



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



In the matter of:)
)
) ISCR Case No. 11-04699
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esquire, Department Counsel
For Applicant: *Pro se*

06/26/2012

Decision

RIVERA, Juan J., Administrative Judge:

During a 1998 security clearance interview, Applicant admitted to security violations and sexual criminal conduct. In 2010, and at his hearing, he made false statements denying his 1998 admissions. His personal conduct continues to cast serious doubt on his judgment, his ability to safeguard classified information, and on his ability to comply with the law and regulations. Clearance is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on February 6, 2009. On January 19, 2012, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) listing security concerns under Guideline E (Personal Conduct).¹ Applicant answered the SOR on March 23, 2012, and requested a

¹ DOHA acted under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (AG), implemented by the DOD on September 1, 2006.

decision based on the record. On April 2, 2012, the Government requested a hearing before an administrative judge. (Appellate Exhibit 1, Tr. 11) The case was assigned to me on April 19, 2012.

DOHA issued a notice of hearing on April 30, 2012, convening a hearing for May 17, 2012. At the hearing, the Government offered exhibits (GE) 1 through 5, which were admitted without objection. Applicant testified and submitted no exhibits. DOHA received the hearing transcript (Tr.) on May 25, 2012.

Findings of Fact

In his response to the SOR, Applicant denied the allegations in ¶¶ 1.a through 1.c, and 1.f through 1.k. He admitted the factual allegations in ¶¶ 1.d and 1.e. After a thorough review of all the evidence, and having observed Applicant's demeanor and considered his testimony, I make the following findings of fact.

Applicant is a 48-year-old project management consultant working for a Government contractor. He was awarded a bachelor's degree in mechanical engineering in 1986, and a master's degree in technology management in 1995. Applicant married his wife in September 1990, and they separated in January 2009. He has three sons, ages 19, 17, and 15.

Applicant started working for Government contractors in 1987, and shortly thereafter he was granted a secret security clearance, which later was upgraded to a top secret clearance. In 1997, he applied for a top secret clearance with access to sensitive compartmented information to work for another Government agency (Agency). During the background investigation, Applicant participated in three polygraph-assisted interviews with the Agency and one with the Federal Bureau of Investigation (FBI). For his second interview with the Agency, Applicant brought to the interview a list of 15 topics he intended to discuss with the interviewer. (GE 2)

As a result of the interviews, Applicant disclosed that:

1. Between 1993 and 1995, Applicant worked for a Government contractor providing services for a joint operation of U.S. and foreign military forces. During this period, he was solicited by three foreign military officers, who identified themselves as members of the foreign country's military intelligence, to work for their organization. He was asked to obtain unclassified and classified documents on operational requirements. Applicant admitted to giving copies of numerous unclassified briefings to two foreign military officers. He never reported these solicitations from foreign military personnel until the Agency's interviews in 1998.

2. He opened a safe containing classified information and allowed a foreign military officer to read a classified document. He never reported this incident until the Agency interviews in 1998.

3. In 1993, a foreign contractor asked Applicant to bring a set of viewgraphs to the United States. The viewgraphs were classified and marked accordingly. Applicant cut off the classification, and cut the axis of the viewgraphs in two. He carried one axis, and another person carried the other axis from the foreign country into the United States. This was done to "declassify" the document and protect the information. Upon his return to the United States, Applicant put the viewgraph together and remarked the document with its classification.

4. Between 1994 and 1995, at the insistence of his supervisor, Applicant signed fraudulent time sheets for two company employees, which resulted in the company paying over 3,500 hour in excess salary.

5. Applicant admitted to physically abusing his children by hitting, choking, and intentionally hurting them. He inserted his finger into his then five and three-year-old sons' rectums while cleaning their bottoms. In 1995, he masturbated his then five-year-old son while he was masturbating himself. (GE 2)

After the polygraph-assisted interviews, Applicant filed an adverse information report on himself. He testified that he reported that, at the request of the project manager (a U.S. military officer), he opened the safe for a foreign military officer and showed him a classified document. This security violation is summarized in paragraph 2, above. (Tr. 23, 33-34)

At his hearing, Applicant admitted that he made all the above statements during his 1998 polygraph-assisted interviews. He denied, however, that they were true. He could not explain why he made the statements if they were not true, but he repeatedly denied that the statements were true. In 1998, Applicant's employment was terminated because of his security violations, and his security clearance was revoked.

On April 30, 2010, Applicant provided a sworn statement to a Government investigator explaining why he was terminated from his employment with a Government contractor and had his clearance revoked in 1998. His April 2010 statement contradicted some of the information he provided to the Agency during the 1998 polygraph-assisted interviews. In the April 2010 statement, Applicant claimed that the contract project manager (a U.S. Marine lieutenant colonel) could not find his copy of the classified document and asked Applicant to open the safe and show the foreign military officer the classified document. Applicant believes that the foreign military officer had a confidential security clearance.

Concerning the viewgraph, Applicant again admitted that he cut off the classification of the viewgraph, cut the axis in half, and that he brought half of the viewgraph to the United States and a U.S. Navy chief engineer brought the other half. He stated that the chief engineer asked him to cut the viewgraph in half to conceal the nature of the viewgraph.

At his hearing, Applicant acknowledged that he knew that the chief engineer had no authority to change the classification of the document, to cut the document in half, or to carry the document to the United States as they did. Nevertheless, Applicant complied because he trusted the chief engineer, and he said it was okay. (Tr. 48)

Regarding his interaction with the foreign military intelligence officers, in his April 2010 statement, Applicant stated: (GE 3)

I have never had contact with anyone representing a non-U.S. intelligence or security service. . . I have never been approached by anyone asking me to work for a foreign entity . . . No one has ever asked me to provide information, regardless of whether or not officially classified, to a foreign entity . . . I have never been asked to work for a foreign intelligence or security service . . . I have never agreed to work for a foreign intelligence or security service.

Applicant also stated in his April 2010 statement that during Thanksgiving 2008, he had threatened his son because he was misbehaving. Applicant explained that he had a table knife in his hand and pointed the knife at his son. He denied threatening to hurt his son with the knife. His wife asked Applicant to leave the house because she believes that Applicant threatened his son with the knife. They separated after this incident. (GE 3) I find the evidence is insufficient to establish that Applicant threatened his son with a knife.

In his April 2010 statement, Applicant admitted to physically hitting his sons, but he denied that he ever sexually abused his sons. He claimed that his 1998 sexual abuse statements to the Agency were false. He noted that he was investigated by the police and child protective services, and no charges were brought against him. Applicant's hearing testimony was consistent with his April 2010 statement.

Policies

Eligibility for access to classified information may be granted "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person's suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available,

reliable information about the person, past and present, favorable and unfavorable must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their 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. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Guideline E, Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

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.

In 1998, Applicant admitted that between 1993 and 1995, he committed a number of security violations involving foreign military officers, and that he engaged in sexual criminal conduct with two of his sons. On April 30, 2010, Applicant made a sworn statement to a Government investigator in which he denied the admissions he made during the 1998 interviews. His hearing testimony was consistent with his April 2010 sworn statement.

Applicant claimed that his 1998 admissions were false. He could not explain why he made such serious, incriminating statements against himself. Considering that he brought his own notes with topics of discussion to his second Agency interview, and that after the interviews he filed an adverse security information report against himself, his

claims are not credible. Analyzing the evidence as a whole, including Applicant's demeanor while testifying, I find that he engaged in all the behavior he disclosed during his 1998 interviews. I further find that he falsified material facts in his 2010 affidavit.

Applicant's behavior triggers the applicability of the following disqualifying conditions under AG ¶ 16:

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

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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.

AG ¶ 17 provides seven personal conduct conditions that could potentially mitigate Applicant's security concerns:

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

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

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

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

None of the Guideline E mitigating conditions apply. I considered as mitigating factors that in 1998, Applicant disclosed his questionable behavior to the Agency investigators, and that after the interviews he filed an adverse information report against himself. However, in April 2010 and at his hearing, he made false statements denying all the behavior he disclosed in 1998. Applicant's false statements are recent. Moreover, his false statements constitute a felony, in violation of 18 U.S.C. Section 1001.

The behavior Applicant admitted in 1998 raises serious questions about his judgment, his ability to protect classified information, and his ability to comply with the law, security rules, and regulations. Those security concerns are exacerbated by his current falsifications. He has not acknowledged his questionable behavior and he has not taken positive steps to reduce or eliminate his vulnerability to exploitation and duress. In sum, Applicant failed to mitigate the personal conduct security concerns.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case and under the whole-person concept. (AG ¶ 2(c)) In light of Applicant's age, education, work experience, and his years holding a security clearance, Applicant's personal conduct continues to raise serious doubt about his judgment, his ability to protect classified information, and his ability to comply with the law and regulations.

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
Subparagraphs 1.a-1.g, and 1.i-1.k:	Against Applicant
Subparagraph 1.h:	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Eligibility for a security clearance is denied.

JUAN J. RIVERA
Administrative Judge