



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



In the matter of:)	
)	
)	ISCR Case No. 11-10667
)	
Applicant for Security Clearance)	

Appearances

For Government: Robert Kilmartin, Esq., Department Counsel
For Applicant: *Pro se*

12/19/2013

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline E, personal conduct. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On July 23, 2013, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, personal conduct. The action was taken 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 DOD on September 1, 2006.

Applicant answered the SOR on August 16, 2013, and requested a hearing before an administrative judge. The case was assigned to me on September 20, 2013. Scheduling the hearing was delayed due to the shutdown of the Federal Government. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on

October 30, 2013. I convened the hearing as scheduled on December 4, 2013. The Government offered exhibits (GE) 1 through 3, and they were admitted into evidence without objection. Applicant testified, and he offered exhibits (AE) A and B, that were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on December 12, 2013.

Findings of Fact

Applicant denied SOR ¶¶ 1.c and 1.d. He admitted the remaining allegations. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 49 years old. He graduated from high school in 1982. He served and retired from the Navy in 2003 in the pay grade E-6. Applicant has been married since 2000 and has a son from the marriage. He was previously married twice to the same woman and has an adult son from the marriage. Applicant held a security clearance while in the Navy and in subsequent employments. He has worked for his present employer, a federal contractor, since 2010.¹

Applicant stated that the security clearance application (SCA) was confusing to complete.²

In about January 2009, Applicant received a written warning from his employer, which stated his conduct and level of cooperation with coworkers were in direct conflict with the professional behavior expected of its employees. He was advised his actions included verbal confrontations with coworkers, perceived lack of team effort, disregard for the safety of those around him, and aggressive and volatile behavior displayed in the workplace, including throwing tools and yelling.³

In about March 2009, Applicant received a written warning from his employer for inappropriate and potentially offensive verbal comments, including sexual innuendo, made to coworkers at his place of employment.⁴

During Applicant's July 5, 2011, interview with an authorized government investigator, when asked if in the past seven years he had any disciplinary actions taken against him, had any violations of policies, was involved in any misconduct in the workplace, if any allegations of misconduct were made against him, if he was verbally reprimanded, or was reprimanded in writing, Applicant answered "no."⁵

¹ Tr. 68-72.

² Tr. 23.

³ Tr. 29-30.

⁴ Tr. 30-31.

⁵ GE 2.

Applicant was confronted during the interview, by the government investigator, about the March 2009 written warning he received from his employer. He then admitted having difficulties at his place of employment during that time, but he did not feel he was involved in any sexual harassment. He acknowledged that after the employer's investigation was conducted he was told by the employer's investigator that he was guilty of sexual harassment. He stated he was given a letter which he signed indicating he would be terminated from employment in two weeks due to a loss of contract. He told the government investigator that the termination letter did not mention the sexual harassment offenses. At his hearing, Applicant continued to dispute that he committed sexual harassment. He believes now he was terminated under unfavorable conditions, but he was not informed of it at the time.⁶

During the same July 5, 2011, interview with the government investigator, Applicant was again asked if he had been disciplined, reprimanded, or counseled for his actions while working for his employer in 2009. He stated "no." Applicant was then asked by the government investigator if he was involved in throwing tools. Applicant then recalled he was reprimanded in writing, which he signed, for throwing tools. Applicant stated he did not recall the incident until the investigator brought it up.⁷

Applicant was further questioned by the government investigator as to why he failed to disclose the abovementioned warning letters. He indicated that he was not sure the background investigator would check into these matters. He also indicated he was not trying to hide anything. He stated at his hearing: "I still honestly did not know that the government was looking for that information from me, ma'am." When questioned why he answered "no" to the specific inquiries made by the investigator about whether he had any disciplinary actions, he again indicated he was not trying to hide anything. He then admitted he willfully concealed the information because he was embarrassed. On November 5, 2012, Applicant signed the summary of the government investigator's interview with him and wrote, "I agree that all the information above is complete and accurate."⁸

At his hearing, Applicant indicated that he is confident he was terminated by the above subject employer, but does not agree he was guilty of sexual harassment. He stated he did not know why he was removed from the contract. He believed if he could have found another contract he could have remained with the employer. He stated he was never told his termination was adverse. He stated he was the person who initially reported sexual harassment in the workplace against another employee. He stated it was not until he was interviewed by the government investigator that he learned he was terminated.⁹

⁶ Tr. 26-31, 48; GE 2.

⁷ GE 2.

⁸ GE 2.

⁹ Tr. 50-62.

At his hearing, Applicant confirmed he received a written warning from his employer because he threw a tool. Applicant stated that he did not intentionally fail to disclose the warning letters he received. He stated he was not sure what information the security clearance application (SCA) was requesting. He also stated that he knew he had written warnings, and he did not disclose them because he did not believe he was guilty. He admitted he intentionally did not disclose the information. He stated when he was confronted by the government investigator he was more concerned about issues with coworkers and their handling of classified material, so he did not answer correctly. He felt his coworkers were retaliating against him because he reported problems with the handling of classified material. He stated he cannot explain his actions, and they do not reflect who he is.¹⁰

Section 22 of the SCA completed by Applicant on February 7, 2011, asked if he had ever been charged with any offenses related to alcohol or drugs. Applicant answered “no.” Applicant was arrested in 1991 or 1992 for driving while under the influence of alcohol. During Applicant’s background investigation interview on July 5, 2011, he failed to disclose this arrest until after he was confronted by the government investigator with the information. Applicant indicated that he did not list the offense because it was discussed in his prior background investigations. At his hearing, he stated he forgot to disclose the information on his SCA. He stated he had previously included it on other SCA he completed, and he had no intention of concealing the information.¹¹

Applicant was diagnosed with an alcohol problem in 1995. He completed a 12-step program. He was advised to abstain from alcohol consumption. He continues to drink in moderation and has not had any further reported incidences. He believed the diagnosis was skewed by his command at the time. In a sworn statement made to the Naval Criminal Investigative Service on January 18, 2005, Applicant stated with regards to his past alcohol problems that, “I was a black out drunk for the entire period of the first marriage.” He went on to state, “After the treatment for alcoholism, I feel that I have learned how to lead a healthy and responsible life.”¹²

While serving in the Navy, Applicant went to nonjudicial punishment three times and was demoted. He has attended anger management classes.¹³

Applicant provided character letters. He is described as extremely knowledgeable and helpful in his area of expertise; completes the job with confidence; does not shy away from obstacles; has an outstanding work ethic; is enthusiastic; has impressive communication skills and a professional demeanor. He is reliable, dedicated,

¹⁰ Tr. 50-62, 73.

¹¹ Tr. 20, 34, 64-67; GE 2.

¹² Tr. 38-46; GE 3.

¹³ Tr. 46-48.

organized, diligent, trustworthy, loyal, and hardworking. He can work with minimal supervision. He, works well with others, and has an unwavering commitment to the customer. While working with classified material, Applicant followed policies and instructions.¹⁴

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. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

¹⁴ AE A; Answer to SOR.

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 pertaining to 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. The following potentially apply:

- (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;
- (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;
- (d) credible adverse information that is not explicitly covered under any other guideline 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 the person may not properly safeguard protected information. This includes but is not limited to consideration of: . . . (2) disruptive, violent, or other inappropriate behavior in the workplace; (3) a pattern of dishonesty or rule violations; and
- (e) personal conduct, 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.

Applicant received written warnings from his employer concerning sexual harassment and his inappropriate conduct in the workplace. Applicant intentionally and deliberately failed to voluntarily disclose these written warnings during his background interview with a government investigator. When questioned by the government investigator, Applicant deliberately lied when he answered “no” about whether he had any written or verbal reprimands from his employer. Applicant also deliberately failed to disclose to the investigator that he had been arrested in 1991 or 1992 for driving under the influence of alcohol. He has established a pattern of dishonesty. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered the following mitigating conditions under AG ¶ 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. 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; and
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant received two written warnings about his behavior in the workplace. He was specifically asked by the government investigator if he had received any disciplinary actions, reprimands, written or verbal warnings. He stated “no.” Applicant may have disagreed with the findings of his employer’s investigation, but he had a duty to disclose he received the warnings. He intentionally did not disclose he received the warnings. He disputed the sexual harassment finding, but did not dispute he threw a tool in the workplace. After the government investigator confronted Applicant, he then admitted that he received the warnings. He finally admitted he did not disclose them because he was embarrassed. Applicant also failed to disclose his DUI arrest. Although

he may have disclosed this information in previous SCAs or investigations, he still was required to do so when completing his most recent SCA. I did not find Applicant's explanations credible because when he was afforded an opportunity to disclose the DUI that was not listed in his SCA to the government investigator, he failed to do so. Applicant did not make his disclosures until he was confronted with the facts by the government investigator. I did not find his testimony credible. His offenses are not minor. Applicant has established a pattern of dishonesty that is not mitigated. None of the above mitigating conditions 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. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is 49 years old. He retired honorably from the Navy, and he provided character letters that describe him as a well thought of employee. Although he appears to have done well in some work assignments, Applicant has had difficulties in others. There is sufficient evidence to conclude Applicant was given written warnings regarding his conduct. The concern is that when asked to disclose any warnings he may have received, Applicant lied about them. It is his actions in concealing the warnings and not disclosing them until he was confronted by the government investigator that is the serious security concern. Self-reporting one's conduct is the corner stone of the investigative process and the expectation when entrusted with handling classified information. Applicant repeatedly failed to self-report information that he was specifically asked about. It is not within his purview to decide what information to provide, especially when it is specifically requested, because he may have disclosed it in the past.

Although, Applicant appears to be well thought of by some as evidenced in the character letters he provided, his failure to be honest during the investigative process is a security concern. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the personal conduct 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
Subparagraphs 1.a-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 a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge