



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



In the matter of:)
)
) ISCR Case No. 17-03673
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: Ryan Nerney, Esq.

08/28/2018

Decision

LOUGHRAN, Edward W., Administrative Judge:

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

Statement of the Case

On November 9, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E, personal conduct. Applicant responded to the SOR on January 5, 2018, and requested a hearing before an administrative judge.

The case was assigned to me on May 8, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 22, 2018, scheduling the hearing for July 11, 2018. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 7 were admitted in evidence without objection. Applicant testified, called three witnesses, and submitted Applicant's Exhibits (AE) A through G, which were admitted without objection. DOHA received the hearing transcript (Tr.) on July 19, 2018.

Findings of Fact

Applicant is a 30-year-old employee of a defense contractor. He has worked for his current employer since June 2016. He served in the U.S. military from 2007 until he was honorably discharged in 2016. He attended college for a period without earning a degree. He is divorced with one child.¹

Applicant was stationed overseas from 2011 until he was discharged in 2016. He married in 2012. He could have petitioned for the military to sponsor his wife to live in the foreign country. He did not seek command sponsorship because that would have added a year to his time overseas, and he was already accepted for a different billet that he did not want to lose.²

Without command sponsorship, Applicant's wife could only stay in the foreign country for up to six months. She lived with her father when she was in the United States, but from their wedding to mid-2014, she spent the majority of her time with Applicant in the foreign country. She "started coming out for four months and then she would go back for a month or a month and a half and then she would come back for another five months and then go back because of [foreign country's] immigration laws." Applicant received Overseas Housing Allowance (OHA) in his own right. Because his wife had an address in the United States, he also rated Family Separation Allowance (FSA) and Basic Allowance for Housing (BAH). The OHA was to pay for Applicant's housing in the foreign country; the BAH was to pay for his wife's housing in the United States; and FSA is designed to offset the incidental expenses that arise when a family is separated.³

Applicant submitted an Individual OHA Report, DD Form 2367, in 2012 shortly before he married and another DD Form 2367 about two weeks after he married. He certified that he would "immediately inform my commanding officer if any changes occur to the information I have provided."⁴ He did not receive FSA and BAH for about the first year of his marriage. He submitted a Statement to Substantiate Payment of FSA, DD Form 1561, in July 2013. The form was used to compute his entitlements to FSA and BAH for the previous year as well as FSA and BAH payments going forward. His wife was staying with him at the time, but he provided his wife's address in the United States.⁵ Above his signature on the form is the following:

I understand that I must notify my commanding officer immediately upon any change in dependency status and if my sole dependent or all of my

¹ Tr. at 50-54, 60, 66, 74; Applicant's response to SOR; GE 1, 2; AE A, D.

² Tr. at 53, 77-80; Applicant's response to SOR; GE 1.

³ Tr. at 77-80; GE 2.

⁴ The first DD Form 2367 was admitted as GE 7. The second DD Form 2367 was not admitted in evidence. The above facts were ascertained from other exhibits. See GE 3-5.

⁵ GE 2, 4, 6.

dependents move to or near this station or if my dependent(s) visit at or near this station for more than 90 continuous days (more than 30 continuous days in the case of FSA-T (Temp) or FSA-S (Ship)) while I am in receipt of FSA.⁶

Applicant was required to notify his commanding officer that his wife was visiting for more than 90 days because his FSA and BAH would stop while she was visiting him.⁷

Applicant was referred to a special court-martial for the following charges under the Uniform Code of Military Justice (UCMJ):

- Article 92: Dereliction of duty between September 2012 and May 2014 in that he willfully failed to inform his commanding officer of a change to his entitlement to a cost-of-living or overseas housing allowance for dependents residing elsewhere as he claimed on his DD Form 2367 in July 2012.
- Article 107: False official statement in July 2013 when he signed with intent to deceive an official document, to wit: DD Form 1561, which he knew to be false in that he reported that his dependent was residing at a U.S. address, when his dependent was residing overseas.
- Article 121; Larceny in that between September 2012 and May 2014, he stole more than \$500 from the U.S. Government.⁸

Applicant pleaded not guilty to all charges before a court-martial panel of officers and enlisted members, and he testified at his trial. He was found guilty of the Article 92 and 107 charges and not guilty of the Article 121 charge. He was sentenced to be reduced one pay grade to E-4 and confinement for 30 days. He served his sentence.⁹

Applicant asserted that he accepts responsibility for his conduct. He stated that never intended to receive money he did not rate. He stated that he did not read the part of the form that stated that he was required to notify his commanding officer if his wife visited for more than 90 days. He listed his wife's U.S. address on the form after consulting with a finance clerk, because the form was to get back pay when she was living in the United States. He asserted that "[a]t no point were [his] intentions malicious or trying to deceive the United States." He stated that he received a lump-sum payment of about \$50,000 in 2013, which was about \$25,000 more than he should have received even if his wife never visited him. He promptly reported the overpayment and paid about \$25,000 back to the U.S. Government. He further stated that all the money he received

⁶ GE 6.

⁷ Tr. at 55, 80-81.

⁸ GE 3.

⁹ Tr. at 54-60, 71; Applicant's response to SOR; GE 3, 4.

that he did not rate was paid back before the court-martial. He stated that the experience taught him a valuable lesson, and it will not be repeated.¹⁰

Applicant deployed to Iraq and Afghanistan while in the military. Three witnesses testified, and he submitted documents and letters attesting to his excellent job performance in the military and in his civilian job. He is praised for his honesty, work ethic, trustworthiness, moral character, leadership, dedication, responsibility, and integrity. He is recommended for a security clearance.¹¹

Policies

This case is adjudicated 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), which became effective on June 8, 2017.

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 national security eligibility will be resolved in favor of the national security."

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.

¹⁰ Tr. at 55-75; Applicant's response to SOR.

¹¹ Tr. at 14-49, 53; AE A-D, G.

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 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 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 conditions are 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;

(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, manipulation, or duress by a

foreign intelligence entity or other individual or group. Such conduct includes:

- (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

Applicant was convicted at a court-martial for false official statement and dereliction of duty. That conduct reflects questionable judgment and an unwillingness to comply with rules and regulations. It also created vulnerability to exploitation, manipulation, and duress. AG ¶ 16(e) is applicable. AG ¶ 16(c) is not perfectly applicable because Applicant's conduct could have been sufficient for an adverse determination under the criminal conduct guideline. However, the general concerns about questionable judgment and an unwillingness to comply with rules and regulations contained in AG ¶¶ 15 and 16(c) are established. Applicant's false official statement establishes AG ¶ 16(a).

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

Applicant asserted that he accepts responsibility for his conduct. But he also stated that he never intended to receive money he did not rate; he did not read the paragraph that told him that he was required to inform his commanding officer if his wife visited for more than 90 days; and he listed his wife's U.S. address on the Form 1561 after consulting with the finance clerk.

Applicant presumably provided similar testimony at his court-martial, yet he was convicted of two specific intent offenses: willful dereliction of duty and false official statement. Willfully "means intentionally. It refers to the doing of an act knowingly and purposely, specifically intending the natural and probable consequences of the act."¹² For false official statement, there must be knowledge that the statement was false, and it must be "made with the intent to deceive."¹³ I did not find Applicant's testimony credible. It is insufficient to overcome the conduct, which was established beyond a reasonable doubt at a court-martial.

I find the conduct continues to cast doubt on Applicant's current reliability, trustworthiness, and good judgment. I am unable to determine that similar behavior is unlikely to recur. There are no mitigating conditions sufficiently applicable to alleviate personal conduct security concerns.

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(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.

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 Guideline E in my whole-person analysis. I also considered Applicant's favorable

¹² See Manual for Courts-Martial United States (2012 Edition) at <https://www.marines.mil/Portals/59/Publications/MCM2012.pdf>.

¹³ See Manual for Courts-Martial United States (2012 Edition).

character evidence and honorable military service, including his deployments to Iraq and Afghanistan.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the personal conduct 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 E: | Against Applicant |
| Subparagraph 1.a: | Against Applicant |

Conclusion

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