



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



In the matter of:)
)
) ISCR Case No. 12-02615
)
Applicant for Security Clearance)

Appearances

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

11/05/2013

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the record, I conclude that Applicant failed to mitigate security concerns under Guideline E, Personal Conduct. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

Applicant completed and certified an electronic questionnaire for investigations processing (e-QIP) on July 25, 2011. On September 22, 2011 and January 11, 2012, he was interviewed by authorized investigators from Office of Personnel Management (OPM). On August 8, 2013, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, Personal Conduct. DOD acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within DOD for SORs issued after September 1, 2006.

Applicant provided a notarized answer to the SOR, dated August 21, 2013. In his answer, he provided additional information. On September 19, 2013, the case was assigned to me for a hearing. I convened a hearing at the Defense Office of Hearings and Appeals (DOHA) on October 16, 2013, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government called no witnesses and introduced three exhibits, which were marked Ex. 1 through Ex. 3 and entered in the record without objection. Applicant testified and called one additional witness. He introduced 11 exhibits, which were identified and marked as Applicant's Ex. A through Ex. K and entered in the record without objection. DOHA received the hearing transcript (Tr.) on October 22, 2013.

Findings of Fact

The SOR contains three allegations of disqualifying conduct under Guideline E, Personal Conduct (SOR ¶¶ 1.a. through 1.c.) In his Answer to the SOR, Applicant denied all three allegations. (SOR; Answer to SOR.)

Applicant is 31 years old and never married. He has completed approximately two years of college study. Since 2010, he has worked as a program manager and security officer for a federal contractor. Since 2006, he has also been employed as a vice-president by a security company owned by his father. He was first granted a security clearance in about 2006. (Ex.1; Tr. 63-64, 130-131.)

In November 2010, Applicant was taken into police custody and charged with Attempted Possession of a Prohibited Weapon. The weapon found in Applicant's possession was a spring-assisted pocket knife, which was considered a prohibited dangerous weapon under the statutes of the jurisdiction where Applicant was apprehended. Applicant pleaded guilty to the charge. He was placed in a *nolo* diversion program and performed 80 hours of community service. The charge was then *nolle prosequi* and dismissed without prejudice. The crime, Applicant's plea, and the disposition of the case are alleged at SOR ¶ 1.a. (Ex. B; Ex. C; Ex. D; Ex. E; Ex. F; Tr. 36-40, 64-71.)

Applicant denied the allegation, asserting that he had never been placed on probation, as alleged in SOR ¶ 1.a. He did not deny the conduct alleged or his guilty plea. He testified that he pleaded guilty to the charge, accepted the *nolo* diversion, and performed 80 hours of community service because he feared losing his security clearance if he did not do so. (Tr. 71-72.)

In March 2009, Applicant traveled with his father and the woman who later became his stepmother to several Asian countries. Applicant's airfare was provided by his stepmother, a native of one of the Asian countries, who worked for an airline. Before going on the trip, Applicant exchanged e-mail correspondence with a young woman who

was a distant relative of his stepmother¹. While on the trip, Applicant was introduced to the young woman, a nurse. He spent time with the young woman, found her interesting, and they became friends. (Tr. 41-45, 72-83.)

Applicant returned to his home in the United States. The young woman sent him an e-mail, dated March 22, 2009, in which she recalled their time together in her country and told him she missed him. Two months later, in May 2009, Applicant traveled again to the Asian country, this time with friends from the United States. Again, his stepmother, through her work connection, provided him with reduced airfare. While in the Asian country, Applicant saw the young woman again. When he returned to the United States, he continued to communicate with the young woman, and his interest in her increased. They communicated once or twice a month between May and August 2009. (Ex. J; Tr. 87-93.)

In August 2009, the young woman informed Applicant that she had accepted a nursing position in a Middle Eastern country. Applicant continued to communicate with the young woman while she was working in the Middle Eastern country. In June 2010, the young woman wrote to Applicant, explained that “things had changed” and she was apparently not ready for the responsibilities of a family. She explained that she was working to help her family back in her country. Applicant continued to exchange e-mails with the young woman in 2010 and 2011. (Ex H; Ex.I; Tr. 97-101.)

Applicant denied that he and the young woman were “boyfriend and girlfriend” when he received the email from her stating that “things had changed.” He stated that he and the young woman did not communicate very much for the six months between February 2011 and August 2011. (Tr. 100-101.)

In August 2011, Applicant initiated contact with the young woman again, first by email and then by telephone. She was still working in the Middle Eastern country. Applicant testified that in August 2011, his relationship with the young woman intensified, and he considered her to be his girlfriend. This relationship continued until August 2012. (Tr. 102-106.)

On July 10, 2013, Applicant responded to DOHA interrogatories and stated that in February 2012 he traveled to the Asian country where the young woman lived. At the conclusion of his hearing, he reported for the first time that he had visited the young woman in February 2012 after she returned from her work in the Middle Eastern

¹ Ex. G contains copies of the first e-mail exchange between Applicant and the young woman. The communications are dated December 8, 2008, December 15, 2008, and December 18, 2008. In an e-mail dated December 18, 2008, Applicant responded to her request that he become a “friend” on a social media account. Applicant provided his telephone number and asked her to call to suggest activities for his upcoming visit to her country with his family. (Ex. G.)

country. Applicant then further testified that in April 2012 he filed a K-1 visa petition² with the intent to sponsor the young woman to come to the United States as his fiancée. Applicant stated that the K-1 visa petition was granted. However, he stated that he and the young woman then decided not to follow through with their plan that she would come to the United States and they would marry. (Ex. 3; Tr. 159-161.)

Applicant reported that he was presently involved in a romantic relationship with another woman, who was expecting his child. Applicant's father appeared as a witness and testified about his travels with Applicant overseas. He stated that of all the people he and his son met in the Asian country, the young nurse was the only person with professional training. He also observed that Applicant had several girlfriends from 2009 until the present time. (Tr. 46, 120-144.)

When Applicant executed and signed his e-QIP on July 25, 2011, he responded to the following question in Section 19:

Foreign Contacts: Do you have or have you had close and continuing contact with foreign nationals within the last 7 years with whom you, your spouse, or your cohabitant are bound by affection, influence, and/or obligation? Include associates, as well as relatives, not already listed in Section 18. (A foreign national is defined as any person who is not a citizen or national of the U.S.). (Ex. 1.)

Applicant answered "No" to the question in Section 19. The SOR alleges at ¶ 1.b. that Applicant falsified material facts in his answer because he knew then and sought to conceal that he was in a relationship with a citizen of an Asian country who was residing in a Middle Eastern country. (SOR; Ex. 1.)

On September 22, 2011, Applicant was interviewed by an OPM investigator, who inquired whether, when he visited the Asian country in 2009, Applicant had contact with any foreign nationals to whom he felt ties of affection, friendship, obligation, or loyalty. Applicant initially told the investigator that he did not have any contact with any foreign nationals with whom he has or has had ties of affection, friendship, obligation, or loyalty. Later, during the same interview, Applicant stated that, due to oversight, he failed to list his friendship with the young nurse from the Asian country working in the Middle Eastern country. He told the investigator that he had telephone and e-mail contact with the young woman more than 15 times a year. He also stated that the young woman was not aware that he was being considered for a security clearance. (Ex. 2.)

The SOR alleges at ¶ 1.c. that Applicant deliberately failed to disclose in the OPM interview that during his two trips to the Asian country in 2009, he had contact with the young woman, a citizen of the Asian country, with whom he had ties of affection and friendship. In his answer to the SOR, Applicant denied knowing the young woman

² I take administrative notice that a K-1 visa "permits a foreign-citizen fiancé(e) to travel to the United States and marry his or her U.S. citizen sponsor within 90 days of arrival." (See http://travel.state.gov/visa/immigrants/types_2994.html.)

before he went on vacation with his father and stepmother in March 2009, although he acknowledged communicating with her by email, at his stepmother's suggestion, once before he traveled to the Asian country for the first time in March 2009. He stated that he and the young woman communicated three times a month from late August 2011 until June 2012. He also asserted that as of August 2012, he was no longer in an affectionate relationship with the young woman, and was in a relationship with another woman, with whom he was expecting a child. (SOR; Answer to SOR; Ex. 2.)

During his hearing, Applicant appeared reluctant to disclose the nature and degree of his friendship with the young woman. I found he was not forthcoming in responding to Department Counsel's questions, and his testimony in this matter lacked candor. (Tr. 72-90.)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant an applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the revised adjudicative guidelines (AG). 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, the administrative judge applies these guidelines 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.

Under Directive ¶ E3.1.14, the Government has the initial burden of proving controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, responsibility then shifts to the applicant to refute, extenuate, or mitigate the Government's case by presenting witnesses and other evidence. Because no one has a right to a security clearance, the applicant bears the burden of persuasion. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of protecting the national interest.

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 or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to 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

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.

Applicant's personal conduct raises security concerns under AG ¶¶ 16(a), 16(b), and 16(c). AG ¶ 16(a) reads: "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." AG ¶ 16(b) reads: "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) reads: "credible adverse information in several adjudicative issues 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 the person may not properly safeguard protected information.”

Applicant denied the allegations at SOR ¶¶ 1.a., 1.b., and 1.c. When SOR allegations are controverted, the Government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. “That burden has two components. First, the Government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the Government must establish a nexus between the existence of the established facts and events and a legitimate security concern.” See ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 08-06605 at 3 (App. Bd. Feb. 4, 2010); ISCR Case No. 08-07290 at 2 (App. Bd. Nov. 17, 2009).

The Government established a prima facie case by the evidence in the record. Additionally, Applicant, a security professional, had held a clearance since 2006, and he was aware of the importance of telling the truth to the Government. When he executed and signed his e-QIP in July 2011, Applicant responded “No” to Section 19, which asked if he had had close or continuing contact with foreign nationals with whom he was bound by affection, influence or obligation within the last seven years. In response to Section 19, Applicant did not list the young Asian woman, working in a Middle Eastern country, with whom he had a friendship and with whom he been in contact since 2009. Applicant testified that approximately one month after completing his e-QIP, he initiated contact with the young woman, and thereafter considered her to be his girlfriend.

During his security interview in September 2011, Applicant initially denied any contacts with foreign nationals when he traveled to the Asian country in March and May 2009. Later, in his interview, he stated that through oversight he had neglected to identify the young Asian woman with whom he spent time during his two visits to her country in 2009.

Several Guideline E mitigating conditions might apply to the facts of this case. Applicant’s disqualifying personal conduct might be mitigated under AG ¶ 17(a) if “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.” If “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 process” and “[u]pon being made aware of the requirement to cooperate or provide information, the individual cooperated fully and completely,” then AG ¶ 17(b) might apply. If “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," then AG ¶ 17(c) might apply.

Applicant denied the allegation at SOR ¶ 1.a., but provided evidence to corroborate the charge, disposition of the charge, and his completion of 80 hours of community service. He denied he was sentenced to probation. Applicant provided evidence to establish that the circumstances giving rise to the charge were unique and not likely to be repeated. I conclude that the mitigating condition at AG ¶ 17(c) applies to the allegation at SOR ¶ 1.a.

However, Applicant failed to mitigate the remaining SOR allegations, and they continue to raise security concerns about his truthfulness and candor. Applicant's own evidence established that he had continuing contacts of a friendly nature with a foreign national from the time of his two visits to the country in March and May of 2009 until he completed his e-QIP in July 2011. By responding "No" to Section 19, even though he knew he had continuing friendly contact with the woman from the Asian country, Applicant falsified material facts on his e-QIP. Moreover, when he was interviewed by an authorized investigator in September 2011, Applicant stated that in his two trips in 2009 to the Asian country, he did not have contact with any foreign nationals with whom he felt ties of affection, friendship, obligation, or loyalty. It was not until later in the interview that Applicant came forth with information about his ongoing friendship with the young woman.

Applicant was evasive when asked about his relationship with the young woman. By denying a relationship with her, he falsified his e-QIP and initially misled an authorized investigator. Applicant's falsifications were not made pursuant to improper or inadequate advice from authorized personnel or legal counsel, nor were they minor, so remote in time, or carried out under circumstances that they were unlikely to recur. Applicant's lack of candor about his contacts with a foreign national, as alleged under SOR ¶¶ 1.b. and 1.c., raises concerns about his trustworthiness, reliability, and judgment. As a security professional, Applicant had reason to know that his unreported and unacknowledged contacts with a foreign national could raise security concerns. I conclude that none of the Guideline E mitigating conditions fully applies to the allegations at SOR ¶¶ 1.b. and 1.c.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an 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 in this case. Applicant, a mature adult, has held a security clearance since 2006. When he executed a security clearance application in July 2011 and was interviewed by an authorized investigator in September 2011, Applicant was not candid about contacts in 2009 with a foreign national. At his hearing, he acknowledged that in August 2011, a month before his security interview, he had initiated contact again with the young woman. At the end of his hearing, he revealed that in February 2012, he had visited the young woman in her country and had sponsored her for a K-1 visa with the expectation that she would come to the United States as his fiancée, and they would marry. Applicant's lack of candor impacts his credibility and raises serious security concerns about his reliability, trustworthiness, and judgment. Applicant failed to meet his burden of persuasion in mitigating two of the three allegations under the personal conduct adjudicative guideline. Overall, the evidence in this case leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance.

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
Subparagraph 1.a.:	For Applicant
Subparagraphs 1.b. and 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 eligibility for a security clearance. Eligibility for access to classified information is denied.

Joan Caton Anthony
Administrative Judge