



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



In the matter of:)
)
) ISCR Case No. 19-02478
)
Applicant for Security Clearance)

Appearances

For Government: Kelly Folks, Esq., Department Counsel
For Applicant: Paul Bartels, Esq.

01/06/2021

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 4, 2019, 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 December 9, 2019, and requested a hearing before an administrative judge. Department Counsel amended the SOR by adding an additional Guideline E allegation on February 21, 2020. Applicant responded to the amended SOR on April 1, 2020. The case was assigned to me on November 18, 2020.

The hearing was convened as scheduled on December 7, 2020. Government Exhibits (GE) 1 through 8 were admitted in evidence without objection. Applicant testified and submitted Applicant’s Exhibits (AE) A through P, which were admitted without objection.

Findings of Fact

Applicant is a 36-year-old employee of a defense contractor. He has worked for his current employer since June 2018. He seeks to retain a security clearance, which he has held for about ten years. He earned a bachelor's degree in 2010 and a master's degree in 2014. He is married with four children. (Transcript (Tr.) at 14, 20-23, 52; Applicant's response to SOR; GE 1)

Applicant went to a department store on July 12, 2017. He taped a barcode of a \$158 piece of sporting equipment to a \$326 piece of equipment. The department store security officer saw him do it, and took him into custody after Applicant purchased the equipment at the lower price. He was arrested and charged with larceny by false pretenses. He pleaded guilty to the lesser charge of disorderly conduct. He performed community service, paid court costs, and the charge was dismissed. (Tr. at 25, 28-30; Applicant's response to SOR; GE 1, 2, 4; AE D)

Applicant stated that he did not go into the department store intending to steal anything. He was in a hurry after work to buy a present for his son who was having a birthday party that evening. He initially testified his son's birthday was July 12th, the day he was arrested. When confronted with the information from his Questionnaire for National Security Positions (SF 86), he admitted that his son's actual birthday was about four months before the date Applicant was arrested. He stated his family took a vacation during his son's actual birthday, and they delayed having the party. He stated that he got confused because it is difficult to memorize his children's birthdays. He also denied that he testified that he was arrested on his son's birthday, even though he testified to that fact just minutes previously. (Tr. at 100-107)

Applicant stated that there was no price tag on the item he wanted, so he took the price tag from a similar item that he thought was about the same price. He admitted that he knew the item purchased was more expensive, but he did not know how much more expensive. He stated that he thought it cost between about \$150 and \$250. He previously worked for the department store chain, and he stated that it was not uncommon for there to be discrepancies between the price tag and what is rung up at the register. He testified that he deeply regrets his actions and is remorseful, but he does not believe what he did was stealing because he did not intend to steal from the department store and he offered to pay for the item. (Tr. at 25-30, 69-76, 100-107; GE 1)

Applicant worked as an electronics engineer for a branch of the U.S. military on a military installation from October 2013 until he went on paid administrative leave (non-duty pay status) in January 2018. He had some difficulties with a new supervisor, and in September 2017, he was required to complete a software training program offered by the DOD. His supervisor noted the training was ordered "because [Applicant's] performance and contribution were severely inadequate and making it impossible for him to perform duties required from his position as a [pay rate] Electronics Engineer." Applicant signed an agreement in September 2017 that the work for the training program would be his own, and that he was not to copy work from other employees or

the Internet. His supervisor met with him in October 2017 and discussed the intent of the program and the importance of completing the program tasks. (Tr. at 21-22, 30-32; GE 1, 3, 5)

Applicant submitted a training-program project for peer review in December 2017. The reviewer did a search of the Internet and found that the project had been copied from sources on the Internet with minor changes to the code. Applicant submitted a reworked project within a few days. His supervisor found that the code Applicant submitted was copied from another employee's submission with minor alterations. (GE 5)

Applicant testified that he did not think that he did anything wrong because code is rarely written from scratch. It usually is modified from a template or other code. He stated that he changed about 20% to 25% of the code, which is substantial. He also stated that the course was conducted in a team environment, and the other student voluntarily gave him her code. He admitted that in his Merit Systems Protection Board (MSPB) hearing (addressed below), the other student testified that she did not give him her code. He stated that he thought she was scared and did not want to get involved in his problems. (Tr. at 31-37, 77-85, 96-99)

Applicant's supervisor discussed the incident with Applicant on December 19, 2017. The discussion was documented in a form for his employee work folder and signed by the supervisor and Applicant. It was noted on the form that the matter was not resolved. (GE 5)

Applicant was issued a notice of proposed removal in late January 2018. It stated: "This is a notice of proposed action to remove you from [military branch] employment to be effective not later than 30 calendar days after you receive this notice." The reason for the proposed action was deliberate misrepresentation, based upon the two incidents of copying code, as addressed above. He was placed on non-duty pay status. It was noted that Applicant had no past disciplinary record, and he received a successful rating on his last performance evaluation. Disciplinary information on three other unnamed employees was included for comparison purposes. Applicant through counsel (different lawyer and law firm than his attorney at his security clearance hearing) responded to the notice of proposed removal in mid-February 2018. (Applicant's response to SOR; GE 5, 6; AE O)

Applicant was issued a notice of decision to remove on April 20, 2018. The notice indicated that the reasons stated in the notice of proposed removal were fully supported by the evidence and warranted his removal from employment with the military branch "effective 4/20/2018." Applicant was informed that he could challenge the removal through a grievance or if the removal becomes effective through an appeal to the MSPB. There were additional options if he believed the action was taken in reprisal for whistleblowing or if it was based on unlawful discrimination. If he believed it was based on unlawful discrimination, he could either appeal to the MSPB or file an Equal Employment Opportunity (EEO) complaint, but not both. He was also notified that his placement in a non-duty pay status was cancelled effective April 20, 2018. He continued

to receive Leave and Earnings Statements (LES) until at least April 2019, stating that he was not receiving pay, but apparently still employed by the military branch. (Tr. at 38-39, 48-49; Applicant's response to SOR; GE 7; AE A-C)

Applicant filed an appeal to the MSPB. He raised unlawful discrimination, based on his race, color, national origin, and retaliation for prior protected activity (EEO complaint). He had a hearing before an MSPB administrative judge in September 2018. The administrative judge issued the decision on October 3, 2018, affirming the military branch's (agency) actions. The administrative judge found that "the agency proved both specifications of its charge by preponderant evidence," and that "the agency proved [Applicant] knowingly provided incorrect information with the intention of deceiving the agency when he submitted the code hoping to pass it off as his own as alleged in both specifications." (Tr. at 31; GE 8)

Applicant through his attorney petitioned the MSPB to review and reverse the administrative judge's decision. He sought "reversal of the Agency's decision in its entirety, [and] reinstatement of [Applicant] with all applicable backpay, attorney's fees, and all associated costs." The final decision of the MSPB is still pending. (Applicant's response to SOR; GE 8)

Applicant submitted an SF 86 on October 1, 2018. Under Section 13A – Employment Activities, he reported his dates of employment with the military branch as "From (Month/Year) 10/2013 to (Month/Year) 05/2018 (Estimated)." He wrote the reason for leaving the job was: "Looking for better career prospects, professional growth and work opportunities."

Applicant answered "No" to the following question:

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

Applicant also answered "No" to the following question.

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?

Applicant was interviewed for his background investigation in April 2019. He told the investigator that he voluntarily resigned his position with the military branch after being placed on paid leave for three months pending an internal investigation into

plagiarizing the intellectual property of another employee. He stated that he filed an EEO complaint, but the complaint was withdrawn when he voluntarily resigned in April 2018. He was adamant that he was never officially terminated. He stated that his case was being appealed before the MSPB because he wanted all allegations of plagiarizing and anything regarding a possible termination removed from his permanent government employment record. His discussions about his arrest and copying code were consistent with his testimony at his hearing. (GE 2)

Applicant denied intentionally falsifying the SF 86. He stated that he was told by the attorney handling his MSPB appeal that he was still employed by the military branch pending the appeal. He did not have a good explanation for why he listed that his employment with the military branch ended in May 2018 if he thought that he was still employed by the military. He stated that was a mistake. He testified that "Looking for better career prospects, professional growth and work opportunities" was accurate because he was already looking for a different job. He also admitted that he did not report everything on the SF 86 because he "was afraid that [defense contractor employer] would use that against [him] to deny [him] of [his] job." (Tr. at 37-52, 86-90; Applicant's response to SOR; AE E-H)

Applicant testified that he had never had a security violation. He testified he misinterpreted the question about whether he had "received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as a violation of security policy," as being limited to security incidents. He also stated that he answered "no" to that question because he was told that if he wins his MSPB case, his employment record would be wiped clean. (Tr. at 51-57)

Applicant admitted that he told the background investigator during his interview that he voluntarily resigned his position with the military after being placed on paid leave for three months pending an internal investigation into plagiarizing the intellectual property of another employee. He testified that was a truthful answer because he received a job offer from the defense contractor in February 2018, before the notice of decision to remove was issued in April 2018. He also stated that he thought he would win his MSPB appeal, and that he would "resign" from working at the group he was with at the military branch and seek a transfer to another group, or he would completely resign from working for the military branch. (Tr. at 57-66, 91-92)

Applicant volunteers in his community, and he is active in his church. He submitted documents and letters attesting to his excellent job performance and sound moral character. He is praised for his dedication, trustworthiness, humility, perseverance, loyalty, dependability, work ethic, diligence, and honesty. (Tr. at 24-25; AE I-N, P)

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.

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;

(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;

(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 individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or government protected information;

(2) any disruptive, violent, or other inappropriate behavior;

(3) a pattern of dishonesty or rule violations;

(4) evidence of significant misuse of Government or other employer's time or resources; 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 essentially denied having any wrongful intent on any of the SOR allegations. He stated that he did not intend to steal from the department store; he thought he was within the parameters of the training program when he copied code from sources on the Internet and from another employee; and he denied intentionally falsifying the SF 86, essentially because he was or he thought he was still technically employed by the military.

I did not find Applicant credible. His explanations were rambling, inconsistent, contradictory, and implausible. Of note are the following:

- Applicant's statement that he was arrested on his son's birthday, and then his denial that he testified to that fact;
- His statement that the other student in the training program voluntarily gave him her code was contradicted by her testimony at the MSPB hearing;
- His lack of a good explanation for why he listed that his employment with the military branch ended in May 2018 if he thought that he was still employed by the military branch;
- His insistence that he gave an accurate answer on the SF 86 when he wrote that the reason for leaving the job was: "Looking for better career prospects, professional growth and work opportunities";
- His testimony that he misinterpreted the question about whether he had "received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as a violation of security policy," as being limited to security incidents. That explanation is inconsistent

with his additional testimony that he answered “no” to that question because he was told that if he wins his MSPB case, his employment record would be wiped clean; and

- His admission that he did not report everything on the SF 86 because he “was afraid that [defense contractor employer] would use that against [him] to deny [him] of [his] job.”

Applicant knowingly provided incorrect information with the intention of deceiving the military branch when he submitted the code hoping to pass it off as his own. He committed criminal conduct resulting in his arrest for larceny by false pretenses. Those incidents reflect questionable judgment and an unwillingness to comply with rules and regulations. His conduct also created vulnerability to exploitation, manipulation, and duress. AG ¶ 16(e) is applicable. AG ¶ 16(d) is applicable as it relates to the workplace misconduct. AG ¶ 16(c) is not perfectly applicable to the allegation that he was arrested for larceny, because that conduct is 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.

The evidence is inconclusive as to whether Applicant was completely terminated from his military employment in April 2018 or if he was still technically employed in a non-pay status pending the MSPB appeal. SOR ¶ 1.e is concluded for Applicant.

The evidence is conclusive that Applicant did not “resign” from his employment; he did not leave the job because he was “Looking for better career prospects, professional growth and work opportunities”; and he should have reported that he received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace. I find that he intentionally provided false information on the SF 86 and during his background interview. AG ¶ 16(a) is applicable to SOR ¶¶ 1.d and 1.h, and AG ¶ 16(b) is applicable to SOR ¶ 1.g.

SOR ¶¶ 1.a and 1.f relate to Applicant’s suspensions in 2015 and 2016. Those allegations were based on a misreading of the evidence. Applicant was not suspended in 2015 or 2016. SOR ¶¶ 1.a and 1.f are 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 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; and

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

Applicant stole from a department store, plagiarized work, and lied on an SF 86 and to a background investigator. He did not accept responsibility for his conduct. Having determined that he intentionally provided false information on the SF 86 and during his background interview, I have also determined that his explanations that he did not intentionally provide false information were also false. It would be inconsistent to find his conduct mitigated.¹ There are no applicable mitigating conditions, and none of the conduct is mitigated.

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 See ISCR Case 03-22819 at 4 (App. Bd. Mar. 20, 2006), in which the Appeal Board reversed the Administrative Judge's decision to grant Applicant's security clearance:

Once the Administrative Judge found that Applicant deliberately falsified a security clearance application in September 2002, the Judge could not render a favorable security clearance decision without articulating a rational basis for why it would be clearly consistent with the national interest to grant or continue a security clearance for Applicant despite the falsification. Here, the Judge gives reasons as to why he considers the falsification mitigated under a "whole person" analysis, namely that Applicant has matured, has held a position of responsibility, recognizes how important it is to be candid in relation to matters relating to her security clearance, and has changed her behavior so that there is little likelihood of recurrence. However, the Judge's conclusion runs contrary to the Judge's rejection of Applicant's explanations for the security clearance application falsification. At the hearing (after earlier admitting the falsification in her March 2003 written statement to a security investigator), Applicant testified that she had not intentionally falsified her application. Given the Judge's rejection of this explanation as not being credible, it follows that the Judge could not have concluded Applicant now recognizes the importance of candor and has changed her behavior.

(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 have incorporated my comments under Guideline E in my whole-person analysis. I also considered Applicant's character evidence, but the favorable information is insufficient to overcome his dishonesty, questionable judgment, and unwillingness to comply with laws, rules, and regulations.

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:	For Applicant
Subparagraphs 1.b-1.d:	Against Applicant
Subparagraphs 1.e-1.f:	For Applicant
Subparagraphs 1.g-1.h:	Against Applicant

Conclusion

It is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge