



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



In the matter of:

Applicant for Security Clearance

)
)
)
)
)

ISCR Case No. 15-04386

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel

For Applicant: *Pro se*

02/16/2017

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to revoke his eligibility for access to classified information. He did not present sufficient evidence to explain, extenuate, and mitigate the security concern stemming from his workplace misconduct in 2010, when he was serving as town marshal (chief of police) for a small town, which resulted in his termination from employment. Accordingly, this case is decided against Applicant.

Statement of the Case

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 format) on March 19, 2013. This document is commonly known as a security clearance application. About three years later on March 11, 2016, after reviewing the application and the information gathered during a background investigation, the Department of Defense Consolidated Adjudications Facility, Fort Meade, Maryland, sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant him

eligibility for access to classified information.¹ The SOR is similar to a complaint. It detailed the factual reasons for the action under the security guideline known as Guideline E for personal conduct. He answered the SOR on April 11, 2016, in a detailed 12-page memorandum, and he requested a hearing.

The case was assigned to me on June 17, 2016. The hearing was held as scheduled on September 6, 2016. At the outset of the hearing, Department Counsel withdrew the allegation in SOR ¶ 1.e because it was unfounded.² Department Counsel offered Exhibits 1-8, and they were admitted. Applicant testified on his own behalf, but offered no documentary matters. The record was left open for him to do so after the hearing, and he submitted three documents, which are admitted without objections as Exhibits A, B, and C. The transcript of hearing was received on October 13, 2016.

Findings of Fact

Applicant is a 61-year-old employee who has a security clearance for his part-time job as a contract investigator conducting background investigations for the federal government. He has performed this work since about October 2011. In addition, since 1998, he has been the owner and president of a licensed private investigative agency. He also has decades of experience serving as a certified police officer.³ His employment history includes four years of active duty military service in the U.S. Army during 1975-1979, resulting in an honorable discharge. His educational background includes a high school diploma and about 80 hours of college credit without the award of a degree. His first marriage ended in divorce. He married for the second time in 1998. He has four children and two stepchildren, all of whom are adults.

Applicant was granted a secret-level security clearance as a result of a background investigation conducted in 2011.⁴ His 2013 security clearance application was submitted to upgrade to a top-secret clearance for his position of key management official (the owner and president) of his investigative agency.⁵ Although the SOR contains four allegations, this case involves three discrete incidents of workplace behavior. Each incident is discussed below.

¹ This action was taken under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended, as well as Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (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 here. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006).

² Tr. 17-18.

³ Exhibit A.

⁴ Exhibits 2 and 4.

⁵ Exhibits 1 and 3; Tr. 5, 8-9.

SOR allegation ¶ 1.d. In 1978, at the age of 22, Applicant was serving as a military police officer when he and another military police officer stole two wheels with tires from a car parked on a military installation.⁶ They were discovered and prosecuted by the Army at a trial by special court-martial. Applicant was found guilty of larceny of private property and sentenced to the following punishment: (1) hard labor without confinement for three months; (2) reduction from specialist (pay grade E-4) to private (pay grade E-1); and forfeiture of \$50 pay per month for three months. Subsequently, Applicant served the remainder of his enlistment, was promoted to private (pay grade E-2), and received an honorable discharge in 1979.

SOR allegation ¶ 1.c. During August-November 2002, Applicant served as the chief of police for a small town after many years of service with a big-city police department.⁷ His employment was limited to three months as he quickly ran afoul of what appears to be small-town politics due to police investigation of the town's mayor's personally-owned businesses and properties for possible violations of the town's laws. The town accused him of possible felony conduct by misusing the state's criminal justice information system in advance of the town's upcoming local elections, although he was never charged or disciplined by any pertinent authority for misconduct. He believes the town terminated him in retaliation for performing his duties as chief of police, which led him to investigate the activities of the town's mayor.

After Applicant's termination, he sued the town for wrongful termination from employment as well as defamation – slander. About four years later in December 2006, the employment-dispute lawsuit was settled in Applicant's favor when the town agreed to pay him \$75,000 in return for dismissal of the lawsuit with prejudice.

SOR allegations ¶¶ 1.a and b. Applicant served as town marshal (chief of police) for another small town from November 2006 until his termination in October 2010.⁸ According to Applicant, drug trafficking was quite prevalent in the area, and the police department made numerous arrests, which included family members of the town council.⁹ The events leading up to Applicant's termination began when the police department arrested a suspect (John Doe) and filed charges against him in September 2009 for aggravated assault with a deadly weapon or dangerous instrument (a broken glass bottle) on a police officer as well as charges of domestic violence, burglary, aggravated assault/forcible rape of Doe's girlfriend.

⁶ Exhibit 8.

⁷ Exhibits 7 and B.

⁸ Exhibits 5, 6, and C. The best evidence concerning the termination is contained in Exhibits 5 and 6. Exhibit 5, at pages 25-41, contains the August 2011 hearing officer's decision in Applicant's name-clearing hearing. Exhibit 6 is the April 2014 court order from a U.S. district court granting summary judgment against Applicant and dismissing his lawsuit against the town.

⁹ Tr. 50.

The charges against Doe were primarily based on an oral report of the incident that Applicant gave to the chief criminal deputy prosecuting attorney of the county attorney's office, which culminated in a criminal complaint sworn to by Applicant. Doe was convicted of the aggravated assault offense against the police officer. Post-trial, Doe's defense filed a motion to vacate the judgment, which the prosecution did not oppose, based on newly discovered evidence that the victim was not a *bona fide* police officer at the time of Doe's arrest. Applicant explained at the hearing that the victim had been a certified police officer and was assisting at the police department pending recertification. The county attorney's investigation of the issue established that Applicant issued the victim a gun and a badge although he was not a certified police officer, as his certification had lapsed in 2002 following his retirement from a big-city police department. The victim was also not on the town's payroll as a police officer when Doe was arrested.

In conceding Doe's motion to vacate, the prosecution concluded that the victim and the town's police department had misled the prosecutor's office by not disclosing that the victim was not a certified police officer when Doe was arrested. The county superior court dismissed the aggravated assault charge with prejudice because the integrity of the judicial system was compromised with misleading and false statements and the case against Doe was tainted. The day after the court dismissed the case against Doe, the county attorney informed the then town manager that they would no longer work with Applicant or the town's police department.

As a result, the town council moved to terminate Applicant based on a lack of confidence and trust due to the recent deterioration in his relations with the county attorney's office and the superior court, which damaged his effectiveness as chief of police. The town council voted to terminate Applicant after affording him an opportunity to present his side of the story concerning the events in the Doe case. After voting, the town council instructed the town manager to dismiss Applicant from employment. The town manager refused because he thought Applicant had done nothing wrong. The town council then terminated the town manager, appointed an acting town manager, and instructed her to terminate Applicant, which she did in October 2010.

Subsequently, in December 2010, the superior court found Applicant in contempt of court (it's not clear if it was civil or criminal) because he acted in a manner to obstruct the administration of justice. The court ordered Applicant to pay \$1,650 in fees.

Upon Applicant's request, a post-termination name-clearing hearing was conducted by a retired state appellate court judge in March 2011. The hearing officer concluded that the town had good cause to terminate Applicant because he failed to disclose exculpatory evidence (e.g., the victim was not in fact a police officer at the time of the assault) resulting in Doe being denied due process of law and a fair trial. In reaching that decision, the hearing officer specifically concluded that Applicant knew the victim was not a certified police officer at the time of the assault; Applicant never notified the county attorney's office that the victim was not a certified police officer; the chief criminal deputy prosecuting attorney spoke with Applicant before issuing the complaint against Doe and believed that the victim was a certified police officer when

Doe assaulted him; Applicant swore to the truthfulness of the complaint; and a superior court judge later found the Doe case was based on a complaint that Applicant knew was false. Applicant maintained then, as he does now, that he did not tell the county attorney's office about the status of the victim because he never spoke to anybody from the office before the complaint was issued against Doe. He also believes the action by the town council was a pretext when in fact the town council was retaliating against him for his zealous policing of drug cases.

After the name-clearing hearing, Applicant sued the town and others for various federal and state law claims, including breach of contract and wrongful termination. The case was removed from state court to federal court based upon federal question jurisdiction. In April 2014, the U.S. district court granted a motion for summary judgment for the defendants, thereby ending Applicant's lawsuit.

Law and Policies

It is well-established law that no one has a right to a security clearance.¹⁰ As noted by the Supreme Court in *Department of the Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."¹¹ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.¹² An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹³

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁴ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹⁵ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹⁶ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁷

¹⁰ *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (no right to a security clearance).

¹¹ 484 U.S. at 531.

¹² Directive, ¶ 3.2.

¹³ Directive, ¶ 3.2.

¹⁴ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹⁵ Directive, Enclosure 3, ¶ E3.1.14.

¹⁶ Directive, Enclosure 3, ¶ E3.1.15.

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.¹⁸ The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.¹⁹

Discussion

Under Guideline E for personal conduct, the concern is that "conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about [a person's] reliability, trustworthiness, and ability to protect classified information."²⁰

In analyzing the facts of this case, I considered the following disqualifying and mitigating conditions or factors:

AG ¶ 16(c) credible adverse information in several adjudicative issues 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;

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 [person's] reliability, trustworthiness, or good judgment; and

AG ¶ 17(f) the information was unsubstantiated or from a source of questionable reliability.

I have considered the three incidents of workplace behavior and the relevant surrounding circumstances as discussed above. I have given little weight to Applicant's 1978 court-martial conviction for larceny. The offense is relatively minor as reflected by the level of court-martial and the light punishment. Moreover, the offense took place nearly 40 years ago when Applicant was a 22-year-old soldier. He was able to redeem himself in the eyes of the Army by completing his term of enlistment and receiving an honorable discharge.

¹⁷ Directive, Enclosure 3, ¶ E3.1.15.

¹⁸ *Egan*, 484 U.S. at 531.

¹⁹ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

²⁰ AG ¶ 15.

Likewise, I have given little weight to Applicant's termination from the position of chief of police in 2002. There was never a finding by a judicial or quasi-judicial body to substantiate that he engaged in misconduct while in office. Moreover, he ultimately prevailed in his employment-dispute lawsuit when the town agreed to settle the case by paying him \$75,000. Those circumstances suggest that Applicant did not engage in serious workplace misconduct.

But I have concerns about the facts and circumstances that led to Applicant's termination from the position of chief of police in 2010. With that said, having grown up in a small town, I know that serving as a police officer in a small town comes with many challenges (e.g., lack of anonymity, lack of resources, and the nature of small-town politics). Nevertheless, Applicant demonstrated questionable judgment and a lack of candor when he allowed a criminal case to proceed against Doe based on false information, because he knew that an alleged victim was not a certified police officer at the time of the assault by Doe. Indeed, he swore to a criminal complaint that he knew or should have known was false in that respect. Once discovered, the superior court dismissed the charge against Doe and found Applicant in contempt of court, the county attorney's office severed its working relationship with the town's police department, and the town fired Applicant due to a loss of trust and confidence in his ability to perform his job as chief of police. He maintained then as does now that he did not speak to anyone from the county attorney's office before he swore to the criminal complaint, but his statement has been flatly contradicted, as discussed in the hearing officer's decision. Moreover, a neutral hearing officer, who was not connected to the town, concluded that Applicant failed to refute the town's charges and clear his name.

The facts and circumstances surrounding Applicant's termination from employment in 2010 create doubt about his reliability, trustworthiness, good judgment, and ability to protect classified information. The law requires that the doubt be resolved in favor of protecting national security. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also considered the whole-person concept. Accordingly, I conclude that he did not meet his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

The formal findings on the SOR allegations are:

Paragraph 1, Guideline E:	Against Applicant
Subparagraphs 1.a and 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	Withdrawn

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant access to classified information.

Michael H. Leonard
Administrative Judge