



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

DUJARDIN, Christopher J.
SSN: XXX-XX-3492

WHS-C No. 17-00451

Appellant in Personal Appearance

Appearances

For Government: Andrea Corrales, Esq., Department Counsel
For Appellant: Eric A. Eisen, Esq.

AUG 2 5 2017

Decision

HARVEY, Mark, Administrative Judge:

Recommend that the Washington Headquarters Services (WHS) Clearance Appeal Board (CAB) overturn the action of the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) to revoke Appellant's eligibility for access to classified information and/or assignment to duties that have been designated national security sensitive (MOR). Appellant did not intentionally employ countermeasures during polygraph testing. Shortly after the polygraph he disclosed the reason he was anxious and upset during the polygraph. Personal conduct security concerns are mitigated.

Statement of the Case

On July 29, 2016, the DOD CAF issued a statement of reasons (SOR) to revoke Appellant's eligibility for access to classified information and/or occupancy of a sensitive position. The SOR set forth security concerns based on Guideline E (personal conduct). This action was taken under Executive Order (Exec. Or.) 12968, *Access to Classified Information*, dated August 4, 1995; DOD Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), which became effective on September 1, 2006.

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On October 4, 2016, Appellant provided a response to the MOI. On January 24, 2017, the DOD CAF issued the MOR. The MOR indicated personal conduct security concerns were not mitigated. The MOR informed Appellant that he could appeal the decision, in writing, directly to the PSAB or request a personal appearance before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On January 26, 2017, Appellant requested a personal appearance.

On February 1, 2017, DOHA received the case, and on April 7, 2017, the case was assigned to me. On May 4, 2017, his personal appearance was scheduled for May 8, 2017. Appellant's personal appearance was held as scheduled in Arlington, Virginia. Appellant provided four exhibits, which were admitted into evidence. (Transcript (Tr.) 10-11; AE A-AE D) On May 16, 2017, DOHA received a transcript of the personal appearance.

The MOR in this case was issued under DOD 5200.2-R and the September 1, 2006 AGs. DOD Manual 5200.02, *Procedures for the DOD Personnel Security Program (PSP)* became effective on April 3, 2017, and it incorporates and replaces DOD 5200.2-R. While this case was pending a decision, the DNI issued Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), which he made applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The new AGs supersede the September 1, 2006 AGs and are effective "for all covered individuals" on or after June 8, 2017. Accordingly, I have evaluated Appellant's security clearance eligibility under DOD Manual 5200.02 and the new AGs.¹

Findings of Fact

Appellant is 39-year-old GG-13 who has been responsible for acquisitions for the Pentagon Force Protection Agency since January 2016. (Tr. 17-18, 26) He has been on administrative leave since July 2016 because of the suspension of his access to classified information. (Tr. 22) In 1996, he graduated from high school. (Tr. 64) In 2000, he received a bachelor's degree in history, and he joined the Navy. (Tr. 28) He deployed to Japan, Bahrain, and Germany while he was in the Navy. (Tr. 65) He served as a surface warfare officer; he left active service as a lieutenant in 2006; and he received an honorable discharge. (Tr. 29, 64; file) His highest award is the Joint Service Commendation Medal. (Tr. 65)

From 2008 to 2016, Appellant worked in procurement for government contractors and DOD agencies. (Tr. 29-30) While employed at the Defense Intelligence Agency (DIA), he was deployed to Afghanistan for seven months. (Tr. 65) He was exposed to

¹ Application of DOD 5200.2-R and the September 1, 2006 AGs, which were in effect when the SOR was issued, would not change my decision in this case.

hostile enemy indirect fire on one occasion in Afghanistan. (Tr. 65-66) He has never married, and he does not have any children. (Tr. 64)

Personal Conduct

In 2008, Appellant received a polygraph while employed at the Naval Reconnaissance Office. (Tr. 30) He had to take three polygraphs before he passed because he is a very nervous person. (Tr. 30) He received a top secret clearance with access to sensitive compartmented information (SCI). (Tr. 40)

Appellant took three polygraphs when he was employed at the Defense Intelligence Agency (DIA). (Tr. 31) The first two polygraphs were conducted on October 10 and 16, 2013, and the results were inconclusive. (AE A) Appellant believed the results of the polygraphs in October 2013 were inconclusive because he is very nervous. (Tr. 31)

On December 12, 2014, during the third polygraph, the polygrapher asked Appellant whether he had ever falsified or forged an official document. (Tr. 32)² His abdominal muscles tightened when he answered, no, because he was thinking about his forgery of his mother's signature on a bad mid-term report card when he was in junior high school. (Tr. 32, 48) The polygrapher noticed the muscle contraction, and she told Appellant to stop doing that. (Tr. 32-33) Appellant agreed to not contract his muscles, and the polygraph resumed. (Tr. 34) When he again answered, no, to the question about forgery of official documents, his muscles contracted, and the polygrapher again told him to stop doing that. (Tr. 34, 48) She resumed the polygraph. When she came to the question about forgery of official documents, his abdominal muscles contracted the third time, and she terminated the polygraph test. (Tr. 35) He acknowledged he should have answered, yes, and disclosed the forgery of the report card to the polygrapher. (Tr. 48-49) Currently, he does not believe a report card is an official document. (Tr. 58)

On December 12, 2014, after the polygraph test, Appellant provided a statement to the polygrapher.³ Appellant said he reacted to the question about forgery of official records because he remembered the incident from his childhood and felt like he was

² The polygrapher asked the Series I through VI questions of the "Initial Counterintelligence-Scope Polygraph (CSP) Screening Examination," as the relevant questions during the polygraphs in October 2013. (DIA Polygraph Examination Report 13-300-104, Ex. 1, 2) The file does not indicate the control questions asked during the first and second polygraph tests. The file does not include the relevant or control polygraph questions for the third polygraph test. The question about forgery of official documents was not a relevant question as CSP examinations are limited to counterintelligence topics. See Department of Defense Instruction (DODI) 5210.91, *Polygraph and Credibility Assessment (PCA) Procedures*, (Aug. 12, 2010) Incorporating Change 1 (Effective Oct. 15, 2013) (DODI 5210.91), Encl. 4, para. 3a. The question about forgery of official documents is used as a control question to establish baseline physiological reactions for comparison with reactions to the relevant questions.

³ The sources for the facts in this paragraph and the next paragraph are Appellant's statements on December 12 and 17, 2014. (AE A) Parts of the copy of the December 17, 2014 statement is illegible. (AE A)

lying when he answered, no. In the statement, he admitted to “trying to alter [his] physiology during that question” because he “did not want the lie uncovered and the question made [him] nervous to the point where [he] wanted to get past the question.” He continued to contract his abdominal muscles even after the polygrapher asked him to stop because he was nervous. Initially, he said in the December 12, 2014 statement that he did not deliberately contract his abdominal muscles during the test, and then he crossed out his answer and changed it to an acknowledgement that he deliberately contracted his stomach muscles. During the polygrapher’s interrogation, Appellant told the polygrapher that the abdominal contractions were involuntary; however, she insisted they were voluntary. (Tr. 40, 52) Under her pressure, he agreed to put in his statement that the abdominal contractions were voluntary. (Tr. 40)

On December 17, 2014, Appellant provided an additional statement about the polygraph test. He admitted that he forged his mother’s signature on a report card, and he explained that the abdominal contraction was a “sign of relief” or a “motion of relief more than anything.”

Appellant’s contraction of his muscles during the question about forgery of official documents, if the contraction was not detected, would cause the polygrapher to believe his physiological responses to that question were elevated because muscle contractions increase physiological responses.⁴ His responses to this control question are compared to his responses to relevant questions, and it is less likely that false answers to relevant questions would be detected if physical countermeasures are employed. If the polygrapher detects abdominal contractions, then the polygrapher would conclude that he was employing a countermeasure to manipulate the polygraph test. See notes 1 and 3 *supra*.

At his personal appearance, Appellant said his abdominal contractions were involuntary. (Tr. 37) He said he told the polygrapher his movements were not deliberate. (Tr. 37) He indicated for him, the abdominal contractions were like a cough or sneeze, and he was unable to stop them from occurring. (Tr. 38) He does not want to take another polygraph test. (Tr. 66)

Since August 2016, Appellant has had more than 20 therapy sessions with Dr. Christine Healy-Johnson, Psy.D, who has treated him for anxiety.⁵ (Tr. 39, 55; AE B) Dr. Healy-Johnson concluded that Appellant occasionally suffers from panic attacks, which includes “heart palpitations, shortness of breath, sweating, and shaking. These symptoms cause involuntary movements. I believe that this was occurring during Mr. DuJardin’s polygraphy session in question.” (AE B) She opined that he falsely stated the

⁴ For general information about polygraph testing and countermeasures, see *Scientific Validity of Polygraph Testing: A Research Review and Evaluation*, A Technical Memorandum, Ch. 6, Factors Affecting Polygraph Examination Validity, Washington, D.C.: U.S. Congress, Office of Technology Assessment, OTA-TM-H-15 (Nov. 1983), Federation of American Scientists website, <https://fas.org/sqp/othergov/polygraph/ota/validity.html>. (HE 2)

⁵ In August 2015, a DOD psychologist recommended that Appellant seek counseling for anxiety. (Tr. 60)

abdominal movements were voluntary to "make the aggressive questioning stop." (AE B)

Character Evidence

Appellant's current supervisor described him as knowledgeable, professional, diligent, efficient, conscientious, and valuable to his office. (Tr. 18-20) The general sense of Appellant's five character statements from DOD coworkers is that he is a consummate contracting professional, who is conscientious, diligent, and trustworthy. (SOR response)

Policies

As set forth in the Adjudicative Guidelines, every recommended personnel security decision must be a fair and impartial overall common sense decision based on all available evidence, both favorable and unfavorable. The decision must be arrived at by applying the standard that the grant or continuance of a security clearance or access to classified information is clearly within the interests of national security.

The objective of the security clearance process is the fair-minded, common sense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of his or her acts, omissions, and motivations as well as various other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. No unfavorable personnel security clearance or access determination may be made without granting the individual concerned the procedural benefits set forth in the Regulation.

In all adjudications, the protection of the national security is the paramount consideration. Therefore, any doubt concerning personnel being considered for access to classified information is resolved in favor of national security. In reaching this decision, I have drawn only those conclusions that are reasonable and logical as well as based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Analysis

Personal Conduct

AG ¶ 15 describes the security concern involving 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

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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:

AG ¶ 15(a) describes one condition that could raise a security concern and may be disqualifying in this case:

(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.

On December 12, 2014, during his third polygraph, the polygrapher asked Appellant whether he had ever falsified or forged an official document. His abdominal muscles tightened when he answered, no, to that question because he was thinking about his forgery of his mother's signature on a bad mid-term report card when he was in junior high school. The polygrapher noticed and told Appellant to stop doing that. Appellant promised not to contract his muscles, and the polygraph resumed. When he again answered, no, to the question about forgery of official documents, his muscles contracted, and the polygrapher again told him to stop doing that. She resumed the polygraph, and when she came to the question about forgery of official documents, his abdominal muscles contracted the third time, and the polygrapher terminated the polygraph test.

Department of Defense Instruction (DODI) 5210.91, *Polygraph and Credibility Assessment (PCA) Procedures*, (Aug. 12, 2010) Incorporating Change 1 (Effective Oct. 15, 2013) (DODI 5210.91), Encl. 4, para. 9 describes the polygraph countermeasure program. Polygraphers receive extensive instruction on detection of countermeasures, and para. 9a(4) states, "All polygraph examinations shall include the use of a movement sensor device." This movement sensor device should have had no difficulty detecting an abdominal contraction. Polygraphers are supposed to look for "significantly-timed, recurring patterns that have a signature pattern." DODI 5210.91, Encl. 4, para. 9b(2). Appellant's abdominal contractions were easily detected. His reactions were to a control question, and not to a relevant question, and as such could have been to manipulate the polygraph by creating a high baseline reaction. See notes 1 and 3 *supra* and accompanying text. He indicated he was reacting to concern that he forged a junior high school report card. AG ¶ 15(a) applies.

AG ¶ 17 lists conditions that could mitigate personal conduct security concerns:

(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.

AG 17(c) applies. Appellant's contraction of his abdominal muscles during his polygraph on a control question is not a criminal offense. This lapse in judgment occurred more than two years ago; it was infrequent, as it only happened on one day; and it will not recur as Appellant does not wish to take a polygraph. When he took the polygraph on December 12, 2014, he occupied a DIA position, which entailed access to top secret and SCI. He does not currently occupy a position requiring a top secret or higher-level clearance, and revocation of his clearance for not completing a polygraph examination is not authorized.

DODI 5210.91, para. 4 states, "Personnel who refuse to take or are unable to successfully complete the polygraph examination may be denied access to information identified in [10 U.S.C. § 1564a]." Title 10 U.S.C. § 1564a(c) lists duties that may entail a prerequisite of successful completion of a polygraph examination. Title 10 U.S.C. § 1564a(c) states:

(c) *Covered types of duties.* The Secretary of Defense may provide, under standards established by the Secretary, that a person described in subsection (b) is subject to this section if that person's duties involve--

(1) access to information that--(A) has been classified at the level of top secret; or (B) is designated as being within a special access program under section 4.4(a) of Executive Order No. 12958 [former 50 USCS § 435 note] (or a successor Executive order); or

(2) assistance in an intelligence or military mission in a case in which the unauthorized disclosure or manipulation of information, as determined under standards established by the Secretary of Defense, could reasonably be expected to--(A) jeopardize human life or safety; (B) result in the loss of unique or uniquely productive intelligence sources or methods vital to United States security; or (C) compromise technologies, operational plans, or security procedures vital to the strategic advantage of the United States and its allies.

Appellant's contraction of his abdominal muscles during a polygraph on December 12, 2014, does not cast doubt on his current reliability, trustworthiness, or good judgment. Personal conduct security concerns, pertaining to his contraction of his abdominal muscles and failure to complete the polygraph are mitigated; however, the PSAB may deny his access to top secret and SCI information based on the application of DODI 5210.91, para. 4.

Whole Person Analysis

In all adjudications, the protection of our national security is the paramount concern. A careful weighing of a number of variables in considering the "whole-person" concept is required, including the totality of his or her acts, omissions, and motivations. Each case is decided on its own merits, taking into consideration all relevant circumstances and applying sound judgment, mature thinking, and careful analysis. Under the whole-person concept, 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), "[t]he ultimate determination" of whether to grant a security clearance "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under

Guideline E are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Appellant is 39-year-old GG-13 who has been responsible for acquisitions for the Pentagon Force Protection Agency since January 2016. In 2000, he received a bachelor's degree in history, and he joined the Navy. He deployed to Japan, Bahrain, and Germany while he was in the Navy. He left active service as a lieutenant in 2006, and he received an honorable discharge. His highest award is the Joint Service Commendation Medal. From 2008 to 2016, Appellant worked for government contractors and DOD agencies in procurement. While employed at the DIA, he was deployed to Afghanistan for seven months. He was exposed to hostile enemy indirect fire on one occasion in Afghanistan. Appellant's current supervisor described him as knowledgeable, professional, diligent, efficient, conscientious, and valuable to his office. The general sense of Appellant's five character statements from DOD coworkers is that he is a consummate contracting professional, who is conscientious, diligent, and trustworthy.

On December 12, 2014, during his third polygraph, Appellant was asked three times whether he had ever falsified or forged an official document. His abdominal muscles tightened each time when he answered, no, because he was thinking about his forgery of his mother's signature on a bad mid-term report card when he was in junior high school. He was accused of using countermeasures to attempt to pass the polygraph. This lapse in judgment occurred on one occasion more than two years ago, and it will not recur as Appellant does not wish to take a polygraph. He does not occupy a position authorizing revocation of his clearance for not completing a polygraph examination. There is no Guideline E impediment to reinstating his access to classified information and sensitive information.

Having considered the "whole person" concept in evaluating Appellant's risk and vulnerability in protecting national security, I find Appellant has sufficiently mitigated the personal conduct security concerns to warrant reinstatement of his access to classified information and sensitive information. However, as indicated in DODI 5210.91, para. 4, SCI access should not be reinstated because he did not successfully complete a polygraph examination.

Formal Findings

PERSONAL CONDUCT: For Appellant

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Conclusion

In light of all of the information in this case, it is clearly consistent with the interests of national security to reinstate Appellant's eligibility for access to classified and sensitive information. Accordingly, I recommend that the WHS CAB overturn the MOR.


MARK HARVEY
Administrative Judge

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