



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



In the matter of:)
)
) ISCR Case No. 15-04859
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: *Pro se*

02/22/2017

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the personal conduct and handling protected information security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On April 6, 2016, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E (personal conduct) and K (handling protected information). The action was taken under Executive Order (EO) 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) implemented by the DOD on September 1, 2006.

Applicant responded to the SOR on April 29, 2016, and requested a hearing before an administrative judge. The case was assigned to me on August 9, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on August 18, 2016, scheduling the hearing for October 4, 2016. The hearing was postponed and convened as rescheduled on November 14, 2016. Government Exhibits (GE) 1 and 2

were admitted in evidence without objection. Applicant testified, called three witnesses, and submitted Applicant's Exhibits (AE) A through D, which were admitted without objection. The record was held open for Applicant to submit additional information. He submitted letters that I have marked collectively as AE E and admitted without objection. DOHA received the hearing transcript (Tr.) on November 29, 2016.

Findings of Fact

Applicant is a 47-year-old employee of a defense contractor. He has worked for his current employer or a predecessor contractor since 2012. He served on active duty in the U.S. military from 1987 until he retired as an E-7 with an honorable discharge in 2007. He seeks to retain his security clearance. He is a few credits short of a bachelor's degree. He is married without children.¹

Applicant worked as a civilian employee of the U.S. military from 2009 through 2012. Over the course of about two months in 2012, he had three security-significant incidents. He worked at a secure location where electronic devices were prohibited. He agreed to wear a device for a ratings company that monitored television and radio broadcasts to determine what he was watching and listening to. He knew the device was prohibited at the secure site. Cell phones and other electronic devices, such as the ratings device, had to be secured before departing for the site. Applicant forgot he was wearing the device on two occasions. He self-reported that he had the device at the site on both occasions.²

Applicant received verbal counseling, a written reprimand, and additional training after the second incident. He was also directed to conduct an incident report on another individual who was involved in a similar incident. He was given a classified two-page template to be used for the investigation. Sometime thereafter, a random bag search was conducted when Applicant was leaving the site. Applicant's backpack was searched, and the classified template was discovered in a folder in which he did school work.³

Applicant readily admits that he committed the first two incidents, but he does not believe he is responsible for the third incident. He believes there was a bias against him at the site because of his race. He acknowledges that it is possible that he accidentally placed the document in the binder, but he is convinced that he did not. He thinks someone planted the document in his backpack and arranged for the search, which was an unusual event. He thinks someone may have wanted him to lose his job so that he could be replaced with a new employee of a different race.⁴

¹ Tr. at 44-45, 64-65; GE 1, 2; AE C.

² Tr. at 16-19, 47-52; Applicant's response to SOR; GE 1, 2.

³ Tr. at 19-24, 50; Applicant's response to SOR; GE 2.

⁴ Tr. at 24-26, 36-38, 55, 73-74; Applicant's response to SOR; GE 2.

Applicant's security clearance and access to the secure site was suspended after the third incident. He was told that a security-incident file (SIF) and an investigation would be initiated, which could lead to the loss of his security clearance and his job. He was told that if he resigned, a SIF would not be created, and that everything about the incidents would remain internal. Applicant asked what he should give as the reason for his resignation. He was told words to the effect: "I don't care what you tell them, say you didn't like the commute." Applicant was reminded that he signed a non-disclosure agreement, and he was told words to the effect: "I don't know what you are being asked or who you are talking to, but you do not discuss what goes on up here." Applicant feels that he was not treated fairly, and that his treatment was racially motivated. He resigned.⁵

Applicant submitted a Questionnaire for National Security Positions (SF 86) in February 2014. Under Section 13A – Employment Activities, he reported his civilian job with the military from 2009 through 2012. For the reason for leaving the job, he wrote: "Resigned due to travel concerns."⁶ Applicant answered "no" to the following questions:

For this employment have any of the following happened to you **in the last seven (7) years**?

- Fired
- Quit after being told you would be fired
- Left by mutual agreement following charges or allegations of misconduct
- Left by mutual agreement following notice of unsatisfactory performance

For this employment, **in the last seven (7) years** have you received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as a violation of security policy?⁷

Section 13C – Employment Record of the SF 86 asked similar questions to the above, except it asked: "Have any of the following happened to you **in the last seven (7) years at employment activities that you have not previously listed?** (If 'Yes', you will be required to add an additional employment in Section 13A." (italicized emphasis added) Since any issues that would have required a positive response occurred at an employment that was previously listed, Applicant correctly answered "no" to this specific question.⁸

⁵ Tr. at 29-39, 42-44, 52-56; Applicant's response to SOR; GE 2.

⁶ GE 1.

⁷ GE 1. The SOR did not allege that Applicant falsified these questions. Any matter that was not alleged in the SOR will not be used for disqualification purposes. It may be used to assess Applicant's credibility, in the application of mitigating conditions, and in the whole-person analysis.

⁸ GE 1.

Applicant was interviewed for his background investigation in March 2014. He initially denied any misconduct, negligence, security infractions, and revocation of site clearance or access. He testified that he was anguished by the circumstances, and he took a break from the interview and called his wife. She told him to just tell the truth. He then went back to the interview and divulged all the incidents that formed the basis for the SOR. There is no evidence that the investigator was aware of the incidents before they were revealed by Applicant.⁹

Applicant stated that he answered the questions on the SF 86 the way he did because he was told before he resigned from his position that he was not to discuss anything that happened at the site. He realizes now that he was wrong to answer the questions incorrectly, and that is why he told the background investigator about the incidents.¹⁰

Applicant deployed to Iraq and other locations when he was in the military. He called three witnesses, and he submitted numerous documents and letters attesting to his excellent job performance, strong moral character, leadership, trustworthiness, honesty, professionalism, honor, ethics, judgment, responsibility, discipline, work ethic, intelligence, dependability, compassion, loyalty, dedication, and integrity.¹¹

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 to be 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, administrative judges apply the 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."

⁹ Tr. at 41-43; Applicant's response to SOR; GE 2.

¹⁰ Tr. at 39, 58-62, 80, 84, 96; Applicant's response to SOR.

¹¹ Tr. at 65-90; Applicant's response to SOR; AE A-E.

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 the 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 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 EO 10865 provides that adverse 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 K, Handling Protected Information

The security concern for handling protected information is set out in AG ¶ 33:

Deliberate or negligent failure to comply with rules and regulations for protecting classified or other sensitive information raises doubt about an individual’s trustworthiness, judgment, reliability, or willingness and ability to safeguard such information, and is a serious security concern.

AG ¶ 34 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

- (b) collecting or storing classified or other protected information at home or in any other unauthorized location;
- (g) any failure to comply with rules for the protection of classified or other sensitive information; and
- (h) negligence or lax security habits that persist despite counseling by management.

Applicant brought an unauthorized electronic device to a secure site on two occasions. A classified document was found in his backpack. He readily admits that he committed the first two incidents, but he believes that he was set up because of his

race, and that someone planted the document in his backpack and arranged for the search. He acknowledges that it is possible that he accidentally placed the document in the binder, but he is convinced that he did not. I also acknowledge that it is possible that he was set up by one or more people. The far more likely conclusion is that Applicant simply placed the document in the binder by mistake. I find by substantial evidence¹² that Applicant accidentally placed the document in the binder. The evidence raises the above disqualifying conditions.

SOR ¶¶ 1.a and 1.b allege the three security incidents. SOR ¶ 1.c alleges that Applicant resigned from the job in lieu of termination after incurring the three infractions. SOR ¶ 1.c does not allege any conduct that is not already alleged under SOR ¶¶ 1.a and 1.b. SOR ¶ 1.c is concluded for Applicant.

Conditions that could mitigate handling protected information security concerns are provided under AG ¶ 35. The following are potentially applicable:

(a) so much time has elapsed since the behavior, or it has happened so infrequently or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

(b) the individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities.

Applicant self-reported the first two incidents. The third incident is troubling because of Applicant's failure to accept responsibility for the incident. While there are some mitigating factors, Applicant's failure to accept responsibility makes it difficult to conclude that the conduct is completely mitigated. Further discussion will be included under the whole person.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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

¹² Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." ISCR Case No. 10-09035 at 5 (App. Bd. Jun. 13, 2014) (citing Directive ¶¶ E3.1.14; E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994); ISCR Case No. 04-07187 at 5 (App. Bd. Nov. 17, 2006).

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 disqualifying condition is potentially applicable:

(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.

Applicant intentionally falsified his SF 86 when he gave the reason for leaving the job as: "Resigned due to travel concerns." AG ¶ 16(a) is applicable to SOR ¶ 2.a.

SOR ¶ 2.b alleged that Applicant intentionally falsified Section 13C. However, any adverse information about his employment was required to be placed in Section 13A, not 13C. His answer to 13C was correct. SOR ¶ 2.b is concluded for Applicant.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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 knew the answer to the SF 86 was false. I accept that he was told that he could not discuss what went on at the secure site. Applicant served 20 years in the

military and retired as an E-7. It is difficult to accept that he 100% believed that the advice included lying on a security clearance application. He initially was untruthful to the background investigator. To his credit, he then divulged all the incidents that formed the basis for the SOR. There is no evidence that the investigator was aware of the incidents before Applicant revealed them. If he completely believed he was acting appropriately, there would have been no reason for him to correct the information. I find that all of the above mitigating conditions are at least partially applicable. Further discussion will be included under the whole person.

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 Guidelines E and K in my whole-person analysis.

Applicant's character evidence is exceptional. He honorably served 20 years in the military and deployed in support of the national defense. However, he violated security rules on three occasions. Security violations are one of the strongest possible reasons for denying or revoking access to classified information, as they raise serious questions about an applicant's suitability for access to classified information. Once it is established that an applicant has committed a security violation, he has a very heavy burden of demonstrating that he should be entrusted with classified information. Because security violations strike at the very heart of the industrial security program, an administrative judge must give any claims of reform and rehabilitation strict scrutiny. In many security clearance cases, applicants are denied a clearance for having an indicator of a risk that they might commit a security violation (e.g., alcohol abuse,

delinquent debts, or drug use). Security violation cases reveal more than simply an indicator of risk.¹³

Applicant also intentionally provided false information on his SF 86. One or more of the four incidents could be mitigated if considered in a piecemeal manner, which is not permitted.¹⁴ However, when considering the totality of the conduct, despite Applicant's strong character evidence, I have remaining concerns under both guidelines. Applicant has not met his heavy burden of demonstrating that it is clearly consistent with the national interest to continue his security clearance.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the personal conduct and handling protected information security concerns.

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 K:	Against Applicant
Subparagraphs 1.a-1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	For 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.

Edward W. Loughran
Administrative Judge

¹³ ISCR Case No. 03-26888 (App. Bd. Oct. 5, 2006).

¹⁴ See, e.g., ISCR Case No. 11-09219 (App. Bd. Mar. 31, 2014).