



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



In the matter of:)
)
) ISCR Case No. 11-15161
)
Applicant for Security Clearance)

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel
For Applicant: Christopher Graham, Esq.

07/31/2012

Decision

NOEL, Nichole L., Administrative Judge:

Applicant deliberately omitted material facts from his security clearance application regarding his repeated travel to Cuba and his former marriage to a Cuban national in an attempt to mislead the Government. Clearance is denied.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on January 18, 2012, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) explaining that it was unable to find that it is clearly consistent with the national interest to grant Applicant access to classified information. The SOR, which detailed the reasons for the action under the personal conduct guideline, recommended

¹ This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

the case be submitted to an administrative judge for a determination to revoke or deny Applicant's access to classified information.

Applicant, through counsel, timely answered the SOR and requested a hearing. The case was assigned to me on April 19, 2012. The hearing took place as scheduled on June 20, 2012. At hearing, Government's Exhibits (GE) 1 through 5 were admitted without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through D, which were also admitted without objection. At Applicant's request, I left the record open until June 22, 2012. He submitted one additional document, which I admitted as AE E without objection. I received the transcript (Tr.) on June 29, 2012.

Findings of Fact

Applicant, 66, is the owner of a company seeking to obtain a facility security clearance. After submitting his security clearance application in December 2009, both Applicant and his facility received an interim security clearance in January 2010.²

The SOR alleges that Applicant falsified his security clearance application by deliberately omitting his prior marriage to a Cuban national and his repeated trips to Cuba between 2002 and 2003. Although not alleged, Applicant reported a nine-year relationship, with a girlfriend who is a Cuban expatriate living in the United States. The girlfriend is actually the ex-wife he failed to disclose in response to the marital status question. The couple's almost two-and-a-half-year marriage was dissolved by an annulment in 2005, after Applicant sponsored his ex-wife and her son's immigration to the United States.³

Applicant initially completed the security clearance application on his own, consulting the personal files he kept in his office. He felt that the task was too time consuming. Applicant believed that if he entered all of the required information into the electronic form that the task would take an exorbitant amount of time, which as the owner of a busy company, he could not spare. Accordingly, Applicant submitted the security clearance application knowing it contained incomplete and inaccurate information. He testified that his intention was to provide complete and accurate information during his subject interview.⁴

Between February and May 2010, two investigators interviewed Applicant. In the first interview, Applicant stated that he mistakenly listed his third wife as his girlfriend on his security clearance application. He also informed the investigator that he met and married his ex-wife during his trips to Cuba between 2001 and 2002. He did not disclose the extent of his travel to Cuba, which did not end until October 2003. In May 2010, another investigator conducted an interview with Applicant that lasted five days.

² Tr. 39, 62; GE 1-2.

³ GE 1, GE 2.

⁴ Tr. 25-26, 40-41, 55-56, 63-64.

Applicant, with the help of the investigator, scoured the files in his office and made phone calls to third parties to gather the information needed to completely and correctly answer the questions on the security clearance application. At the end of the interview, Applicant executed a 53-page affidavit, with attachments detailing his financial holdings, his former marriages, and his travel to Cuba between June 2001 and October 2003. He also provided explanations for the omissions on his December 2009 security clearance application.⁵

The record contains Applicant's conflicting explanations regarding the omissions of material facts from his security clearance application. Applicant, who according to the chief financial officer of his company, is very impatient with computers and has difficulty with electronic forms, claimed that the electronic version of the application would not allow him to input his multiple divorces, his annulled marriage, or his extensive foreign travel. He also reasoned that because his marriage to his Cuban wife was annulled, she was never his wife and that the term girlfriend most accurately described her. In his opinion any other description would have been a misrepresentation of facts. However, the two have not had any contact since at least 2009. Applicant further justified his actions asserting that the mere disclosure of a Cuban citizen on his security clearance application was sufficient information to prompt further investigation by the Government.⁶

In attempt to explain away his failure to report his travel to Cuba, Applicant avowed that at the time he completed his security clearance application, he believed that his travel occurred outside the seven-year reporting window. Contrarily, he offered that he did not list his travel to Cuba because he did not think of it as travel outside the United States, despite having to clear Cuban customs upon entering and exiting the country. Applicant contends that his Cuba travel was legal, and that he complied with all U.S. rules and regulations related to travel to that country. However, based on a document provided by Applicant, he was investigated by the Department of Treasury, Office of Foreign Asset Control (OFAC), after being barred from boarding a plane to Cuba in October 2003, for suspicion of unauthorized or unclaimed travel to Cuba for nine trips he made between June 2001 and June 2003. Applicant vaguely recalls the investigation, which resulted in no findings against him.⁷

Three witnesses testified on Applicant's behalf. Each testified to Applicant's highly sought after and unique skill set, which makes him an invaluable resource to the Government as a federal contractor.⁸

⁵ Tr. 25-26, 29-30, 45,64, 70; GE 3.

⁶ Tr. 24-25, 37, 43, 46, 57-60, 80-81; Answer; GE 1; GE 2.

⁷ Tr. 25, 32-35, 42-45; GE 2; AE E.

⁸ Tr. 75-91.

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.

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." 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 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 protect classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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 explains why personal conduct is a security concern:

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.

Under AG ¶ 16, the following disqualifying condition applies to this case:

(a) deliberate omission, concealment, or falsification of relevant facts from a personnel security questionnaire, personal history statement, or similar form used conduct investigations, determine employment qualifications, award benefit status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

The SOR alleges that Applicant deliberately omitted information from his December 2009 security clearance application about his travels to Cuba and his Cuban ex-wife. Applicant denies these allegations, explaining that while he knew his application was incomplete, his omissions were motivated by constraints on his busy schedule, not by any intent to mislead the Government. An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported. Conversely, an omission is deliberate when it is made knowingly and willfully. I find that Applicant deliberately omitted relevant facts from his security clearance application in an effort to mislead the Government.

Applicant's conflicting and incredible explanations for the omissions under mine any finding that the omissions were merely innocent mistakes. His claim that the electronic form cannot accept the reporting of multiple marriages, annulments, or large quantities of foreign travel entries is not true. In addition, the record is replete with circumstantial evidence of Applicant's intent to mislead the Government regarding the extent of his connections to Cuba. The magnitude of his deception is shown in the way he chose to mischaracterize his ex-wife as a girlfriend on his security clearance application. His rationalizations about the appropriateness of this characterization are disingenuous and cannot be sustained under reasonable person's standard.⁹ Moreover, his disclosure and subsequent explanations run afoul the plain language of the marital status question.¹⁰

None of the mitigating conditions available under AG ¶ 17 apply; however a brief discussion of AG ¶¶ 17(a) and (c) are warranted. Applicant did not make a prompt, good-faith effort to correct the omissions on his security clearance application. His insistence that he intended to correct his security clearance application at his subject interview is not supported by the record. Applicant did not provide full disclosure of the omitted information at his initial interview. Instead, he provided piecemeal disclosure over the course of two interviews occurring four months apart. The latter interview required five days for the investigator to develop a complete record. Neither can

⁹ See ISCR Case No. 98-0470 (App. Bd. Apr. 19, 1999) (Given the "clearly consistent with national interest" standard, an applicant's conduct must be judged against the "reasonable person" standard. An applicant who is unwilling or unable to act in a reasonable manner does not demonstrate the high degree of judgment, reliability and trustworthiness required of persons granted access to classified information.)

¹⁰ See ISCR Case No. 00-0713 at 3 (Feb. 15, 2002) (the Appeal Board has applied the "plain language" test to hold that "[h]owever narrowly Applicant seeks to characterize or label the facts and circumstances," the Applicant is bound by the plain language of the question)

Applicant's omissions be considered minor nor immaterial as they were contrived to impede the Government's search for the truth.

An applicant does not have the imperium to decide what information the Government needs to effectuate a complete and thorough investigation and ultimately assess an individual's security worthiness. An applicant is expected to provide full, frank, and candid answers throughout the investigative and adjudication process. Failure to do so interferes with the integrity of the industrial security program.¹¹ Such behavior provides a rational basis for finding against an applicant's security worthiness.

Whole-Person Concept

Accordingly, I have reservations and doubts about Applicant ability to protect classified information. In reaching this conclusion, I have also considered the whole-person factors at AG ¶ 2. My comments regarding the personal conduct guideline are incorporated into this analysis. However, the circumstances surrounding Applicant's deliberate omissions of material facts raise concerns about his willingness to comply with rules and regulations as it pertains to the safeguarding of classified information. Applicant disregarded his obligation to provide true, complete, and correct answers to the questions on the security clearance application because he found the process discommoding. Only after Applicant expropriated a background investigator to act as his personal assistant, unnecessarily expending five days of government resources, did he finally provide the information being solicited in the questionnaire. Applicant's actions call into question his willingness to comply with security procedures when they are time-consuming or inconvenient. His behavior is an indication that he will put his self-interests ahead of that of the Government.

Applicant's continued justification of his actions prevents a finding of rehabilitation or other permanent behavior change to justify his access to classified information. Furthermore, he has not demonstrated that the misconduct is unlikely to recur. The record leaves doubt as to whether Applicant would disclose situations or circumstances, whether deliberate or inadvertent, that raise security concerns. Overall, the record evidence leaves substantial doubt about Applicant's eligibility and suitability for a security clearance. Accordingly, I conclude Applicant has not mitigated the security concerns arising from the deliberate falsification of his security clearance application. Clearance is denied.

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.b.:	Against	Applicant

¹¹ ISCR Case No. 01-03132 (App. Bd. Aug. 8, 2002).

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Clearance is denied.

Nichole L. Noel
Administrative Judge