



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-07539

Appearances

For Government: Andrea Corrales, Esq., Department Counsel
For Applicant: Tod D. Stephens, Esq.

05/25/2018

Decision

LYNCH, Noreen A., Administrative Judge:

This case alleges security concerns raised under Guideline E (Personal Conduct). Eligibility for access to classified information is granted.

Statement of the Case

On November 5, 2016, in accordance with DoD Directive 5220.6, as amended (Directive), the Department of Defense issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guideline E.¹ The SOR further informed Applicant that, based on information available to the government, DoD adjudicators could not make the preliminary affirmative finding it is clearly consistent with the national interest to grant or continue Applicant's security clearance.

Applicant answered the SOR on January 17, 2017, and requested a hearing before an administrative judge. (Answer) The case was assigned to me on September 26, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on December 21, 2017, scheduling the hearing for March 22, 2018. The hearing was

¹ I considered the previous Adjudicative Guidelines, effective September 1, 2006, as well as the new Adjudicative Guidelines, effective June 8, 2017. My decision would be the same if the case was considered under the previous Adjudicative Guidelines, effective September 1, 2006.

convened as scheduled. The Government offered Exhibits (GE) 1 through 3. Applicant testified on his own behalf and called three witnesses. Applicant presented 26 documents, which I marked as Applicant's Exhibits (AE) A through Z. DOHA received the transcript of the hearing (Tr.) on March 29, 2018.

Findings of Fact

Applicant, age 53, is married and has no children. He received his undergraduate degree in 1987. He served 22 years in the U.S. Army as an intelligence officer, serving in a variety of assignments in the United States and abroad. He retired from the military with an honorable discharge in October 2009. (AE B) He obtained his Master's degree in 2017. (AE C) Since 2010, he has worked as a system engineer for his current employer. Applicant has held a security clearance throughout his military and civilian career. (GE 1) In 2013, his security clearance was suspended. (GE 3)

The SOR alleges that in April 2011, Applicant intentionally manipulated his physiology during a DoD polygraph examination. (SOR 1.a) It also alleges that Applicant deliberately provided false and misleading information concerning relevant facts during his interview to an authorized representative for the DoD on November 6, 2013. (SOR 1.b)

Applicant denied that he intentionally manipulated his physiology during the 2011 polygraph examination. (Tr. 21) He stated that he was nervous and stressed at the time. He admitted that he tried to control his breathing by breathing normally, as instructed and answer the questions to the best of his ability. Applicant stated that he had nothing to hide. Applicant referred to the fact that breathing normally is not an attempt to manipulate a polygraph. (Tr. 45) He denied ever saying that he manipulated his physiology in any polygraph. This is the opposite of what is reflected in a July 2014 memorandum from another government agency in its conclusion. (GE 3) However, Applicant was credible when he stated that he followed the examiner's instructions concerning his breathing. He also testified that there was nothing unusual about the polygraph in 2011. In fact, he testified that he thought everything was fine and he went back to work and did not hear any more about the 2011 polygraph until 2013. (Tr. 89) He was adamant that he never stated that he intentionally manipulated his physiology during his 2011 polygraph examination. I found Applicant's testimony and demeanor more credible than the summary clearance decision of 2013 from the other agency.

Applicant failed a December 2009 polygraph for another agency that due to a question about having ever committed a serious crime. After extensive questioning, Applicant acknowledged that he did not have a permit to carry a concealed handgun and had been doing so since 2004. He explained that he has an extensive gun collection and acknowledged that he knew the activity was illegal. (GE 3) Applicant's clearance for the other government agency was denied initially in 2010. Applicant appealed and the decision was reversed. (GE 3) The reversal was based on the fact that Applicant obtained the proper gun permits.

As to SOR allegation 1.b, Applicant admitted that he provided false and misleading information during an interview/polygraph with a DoD authorized representative on November 6, 2013. He did not initially answer a question about visiting a polygraph website affirmatively because he was embarrassed and concerned about his security clearance. (GE 2) He stated that he did look through a stack of documents concerning taking polygraphs and purchased materials from a website. He claims that later in the same polygraph session, he corrected his answer by stating that out of intellectual curiosity, he visited a polygraph website. (Answer to SOR) At the hearing, Applicant expressed remorse. He noted that he had gone to various websites and did background research after his wife shared some materials with him after he failed the 2009 polygraph. (Tr. 51) After repeated denials, he stated that he purchased this material from a website stating that he did not remember doing that or thinking that it was relevant in 2013. (GX 2) He stated that he has never lied or misled anyone else during his military and civilian career and that this was a one-time incident. (Tr. 57) He stated that he deeply regrets this action.

Applicant acknowledged his behavior and lapse in judgment, by not being forthcoming concerning viewing and purchasing materials from a website about polygraphs. He was open with his pastor, employer, and supervisors. He also had peers who testified at the hearing praising his career and dedication to his work. During his military and civilian career he has taken many polygraphs.

In March 2010, Applicant was referred for a psychological evaluation after he was initially denied his security clearance after the 2009 polygraph. He was evaluated over a period of time for his cognitive, emotional and behavioral functioning to determine if there were any psychological contraindications to holding a security clearance. He had a five-hour clinical interview, testing, and a review of all relevant documents concerning the 2009 polygraph and the 2010 Clearance Decision Statement.

Dr. S, a retired military Ph.D. wrote a 12-page evaluation report. (AX Z) He noted that in the 2009 polygraph, Applicant voluntarily disclosed the information concerning the lack of a permit to carry a registered firearm in one state when asked about a "serious crime." The report noted that Applicant has never had any other noncompliance with rules or regulations during his military or civilian career. He has no incidents of alcohol or drug abuse. He has never been arrested. Applicant successfully held a security clearance as an officer in the military for over 22 years in both domestic and foreign environments without any security concerns. (AE Z) In summary, the report concluded that Applicant has a long history of exemplary service to his country and his testing indicates that he is a consistent, reliable individual.

Character Evidence

Applicant submitted 15 sworn affidavits (letters of recommendation). (AE K-Y) He also provided his performance evaluations and evidence of a pay raise in 2013. (AE G and H) His employer is aware of the issues in the SOR. (Tr. 34) Applicant also informed his peers of his situation. (Tr. 60)

Applicant's three witnesses each attested to his character and each had knowledge of the SOR allegations. Applicant's program manager, who has held a security clearance for more than 40 years, has known Applicant for 20 years. He stated that he does not believe Applicant is a liar. (Tr. 108) He stated that Applicant is a man of honor and integrity. The witness concluded that he has the utmost trust in Applicant. (Tr. 109)

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 (AG) list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's national security eligibility.

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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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, "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14, requires the Government to 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 national security eligibility. 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 or sensitive information. Finally, as emphasized in Section 7 of EO 10865, "Any determination under this order adverse to an applicant shall be a determination 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

The concern under this guideline is set out in AG ¶ 15:

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 (b): deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority or other official government representative;

16 (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 that the person may not properly safeguard protected information; and

16 (e) personal conduct or 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.

Applicant admitted providing false and misleading information concerning visiting a polygraph website. He admitted that in 2013, he intentionally did not accurately answer questions about visiting a polygraph website or looking at and purchasing the materials. Later in the polygraph session he corrected his mistake and provided full and frank answers. Given these facts, I find substantial evidence of an intent by Applicant to omit, conceal, or falsify facts during the 2013 polygraph. Therefore, AG ¶ 16(b) is established.

Applicant provided credible information that he did not manipulate his breathing in the April 2011 polygraph. SOR 1.a is found in his favor.

The personal conduct security concerns raised in the SOR may be mitigated by any of the following potentially applicable factors in AG ¶ 17:

(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 advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. 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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

After considering the mitigating conditions outlined above, Applicant made a prompt good-faith effort to correct his falsification or concealment. He is sincerely remorseful about his action and it appears it is out of character for him. He is not vulnerable as all parties are aware of the incidents. The falsification occurred in 2013, and sufficient time has passed for purposes of mitigation. He submitted many affidavits from individuals who have known him and believe he is a trustworthy individual. His witnesses, who have taken polygraphs, trust him and at most believe this was a momentary lapse in judgment. Applicant has shown that similar lapses in judgment are unlikely to recur. Applicant served over 22 years with a clearance without incidents, plus nine years as a civilian contractor. Further, he took responsibility for his actions. He provided sufficient information in this record to demonstrate that he has met his burden of proof for his personal conduct.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the applicable guidelines, each of which is to be evaluated in the context of the whole person. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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.

I have incorporated my comments under Guideline E in my whole-person analysis, and I have considered the factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guideline E, and evaluating all the evidence in the context of the whole person, including his honorable military service, time of the incident, many letters of recommendation and testimony of witnesses, I conclude that Applicant mitigated the security concerns raised under the personal conduct guideline.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline E (Personal Conduct): FOR APPLICANT

Subparagraphs 1.a – 1.b: For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to continue Applicant's eligibility for access to classified information. Clearance is granted.

Noreen A. Lynch
Administrative Judge