



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



In the matter of:)	
)	
)	ISCR Case No. 11-06428
)	
Applicant for Security Clearance)	

Appearances

For Government: Tovah Minster, Esquire, Department Counsel
For Applicant: *Pro se*

04/26/2012

Decision

MASON, Paul J., Administrative Judge:

Applicant exhibited poor judgment in July 2008 when he tried unsuccessfully to distort the results of a polygraph examination. Given Applicant’s age of 22 at the time he took the polygraph, the passage of three and one-half years since the incident, and his favorable credibility and impressive case in mitigation, I find for Applicant under the personal conduct guideline. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on February 2, 2011. (GE 1) In an undated Statement of Reasons (SOR), the Defense Office of Hearings and Appeals (DOHA) detailed security concerns under personal conduct (Guideline E). The action was taken pursuant to 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) implemented by the Department of Defense on September 1, 2006.

Applicant submitted his notarized answer to the SOR on November 30, 2011. DOHA issued a notice of hearing on January 23, 2012, for a hearing on February 21, 2012. The hearing was held as scheduled. At the hearing, three Government exhibits (GE 1 through 3) were admitted into evidence without objection. Applicant called two witnesses. He also testified and offered four exhibits (AE A through AE D) that were admitted into evidence without objection. The record closed on February 29, 2012.

In his closing statement, Applicant cited a decision of another DOHA administrative judge should be followed because of the similarity in issues. Hearing-level decisions are not binding on other administrative judges because the Directive requires that each DOHA case must be decided on its own merits. (¶ E2.2.2(b))

Findings of Fact

The SOR contains one allegation under the personal conduct guideline. Applicant admitted the allegation. He explained that during a portion of the July 3, 2008, polygraph examination, he chuckled to calm his nerves. This chuckling, otherwise known as a type of a countermeasure, distorted the examination results. Even though he contended he chuckled to reduce stress, the primary cause of his stress was his fear of being asked about his sexual orientation. After recognizing his chuckling was not appropriate, he concluded his answer to the SOR by stating that, "Now that over three years have passed, I have a grasp on my sexuality and understand that I am a gay man." (Answer to SOR)

Applicant is 26 years old and single. He received his bachelor's degree in May 2008 with a 3.9 cumulative average. (Tr. 48-50) He began working for his current employer in May 2007 on a part-time basis during his senior year in college. He was investigated for a secret clearance in December 2007. (GE 1 at 31) Applicant's employer hired him as a full-time systems analyst II in June 2008.

In the Spring of 2008 before Applicant began working full-time, he was recruited by another government agency requiring top secret/sensitive compartmented information (TS/SCI) access. (GE 2 at 39; Tr. 52) Part of the application process included taking polygraph examinations in May and July 2008. After learning from friends about the stressful impact that the polygraph examination had on them, and struggling with his own sexual identity, Applicant became curious and wanted to gather more information about the test, particularly whether he could be asked about his sexual orientation. (GE 2 at 39; Tr. 52-53, 80) Before the May 2008 polygraph, he conducted a search on the internet to find out more about the characteristics of the examination. From his search, he learned about

the components of the polygraph. While looking for questions that were asked during the examination, Applicant found a web site that explained ways to distort polygraph results. (Tr. 57-61) Applicant saw advertisements for methods (countermeasures) to alter the polygraphs, but did not open any of the programs to obtain specific information about countermeasures. (Tr. 62-63, 65) Applicant learned through general knowledge such as watching television that placing a tack inside one's shoe before taking a polygraph was a countermeasure designed to alter the results. (Tr. 67-68)

While taking the second polygraph examination on July 3, 2008, Applicant was surprised when the polygrapher told him that she intended to change the format of the questions. Applicant and examiner then collaborated on creating certain "lie questions," questions requiring Applicant to furnish false rather than truthful answers. (GE 2 at 14)¹ Applicant considered the "lie questions" confusing and his false answers not clear enough, "so I tried to exaggerate the answers by chuckling." (*Id.*) The examiner stopped the test and asked Applicant why he was chuckling. He admitted he was chuckling to skew the results. (Tr. 77) Though page 9 of GE 2 indicates that Applicant told the examiner that he wanted to alter the responses to the "lie questions" so the relevant questions would not look as significant, Applicant did not recall making the statement about "relevant questions," and believed the examiner misunderstood him. (Tr. 77-79)

On August 1, 2008, Applicant was advised by letter from the other government agency that his TS/SCI application was denied. (GE 2 at 5) The reason for the denial was his chuckling on the "lie questions" so the relevant questions would not look as significant. Applicant appealed the denial and included seven character statements from friends or neighbors. (*Id.* at 11, 12) In his appeal, Applicant blamed his chuckling on the confusing nature of the "lie questions," rather than an intentional effort to skew the examination results. (*Id.* at 13-14)

In his February 2011 e-QIP, at Section 25, Investigations and Clearance Record, Applicant acknowledged he made a mistake that resulted in the denial of application for TS/SCI with the other government agency. He stated:

After failing to pass the polygraph, I learned that I had problems with self-confidence. My nerves got the best of me during the questioning, and I made a mistake I wish I could take back. Likewise, I lacked the confidence to defend myself (for example, justifying prior research of the polygraph questions), resulting in the polygrapher recording a final statement that wasn't representative of my true intentions and integrity. After nearly three years have gone by, I've tried learning from my mistake while moving forward

¹ The handwritten page numbers are located in the lower right corner of the page.

and improving myself, hoping that this hasn't served as a permanent stain on my records that could blacklist me from being cleared. (GE 1 at 32)

Applicant explained in his answer to the SOR that he was struggling with his sexual identity during the July 2008 polygraph. Though he was apprehensive about the examination, he was equally concerned about whether he would be questioned about his sexuality. In the three and one-half year period since 2008, Applicant has been engaged in a "coming out process" enhanced by the development of a network of friends that have made him more confident with his sexual orientation. (Tr. 57-59)

Character Evidence

Applicant's father considers Applicant's good attendance record at his previous employers and his perfect church attendance as positive examples of his reliability. (Tr. 20) In his father's opinion, over the last three years, Applicant's trustworthiness and honesty have never wavered. In that period, Applicant has gained clarity regarding his sexual identity. (Tr. 26-28)

As Applicant's supervisor since December 2008, Mr. B explained that Applicant's expertise as an "analyst II" is in window systems administration and computer virtualization. (Tr. 36-37) Mr. B has participated in three performance evaluations of Applicant. On a rating scale of 1 to 5, Applicant's performance has consistently been ranked at level 4, which Mr. B considered outstanding. (Tr. 35-36; AE B) According to Mr. B, Applicant was nervous and unsure of himself when he began working full-time in June 2008. He did not have the confidence then that he has now to make presentations to his team on a continual basis. (Tr. 39-40) Mr. B commended Applicant's honesty in never trying to conceal information by always keeping his supervisor informed. Mr. B recommends Applicant for a position of trust. (Tr. 38)

Attached to his October 2008 appeal of the other government agency's denial of his TS/SCI application are seven character statements from Applicant's neighbors and friends. The references praise Applicant's reputation for honesty and reliability. (GE 2 at 17-25)

Applicant provided four additional character statements from coworkers, friends and family members. One reference, a coworker and friend, lauds Applicant's trustworthiness and courage in disclosing his sexual identity. The other references have found Applicant to be trustworthy and reliable. (AE A) Applicant received a certificate of recognition in 2009 and three awards for completing certification requirements in December 2010, January 2011, and November 2011. (AE C) Applicant received nine hours of security training in 2009, six and one-half hours in 2010, and five hours in 2011.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. Each guideline lists potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant's eligibility for access to classified information.

The administrative judge's ultimate goal is to reach a fair and impartial decision that is based on common sense. The decision should also include a careful, thorough evaluation of a number of variables known as the whole-person concept that brings together all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. 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 the potential, rather than actual, risk of compromise of classified information.

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 applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

Analysis

Personal Conduct

The security concern for personal conduct is set forth in AG ¶ 15:

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 contains two disqualifying conditions that may be applicable:

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.

AG ¶ 16(c) credible adverse information in several adjudicative 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 he may not properly safeguard classified information.

On July 3, 2008, Applicant was taking a second polygraph examination to determine his qualifications for TS/SCI access with another government agency. He was nervous and concerned whether he would be asked about his sexual orientation. Though he was surprised when the examination changed to a “lie question” format, he acknowledged the polygrapher alerted him to the change in format. However, his nervousness increased because he was concerned he would be asked about his sexuality during this portion of the examination. Applicant chuckled while answering the “lie questions.” After the polygrapher stopped the polygraph and asked him why he was chuckling, he stated he was attempting to skew the results of the examination. In his appeal of the denial of his TS/SCI access, he reiterated his objective to distort the polygraph results, but blamed his actions on confusion. In his answer to the SOR, he acknowledged his misconduct was a sign of untrustworthiness. AG ¶ 16(b) applies.

Applicant’s deliberate “chuckling” to distort the examination results also supports a whole-person assessment of questionable judgment, untrustworthiness, and unreliability indicating that he may not properly safeguard classified information. AG ¶ 16(c) applies. Applicant’s inability to remember that he skewed responses to the “lie questions” to make the relevant questions look less significant does not reduce his poor judgment in trying to alter the outcome of polygraph examination.

There are two mitigating conditions under AG ¶ 17 that are potentially applicable to the circumstances in this case. Those conditions are:

AG ¶ 17(c) the offense was 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

AG ¶ 17(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate stressors, circumstances, or factors that caused untrustworthy, unreliable or other inappropriate behavior, and such behavior is unlikely to recur.

To Applicant's credit, he now comprehends the inappropriateness of his conduct which occurred over three and one-half years ago. In that period, Applicant has consistently produced an outstanding job performance, changing from a nervous employee unsure of himself to a confident performer delivering presentations to his team on a continual basis. Considering the evidence as a whole, including Applicant's favorable credibility, I conclude that AG ¶¶ 17(c) and 17(d) apply.

Whole-Person Concept

I have also weighed the circumstances within the context of nine variables known as the whole-person concept. In evaluating the relevance of an individual's conduct, the administrative judge should consider the following factors under 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 the participation was 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 a security clearance must be an overall commonsense judgment based upon consideration of the guidelines and the whole-person concept.

The character endorsements from Applicant's neighbors and friends describe a person who was always reliable and honest during his teenage years. Applicant's deliberate misconduct during the polygraph examination in July 2008 was an unsuccessful attempt to generate misleading examination results. He was 22 years old when he took the polygraph. Concurrently, he was struggling with his sexual identity and grew increasingly

nervous about the polygraph because he believed he would be questioned about sexual issues. As noted in the documented material from the other government agency, Applicant admitted to the polygrapher what his chuckling was designed to do.

Over the next three and one-half years, there is persuasive evidence of positive changes in Applicant's behavior. In addition to his consistently high quality job performance in the last three and one-half years, Mr. B has observed profound changes in Applicant's confidence. The potential for coercion that existed in 2008 has been eliminated by Applicant's realization and disclosure of his sexual identity. Judging by the totality of the evidence, given Applicant's compelling character evidence and the critical insight he has internalized about himself since 2008, I am completely confident that Applicant recognizes he must be candid during all phases of a security clearance investigation. The personal conduct guideline is resolved in his favor.

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
Subparagraph 1.a:	For Applicant

Conclusion

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

Paul J. Mason
Administrative Judge