



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
XXXXXXXX, Xxxx-Xxxx Xxxxxx) ISCR Case No. 11-07729
)
Applicant for Security Clearance)

Appearances

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

07/13/2012

Decision

METZ, John Grattan, Jr., Administrative Judge:

Based on the record in this case,¹ I grant Applicant’s clearance.

On 14 March 2012 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 Applicant timely answered, requesting a hearing. DOHA assigned the case to me 18 May 2012, and I convened a hearing 28 June 2012. DOHA received the transcript 9 July 2012.

¹Consisting of the transcript (Tr.), Government’s exhibits (GE) 1-4, and Applicant’s exhibits (AE) A-B.

²DOHA 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* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on 1 September 2006.

Findings of Fact

Applicant admitted falsifying his October 2009 clearance application (SOR 1.a). He is a 27-year-old software developer employed by a defense contractor since November 2010. He seeks reinstatement of the clearance he was issued in early 2010.

Applicant deliberately falsified his clearance application in October 2009 (GE 4) when he failed to disclose his marijuana use in 2008 and his nitrous oxide (N₂O) use six times between 2001 and 2009. An acquaintance told him that he would not get his clearance if his drug use was any more recent than the last two years. Applicant feared he would not be granted his clearance, and he made the decision to falsify his application. He repeated his falsifications during a December 2009 subject interview. He later obtained his initial clearance.

Applicant's job required him to have special compartmented information (SCI) access, and in February 2010, he completed the necessary additional application. The record does not contain that application, but Applicant believes he repeated his denials of any drug use on that application, as well as during a security interview in March 2010. Applicant disclosed his N₂O use during a polygraph in May 2010. He disclosed his marijuana use, as well as more specifics about his N₂O use, during a July 2010 polygraph. The sponsoring agency denied his request for SCI access in September 2010, and informed him of the reasons in October 2010 (GE 2). Applicant did not appeal that decision. Because Applicant's company did not have any positions he could fill without a clearance, the company terminated him in November 2010.

Applicant obtained his current job in November 2010, and his company sponsored him for a clearance in December 2010. On his December 2010 clearance application (GE 1), Applicant fully disclosed his past drug use, as well as the adverse clearance action taken by the other agency and the adverse circumstances of his departure from the other company. He discussed these issues in his February 2011 sworn statement (GE 3) and in his November 2011 response to DOHA interrogatories (GE 2).

Applicant's work references from his current job and the job he was released from consider him honest and trustworthy, and recommend him for his clearance (AE A). However, none of them appear aware of the issues raised in the SOR. Applicant received a promotion and a merit salary increase after his first year with the company, and received two spot performance bonuses in March 2012 (AE B).

Policies

The adjudicative guidelines (AG) list factors to be used to evaluate an applicant's suitability for access to classified information. Administrative judges must assess both disqualifying and mitigating conditions under each issue fairly raised by the facts and situation presented. Each decision must also reflect a fair, impartial, and commonsense consideration of the factors listed in AG ¶ 2(a). The presence or absence of a

disqualifying or mitigating condition is not, by itself, conclusive. However, specific guidelines should be followed where a case can be measured against them, as they represent policy guidance governing the grant or denial of a clearance. Considering the SOR allegations and the evidence as a whole, the relevant adjudicative guideline is Guideline E (Personal Conduct).

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 Applicant to refute, extenuate, or mitigate the Government's case. As no one has a right to a clearance, the applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the requisite judgement, reliability, and trustworthiness of those who must protect national interests 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.³

Analysis

The Government established a case for disqualification under Guideline E, by demonstrating that Applicant deliberately falsified his drug involvement on his October 2009 clearance application, because he feared he would not get his clearance. He repeated that falsification during a December 2009 subject interview, on his February 2010 application for SCI access, and during a security interview for his SCI access.⁴ He did not disclose his drug use until he was subjected to polygraph examinations.⁵ Applicant accepts full responsibility for his misconduct regarding this clearance process.

Most of the Guideline E mitigating conditions do not apply. The concealed information was relevant to a clearance decision. Applicant did not disclose this adverse information until he was faced with polygraph examinations. Thus, his disclosure was not a prompt, good-faith disclosure. The person who gave him the bad advice about his application was not an authorized person within the meaning of the Directive. And the

³See, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁴¶ 16(a) deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, . . . [or] determine security clearance eligibility or trustworthiness. . . ; (b) deliberately providing false or misleading information regarding relevant facts to an . . . investigator . . . ;

⁵The falsifications and omissions that were not alleged in the SOR may not be considered on the merits of the Guideline E allegations, but may be considered as relevant to the Applicant's credibility, his whole person analysis, and to establish absence of mistake on the falsifications that were alleged.

falsification cannot be considered minor or distant.⁶ The Government has an interest in examining all relevant and material adverse information about an applicant before making a clearance decision. The Government relies on applicants to truthfully disclose that adverse information in a timely fashion, not when they perceive disclosure to be prudent or convenient. Further, an applicant's willingness to report adverse information about himself provides some indication of his willingness to report inadvertent security violations or other security concerns in the future, something the Government relies on to perform damage assessments and limit the compromise of classified information. Applicant's conduct suggests he is willing to put his personal needs ahead of legitimate Government interests.

However, Applicant's subsequent behavior suggests that he is unlikely to repeat the conduct. Applicant's falsifications cost him his clearances and his job. Nevertheless, when he was hired by another company and sponsored for another clearance, he completed his clearance truthfully, and provided full and frank discussions of his adverse information in February and November 2011.⁷ He provided those truthful answers when the drug use and other adverse information was still relevant and material to his clearance decision. Department Counsel acknowledges as much, but argues that more time should pass before the falsifications can be considered mitigated. Clearance decisions are not designed to be punitive, so the question remains what legitimate security concern would be served by Applicant waiting another year plus to obtain his clearance. Considering Applicant's first clearance process as a single entity, it has been more than two years since Applicant attempted to falsify any relevant information. Meanwhile, he has been completely forthcoming his second time through the clearance process. He can be expected to be completely forthcoming in the future. If the misconduct is unlikely to recur, there is nothing to be gained by requiring Applicant to go without his clearance for the year required by the Directive for re-applications. His whole-person evidence also suggests that he has the judgment, reliability, and trustworthiness to safely handle classified information. Accordingly, I resolve Guideline E for Applicant.

Formal Findings

Paragraph 1. Guideline E: FOR APPLICANT

Subparagraph a: For Applicant

⁶¶ 17(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. . . . (c) The offense is so minor, or so much time has passed . . . ;

⁷¶ 17(d) the individual has acknowledged the behavior and . . . 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;

Conclusion

Under the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance granted.

JOHN GRATTAN METZ, JR
Administrative Judge