



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



In the matter of:)	
)	
)	ISCR Case No. 12-00736
)	
Applicant for Security Clearance)	

Appearances

For Government: Richard A. Stevens, Esq., Department Counsel
For Applicant: *Pro se*

07/02/2014

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 February 11, 2014, 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.

Appellant answered the SOR on March 13, 2014, and requested a hearing before an administrative judge. The case was assigned to me on May 2, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 3, 2014. I convened the hearing as scheduled on June 11, 2014. The Government offered

exhibits (GE) 1 through 12, and they were admitted into evidence without objection. Applicant testified on his own behalf. He offered Applicant's Exhibit (AE) A through F, which were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on June 20, 2014.

Findings of Fact

Applicant denied all of the allegations in the SOR with explanations. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 39 years old. He holds two bachelor's degrees and three master's degrees. He married in 1998, separated in 2011 and divorced in 2012. He has three children from the marriage ages 14, 13 and 9.¹ He is co-owner of a company. He served as the company's facility security officer (FSO) from 2004 to 2009.

Applicant has held a security clearance since 2003. In May 2009, while processing his application for access to sensitive compartmented information (SCI), Applicant disclosed that he used marijuana one time in July 2008. The agency processing his application discontinued the process and denied him access to SCI. Applicant successfully appealed, and in October 2009 he was granted access.²

In conjunction with his security clearance processing, Applicant was interviewed on January 19, 2010, and March 16, 2010, as part of a polygraph examination. Based on information provided during the interview, on June 18, 2010, Applicant was denied access to SCI. He appealed the decision and in November 2011 the decision to deny him access to SCI was sustained.³

During the March 2010 interview, Applicant disclosed that his company received between \$5,000 and \$15,000 in overpayments from clients over seven years. These payments occurred most often in amounts between \$500 and \$1,500. Rather than refund the monies to the client the company kept them. He attributed it to confusing invoice practices of the firm's primary client, a large corporation.⁴ Applicant indicated he felt somewhat justified in not attempting to repay the overpayments because "sometimes our clients screw us, and this is our way of making it back." He clarified his statement by explaining that he felt he lost billable work to his client due to the client refusing to pay unauthorized overtime hours. He estimated his clients withheld between

¹ Tr. 37, 70-71.

² Tr. 39-40; GE 1, 10, 11. This information was not alleged in the SOR and will not be considered for disqualifying purposes, but will be considered when analyzing Applicant's credibility and the whole person.

³ GE 2, 3, 4, 5.

⁴ Tr. 44-46.

\$2,000 and \$10,000 that he felt his employees had rightfully earned during the time the company had been in operation. He felt slightly guilty for not attempting to repay the overages, but let the overpayments go unaddressed when it would be “more effort to fix it than to leave it alone.”⁵ He admitted that he told the polygraph examiner what is alleged in SOR ¶ 1.a, that is his company retained money from their client for overpayments rather than refund it. At his hearing, Applicant could not remember if he made the above statements when interviewed.⁶ He explained that he did not do it for personal gain or wrongfully. He felt guilty about it because it did not line up with his moral code. He indicated his accountant told him to retain the money. He explained that due to complex accounting practices it was difficult to return money. He felt his company was being unjustly enriched by the overpayments, but he could not get the client to respond, and he could not find someone to take it.⁷ He admitted that his company could have drafted a check for the overage and given it to the client, but the client would have likely come back with other charges.⁸

Applicant explained that when he was participating in the polygraph he “was basically spitting out guilt.”⁹ Whatever came to his mind that he could “spit out” he did.¹⁰ He relinquished accounting responsibilities in 2010. Applicant provided information about his personal finances to show he is solvent and donates to charity and did not need to receive extra money for personal gain.¹¹ I find Applicant, as co-owner of his company knowingly and wrongfully retained approximately \$5,000 to \$15,000 from billing overpayments made by his company and did not refund them to his client.

During the March 2010 interview, Applicant disclosed that while serving as the company’s FSO he advised one of his employees to falsify her drug use history on her security clearance application because he believed she would be denied an interim security clearance if she was truthful.¹² Applicant had earlier gone through an experience where his application for access to SCI was denied due to a one-time drug use. He appealed the denial and was granted access. He disclosed that his own experience helped him arrive at a decision to advise his employee to omit her drug use.¹³

⁵ GE 4.

⁶ Tr. 44-51, 70-90; GE 4, 6, 11; AE F.

⁷ Tr. 44-51, 79-90; GE 6; AE E.

⁸ Tr. 44-51, 79-90.

⁹ Tr. 49.

¹⁰ Tr. 49.

¹¹ AE D.

¹² Tr. 51-57.

¹³ GE 4, 6.

During the hearing, Applicant admitted he told the polygraph examiner what is alleged in SOR ¶ 1.b, that is when he was the FSO he told an employee to falsify her security clearance application by not disclosing her prior drug use. He testified that he did not advise the employee to falsify her security clearance application, but stated that he lied to the polygraph examiner when he said he did. He explained that at the time of the polygraph “I believed what I said was truthful, but it was not.” He stated that he told the employee to be truthful.¹⁴

Applicant provided a copy of the employee’s security clearance application that shows she did in fact disclose her prior drug use. Applicant typed on the copy of the page of the application that he had contacted the employee and she verified that he told her to tell the truth. On his typewritten statement he wrote:

My best explanation for what I said during the polygraph is that I falsely remembered what happened, since I really was pretty sure that it was [employee] who I had told that to (which you can hear on the tape). However, it would seem that while my first inclination might have been for her not to say anything, in fact, I took the correct course of action and told her to disclose things, and even helped her draft a paragraph explaining her actions.¹⁵

Applicant did not provide independent information from the employee verifying the veracity of his statement.¹⁶

Applicant was asked at the hearing the following:

Administrative Judge: So if I hear you right, what you’re saying is when you’re under pressure, you say false things.

Applicant: At the time, yes, I mean, I’ve grown a lot as an individual, I think.¹⁷

I find Applicant advised one of his employees to falsify her drug-use history on her security clearance application because he believed she would be denied a security clearance if she was truthful.

Applicant disclosed during his interview that while serving as his company’s FSO, he failed to follow security manual procedures when he indoctrinated employees into access to classified materials before properly verifying their citizenship status.

¹⁴ Tr. 51-57, 90-100; GE 6, 11.

¹⁵ Tr. 51-57; AE B.

¹⁶ GE 6, 11.

¹⁷ Tr. 52.

Applicant stated that the only formal training he received as his company's FSO was a two-hour online course given by the Department of Homeland Security. If he had questions he sought guidance from the Defense Security Service (DSS). Over the course of his tenure as FSO he reviewed approximately 300 security clearance applications.¹⁸

Applicant stated that when he sought guidance from the DSS he would sometimes get conflicting advice. He also noted that there were always exceptions to the National Industrial Security Program Operating Manual (NISPOM). He explained that due to differing advice, he found it difficult to know what the correct procedure was. He admitted he told the polygraph examiner that he failed to follow security manual procedure when he indoctrinated employees into access to classified material before properly verifying their U.S. citizenship status. He explained that there was not a simple rule of law when addressing this issue. He indicated that his basic assumption was that verification was left to the discretion of the FSO. He also stated that "acceptable proof of citizenship is somewhat murky and left to the discretion of the FSO, to some extent."¹⁹

The NISPOM states: "All documents submitted as evidence of birth in the U.S. shall be original or certified documents."²⁰ It also required: "It must bear the raised, impressed, or multicolored seal of the registrar's office. The only exception is if a State or other jurisdiction does not issue such seals as a matter of policy."²¹ Applicant stated the employee would fax him the original and later send the original. So he eventually received the right documentation. He permitted access after he received the fax, which violates the NISPOM. He believed as the FSO he had a certain amount of discretion. He stated he was hyper vigilant in complying with the letter of the law and he received guidance from DSS on the matter.²²

Applicant was specifically asked: "Did you allow access to classified information to people before properly verifying their U.S. citizenship status?" His response was: "according to me, yes[, a]ccording to the letter of the law, very possibly not."²³ I find while serving as the FSO, Applicant failed to follow security manual procedures when he permitted employees access to classified information before properly verifying their U.S. citizenship status.

¹⁸ Tr. 90.

¹⁹ Tr. 57-63; GE 6, 11, 12.

²⁰ NISPOM § 2.208.

²¹ NISPOM § 2-208.

²² Tr.57-63; GE 6, 11.

²³ Tr. 61.

Applicant explained the reason he provided false information to the polygraph examiner was because he was trying to make sure he did the right thing. He explained that he experienced anxiety in his attempt to be honest. He stated he had the extreme desire to be honest and in doing so he provided false information without having an opportunity to explain. In his appeal letter, Applicant stated that he felt the polygraph examiner was in a hurry and “running out of time and pushed to get through the test, resulting in her not getting a complete understanding of all events, due to time constraints.”²⁴ He further stated: “I write this, not to say that all the information gathered was false, rather to point out that some information is out of context or represents only part of the story, often with important information missing.”²⁵

Applicant provided character letters. They describe him as a remarkable person; a rule follower; an ethical person; and a person who always does the right thing. He is considered reliable, honest, thoughtful, meticulous, professional, idealistic and pragmatic.²⁶

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.

²⁴ GE 5.

²⁵ Tr. 40-41, 63-70; GE 5.

²⁶ AE E. I have also considered AE C, but have not specifically commented on it to maintain Applicant’s privacy.

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.

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

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following potentially apply:

(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, support 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.

(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.

As co-owner of a company Applicant knowingly and wrongfully retained approximately \$5,000 to \$15,000 from billing overpayments received by his company. While serving as the company's FSO, Applicant advised one of his employees to falsify her drug-use history on her security application. Also while serving as the FSO, Applicant failed to follow the security manual procedure and permitted employees access to classified information before properly verifying their U.S. citizenship. Applicant's conduct exhibits a pattern of dishonesty, questionable judgment, and a failure to comply with rules and regulations creating. It also creates a vulnerability to exploitation, manipulation, and duress. 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:

(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 denied the factual content in the SOR allegations and provided explanations for his behavior. He admitted that sometimes when his firm was overpaid, despite his attempts to return the money to the client, it was too difficult and it was not refunded. His explanation that he was lying to the polygraph examiner regarding providing advice as the FSO to his employee about disclosing her drug use is not believable. He has acknowledged he permitted employees access to classified information before verifying their citizenship in violation of the NISPOM. Applicant's behavior was not minor or infrequent. It did not happen under unique circumstances, and I am not convinced it is unlikely to recur. His behavior casts doubt on his reliability, trustworthiness and good judgment. AG ¶ 17(a) does not apply.

Applicant has acknowledged that he experiences anxiety when under pressure. He no longer is involved in the accounting practices of his company. He no longer serves as the company's FSO. I find AG ¶¶ 17(d) and (e) partially apply to SOR ¶¶ 1.a and 1.c.

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 a highly-educated 39 year old. He is co-owner of a company and was its FSO. His actions in failing to comply with the NISPOM and failure to refund money to his clients raise concerns. His advice to his employee to lie on her security clearance application is also a concern. His explanations that his statements made to a polygraph examiner were untruthful and therefore are mitigating are contradictory. Despite removing himself from the accounting practices of his company and serving as the FSO, Applicant's personal conduct continues to raise serious security concerns that he has failed to mitigate. Overall, the record evidence leaves me with serious 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.c: 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