an administrative judge. The case was assigned to me on July 20, 2011. DOHA issued a notice of hearing on August 2, 2011, with a hearing date of August 26, 2011. The hearing was held as scheduled. The Government offered Exhibits (GE) 1 through 3, which were admitted into the record without objection. Department Counsel's exhibit index was marked as Hearing Exhibit (HE) III.¹ Applicant testified and offered exhibit (AE) A that was admitted into the record without any objection. The record was left open for Applicant to submit additional evidence. He timely submitted AE B and C. DOHA received the hearing transcript (Tr.) on September 12, 2011.

Procedural Ruling

Department Counsel moved to amend the SOR to change the erroneous case number from 09-01391 to 11-03901. Applicant raised no objection and the motion was granted. Department Counsel also informed me that he was not offering any evidence to support the allegation contained in SOR ¶ 1.b. I indicated that I would rule in favor of Applicant on that allegation.²

Findings of Fact

In Applicant's answer to the SOR, he denied the allegations. After a thorough and careful review of the pleadings, testimony, and exhibits, I make the following findings of fact.

Applicant is 54 years old. He is legally separated and has two adult children. He works for his own company who does business as a defense contractor. From 2000 to 2006, he worked for a defense contractor and held a top secret clearance. He holds a bachelor's degree in business management. He served in the Army from 1980 to 2001 and held a top secret security clearance. He served in combat on two different occasions, during Desert Storm and in Bosnia. He retired as a master sergeant (E-8) and received an honorable discharge.³

The sole allegation that the Government is offering proof on alleges Applicant was terminated for misconduct from his defense contractor position because he filed a false claim for travel expenses and a false trip report on June 12, 2009, for a business trip he took (SOR ¶ 1.a).

¹ Hearing exhibits (HE) I and II were offered by Department Counsel to show that Applicant's case was originally listed under a different case number (09-01391) which was closed for non-sponsorship. Subsequently, Applicant gained new employment from a company who is sponsoring him for this clearance. See Tr. at 15-16.

² Tr. at 15-17.

³ Tr. at 5-6, 36-38, 58; GE 1.

Applicant began working for a defense contractor in January 2009. His duties included working as a project manager overseeing several service contracts for which he reported directly to his first line supervisor (Mr. E). Applicant describes his relationship with Mr. E as difficult because he viewed Mr. E as either non-approachable or non-informative when he was approachable. Because of this, Applicant was left with many questions about his duties that he sought answers from other tenured employees. Applicant's position required him to travel off site to administer the service contracts for which he was responsible. One of the projects he was responsible for required him to travel to another location to attend a conference May 12-14, 2009. He made the proper request for travel and the trip was approved by his supervisory chain of command. He traveled to the conference the day before it started. The next day when he attempted to gain admittance to the conference, he was turned away because his registration was not received and his security clearance could not be verified. He tried to remedy the situation by calling the point of contact for the conference, but was not able to contact anyone. He also tried to register on-line, but was also unsuccessful in this attempt. He went back to his hotel room and worked on other work he brought with him. He did not let Mr. E know what had happened, nor did he contact anyone else at his home location. He tried to gain admittance the next day, but was turned down again for the same reason.⁴

Applicant returned home as scheduled having never attended any of the conference. Once back to his home location, he did not inform Mr. E or anyone else that he had not attended the conference. Applicant prepared and submitted a travel expense report for his trip. In that report, he claimed his airfare, lodging, meals and other expenses for his trip. On the line of the report marked "Business Purpose", he stated the following: "Attend 2009 (redacted name of course) Summit, 12-14 May 2009." He did not note on the report that he did not actually attend the course because of the registration issue. Sometime after he submitted the travel report, questions arose about whether he attended the course. His second level supervisor, an Air Force Colonel, asked him directly if he had attended the course and Applicant responded with a no answer. The Colonel asked no further questions and Applicant did not give any further explanation. He was terminated the next day. The money he was paid for his expenses from the trip was taken out of his final pay so that the company was not out any money from his trip.⁵

When asked why he did not inform anyone about his inability to gain admittance to the conference, Applicant responded that he did not think it would help him. He said he really did not know what to do. Part of the reason for his reluctance to let his supervisor know what was happening was because of the difficult relationship he had with Mr. E. This relationship was referred to by a coworker of Applicant who verified the strained relationship between the two.⁶

⁴ Tr. at 45-52; GE 2-3.

⁵ *Id.*

⁶ Tr. at 53, 55; AE A.

Applicant presented a letter of appreciation and performance reports from his Army career. They reflect professional service, leadership, high integrity, and outstanding performance over the course of his career.⁷

No evidence was offered by the Government in support of SOR allegation ¶ 1.b. Therefore, I find in favor of Applicant on this allegation.

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 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, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and 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 that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible

⁷ AE B-C.

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

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern for 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 in this case. The following disqualifying conditions are potentially applicable:

(d) credible adverse information that is not explicitly covered under any other guideline and may not be 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; 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's filing of a travel expense report without explaining that he was not able to attend the conference and his failure to inform his supervisors at the time calls into question his judgment and created a vulnerability to exploitation. AG ¶ 16(d) and (e) apply to SOR ¶ 1a.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and found the following 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;

Applicant's action in not promptly reporting his non-attendance at the conference that his company paid for and his subsequent filing of an expense report for the conference was an anomaly when compared to his outstanding Army record. His poor decision was affected by the poor working relationship he had with his supervisor. This happened under unique circumstances and is unlikely to recur. Applicant's outstanding Army career supports his reliability, trustworthiness and good judgment. AG ¶ 17(c) applies.

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 considered Applicant's relationship with his supervisor and that this was a one-time event. I also considered that he no longer works for the same company. I considered his outstanding military service, including his two combat tours. Applicant met his burden and provided sufficient evidence to mitigate the security concerns.

Overall the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I

conclude Applicant mitigated the security concerns arising under Guideline E, Personal Conduct.

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:	For APPLICANT
Subparagraphs 1.a-1.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Robert E. Coacher
Administrative Judge