



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 16-00466

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

08/10/2018

Decision

HEINTZELMAN, Caroline E., Administrative Judge:

This case involves security concerns raised under Guideline E (Personal Conduct). Applicant failed to mitigate those concerns raised by his conduct and falsification. National security eligibility for access to classified information is denied.

History of the Case

Applicant submitted security clearance applications (SCAs) on January 20, 2014, and May 23, 2007. On August 12, 2016, the Department of Defense (DOD) issued a Statement of Reasons (SOR) alleging security concerns under Guideline E. The DOD CAF acted 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 (2006 AG).

Applicant answered the SOR on August 30, 2016, and requested a hearing before an administrative judge. The hearing was held on May 23, 2018, I admitted Government's

Exhibits (GE) 1 through 6 and Applicant's Exhibit (AE) A,¹ without objection. Applicant testified. I received the completed transcript (TR) on June 8, 2018.

On June 8, 2017, the DOD implemented new AG (2017 AG).² Accordingly, I have applied the 2017 AG.³ However, I have also considered the 2006 AG, because they were in effect on the date the SOR was issued. My decision would have been the same under either version.

Findings of Fact

Applicant is 48 years old. Since January 2018, he has worked as an onsite engineer for his current employer. He requires a clearance for his employment. He has held a DOD security clearance for approximately 30 years. He has been married three times and has two children and two stepchildren.⁴ In 1988, he enlisted in the U.S. Navy after he graduated from high school and honorably served for approximately ten years. During his service, he was awarded three Navy Good Conduct Medals, a Navy Achievement Medal, and ten letters of commendation. (AE A)

SOR ¶ 1.a. Applicant was arrested in 2005, and charged with solicitation of a prostitute. He pled no contest and was given six months of probation. Using the internet, Applicant solicited a person he believed to be a prostitute. Applicant claimed he engaged in this behavior because he was immature and peer pressured by on-line friends to solicit a prostitute. (GE 3) He met the individual at a hotel, entered an elevator to go up to a room with her, and discussed the costs. After he exited the elevator, he was arrested, and informed that the woman was an undercover police officer.⁵ Applicant held a security clearance at the time of the arrest and conviction.

¹ On October 20, 2017, a discovery package was sent to Applicant at his permanent address in State A. I marked that as Hearing Exhibit (HE) 1, but did not admit it into evidence.

² On December 10, 2016, the Security Executive Agent issued Directive 4 (SEAD-4), establishing a "single, common adjudicative criteria for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position." (SEAD-4 ¶ B, *Purpose*). The SEAD-4 became effective on June 8, 2017 (SEAD-4 ¶ F, *Effective Date*). The National Security Adjudicative Guidelines (AG), which are found at Appendix A to SEAD-4, apply to determine eligibility for initial or continued access to classified national security information. (SEAD-4 ¶ C, *Applicability*).

³ ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003) (security clearance decisions must be based on current DOD policy and standards).

⁴ Applicant was married to his first wife from 1991 to 1994, they had one son. He was married to his second wife from 1995 to 1998, they had no children. He married his third wife in 2000, and she has two adult children. Applicant's daughter was born in 2015, due to an extra-marital relationship. (TR at 13, 46-51; GE 4 at 2)

⁵ Applicant was interviewed by a Government investigator in March 2008. This document was included in the October 2017 discovery package. He did not object to the admission of GE 3 at the hearing; however, during cross-examination Applicant claimed he never met the officer posing as a prostitute. He also stated that the detailed information in the March 2008 interview is not what he told the investigator. (TR at 30-31; GE 3)

Applicant disclosed this arrest in his May 2007 SCA. In his March 2008 interview, he claimed this was a one-time event and this sexual behavior would not recur. (Answer; TR at 22, 44; GE 2 at 24-25, 30-34; GE 3 at 1-2)

SOR ¶ 1.b. Applicant was arrested in 2011, and charged with solicitation of a prostitute. He pled no contest. At the hearing, Applicant stated he met the woman in a public place, they discussed the details of the transaction, and shortly thereafter he was arrested. Applicant held a security clearance at the time of the arrest and conviction. (TR at 22-23, 34- 41, 45; GE 5)

SOR ¶ 1.c. In 2012, Applicant left State A, where he lived with his wife, and moved to Country B for work. He then engaged in an extra-marital affair with a Country B national, and they had a child in 2015. Prior to leaving the United States, he planned to divorce his wife, but did not due to her medical issues. (TR at 26-30)

At the hearing, Applicant stated his wife became aware of the affair after he left Country B in 2015. However, she only became aware of his daughter during the fall of 2017, when she read discovery documents DOHA sent to their home in State A. When he was asked who knew about his daughter, Applicant disclosed that he told his son approximately two years ago,⁶ and he has told his best friend. However, he did not indicate that he has told any other family members, friends, or colleagues. (TR at 42, 45-48, 50-51)

SOR ¶ 1.d. Applicant did not disclose the 2011 arrest in his 2014 SCA due to a transmission error, but told his security manager. During a January 2016 interview with a government investigator, Applicant voluntarily disclosed the arrest and told the investigator that he never solicited a prostitute before his 2011 arrest, and he intended to never engage in this activity again. (TR at 18, 22-23; GE 1; GE 4) In his August 2017 Answer to the SOR, Applicant claimed he did not lie to the investigator, and he did not remember being asked if he solicited a prostitute before 2011. At the hearing, he stated that he did not completely read and review the interview before he adopted it in June 2016.⁷ (TR at 18-19, 24-28, 37-41; GE 4 at 5-8)

Applicant claimed the incidents alleged in SOR ¶¶ 1.a. and 1.b. were the only times he was involved in prostitution, and he had the misfortune of being arrested both times. (TR at 35-36) His current employer is not aware of the issues alleged in the SOR. (TR at 53)

In describing his solicitation of a prostitute in 2011, Applicant's description in his Answer and in his interview are markedly different. He told the investigator that he solicited, who he believed to be a prostitute, on-line through Craig's List. In his Answer,

⁶ Applicant was unsure whether he told his son about his daughter before or after the SOR was issued in August 2016. (TR at 51)

⁷ At the time that he adopted his statement, Applicant was working in Iraq, and he was concerned about responding to the DOHA Interrogatories in a timely manner. (TR at 24-25, 29, 60)

he claimed a friend referred a woman to him. (Answer; GE 4) At the hearing, he denied giving various incriminating details in his statements to Government investigators. His explanations and the changes in his statements contributed to his lack of credibility. Finally, his statements as to why he adopted his 2016 interview were not plausible.

Policies

“[N]o one has a ‘right’ to a security clearance.”⁸ 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.”⁹ The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.”¹⁰

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”¹¹ Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of

⁸ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

⁹ *Egan* at 527.

¹⁰ EO 10865 § 2.

¹¹ EO 10865 § 7.

establishing controverted facts alleged in the SOR.¹² “Substantial evidence” is “more than a scintilla but less than a preponderance.”¹³ The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability.¹⁴ Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts.¹⁵ An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government.¹⁶

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.”¹⁷ “[S]ecurity clearance determinations should err, if they must, on the side of denials.”¹⁸

Analysis

Guideline E: Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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.

(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

¹² See *Egan*, 484 U.S. at 531.

¹³ See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

¹⁴ ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

¹⁵ Directive ¶ E3.1.15.

¹⁶ ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

¹⁷ ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

¹⁸ *Egan*, 484 U.S. at 531; See also AG ¶ 2(b).

representatives in connection with a personnel security or trustworthiness determination.

The following disqualifying conditions under AG ¶ 16 are potentially applicable:

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, 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, 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 individual may not properly safeguard classified or sensitive information; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, or duress by a foreign intelligence entity or other individual or group.

Applicant was arrested twice for solicitation of a prostitute and he has a child from an extra-marital affair. He failed to be honest and forthright with a government investigator. His testimony and the documentary evidence establish AG ¶ 17(b), 17(c), and 17(e).

After the Government raised potentially disqualifying conditions, the burden shifted to Applicant to rebut or prove mitigation of the resulting security concerns. AG ¶ 18 describes conditions that could mitigate security concerns.

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(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; and

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

Applicant's two arrests, while holding a security clearance, demonstrate conduct involving questionable judgment and an unwillingness to comply with rules and

regulations. His Answer and testimony do not reflect an acceptance of responsibility for his behavior, instead he minimized his culpability.

Applicant did not disclose his 2005 arrest to the Government investigator during the 2016 interview. His explanations and denials are inconsistent, and demonstrate a lack of credibility, which is a significant concern and calls into doubt his trustworthiness. They have been ongoing from 2008 to 2016, and also during his hearing in 2018. His failure to fully disclose requested information was not an isolated event. Sufficient time has not passed since his hearing to mitigate the underlying concerns.

Applicant's failure to be forthright and open about the existence of his daughter to his wife, family, friends, and employer creates a vulnerability and further demonstrates questionable judgment and a lack of candor. Mitigation under AG ¶ 18(a), 180(c), and 18(e) is not established.

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 following 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 the guideline at issue in my whole-person analysis, and I have considered the factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under this guideline, and evaluating all the evidence in the context of the whole person, including the fact that Applicant has held a security clearance during the time of the allegations, Applicant has not mitigated the security concerns at issue. Accordingly, Applicant has not carried his burden of showing that it is clearly consistent with the interests of national security of the United States to grant him eligibility for access to classified information.

Formal Findings

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

Paragraph 1, Guideline E: AGAINST APPLICANT

Subparagraphs 1.a.-1.d.: Against Applicant

Conclusion

I conclude that it is not clearly consistent with the interests of national security of the United States to grant or continue Applicant's eligibility for access to classified information. Eligibility for access to classified information is denied.

CAROLINE E. HEINTZELMAN
Administrative Judge