DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 16-03037
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Brian Olmos, Esq., Department Counsel
For Applicant: *Pro se*

06/26/2019

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Decision

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HEINY, Claude R., Administrative Judge:

Applicant contests the Department of Defense's (DoD) intent to deny his eligibility for a security clearance to work in the defense industry. The Statement of Reason (SOR) alleges Applicant provided false answers on forms applying for a security clearance. The issue is whether his 2011 termination, his two responses on a 2014 Electronic Questionnaires for Investigations Processing (e-QIP), and his single response on a 2003 Security Clearance Application, Standard Form (SF) 86 raise concerns about his fitness to hold a security clearance. He has mitigated the personal conduct security concerns. Applicant's eligibility for access to classified information is granted.

Statement of the Case

On October 5, 2017, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued an SOR to Applicant, detailing the security concerns under Guideline E, personal conduct, and explaining why it was unable to find it clearly consistent with the national interest to grant or continue security clearance eligibility for him.

The DoD CAF took the action under Executive Order 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 for Determining Eligibility for Access to Classified Information* (AG) effective within the DoD on June 8, 2017.

On October 24, 2017, Applicant answered the SOR allegations and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On November 26, 2018, DOHA issued a Notice of Hearing scheduling a hearing that was conducted on December 12, 2018.

Eleven Government exhibits (Ex. 1-11) and two Applicant exhibits (Ex. A and B) were admitted into evidence without objection. Documents submitted by Applicant as attachments to his SOR answer were also considered. Applicant testified, as reflected in a transcript (Tr.) received on January 2, 2019. I held the record open after the hearing for Applicant to submit additional documents. On January 23, 2019, Applicant submitted a November 2017 e-QIP that was admitted without objection as Ex. C.

Findings of Fact

In Applicant's answer to the SOR, he admitted he left employment with a company over educational requirements and admitted he incorrectly answered questions on his e-QIP, but denied he intentionally falsified his answers. He indicated his failures to disclose information was due to misunderstandings and a false impression of his circumstances. At the hearing, he admitted he completed the e-QIP faster that he should have. (Tr. 80) After a thorough review of the pleadings and exhibits, I make the following findings of fact:

Applicant is a 46-year-old senior engineer who has worked for a defense contractor since November 2017. (Ex. 2) From June 1991 to June 1997, he honorably served in the U.S. Army working on aircraft electrical and armament systems. (Tr. 23) While in the Army, he attended a six-month electronic aviation course. (Tr. 34) He married in November 2017 and has no children. (Tr. 24)

Applicant testified that in 1991, at age 18, five months after joining the Army, he attended a party, met, and spent the night with a female Marine. The next day, he was informed he was being charged with rape. Applicant later learned the woman was not fully aware of the seriousness of the charges and decided to drop the charges. (Tr. 57)

Although charged by civil authorities with rape, the charges were *nolle prosequi*ed. No disciplinary action was taken by the civilian or military authorities after the allegations were dropped. (Tr. 25) Applicant appeared in court with his drill sergeant. The district attorney said the charges had been dropped and there was nothing to prosecute. Applicant's court appearance lasted five minutes. He was not asked any questions during the court proceeding nor was he informed the charge was a felony. (Tr. 27)

When Applicant completed his August 2004 SF 86, he answered "no" when asked if he had ever been charged with or convicted of a felony offense. (Ex. 1) He answered

as he did because, "I assumed that . . . somebody made a false allegation and it went to court and nothing happened." (Ex. 3, Tr. 40) He now understands that similar questions on security forms requires an affirmative answer. (Tr. 41) He admits he went through the questionnaire faster than he should have due in part to his work load. (Tr. 44, Tr. 80) When he completed his November 2017 e-QIP, he indicated he was "accused of rape, but charges were dropped by accuser and the state said there was no evidence to file charges or continue the case."` (Ex. C)

Applicant had two Enhanced Subject Interviews. One in December 2014 focused on his 1991 arrest and the other, in June 2016, focused on his 2011 termination. In his 2014 interview, Applicant explained that he had been charged with rape in 1991, was taken to the police station, and then released. (Ex. 3) He said he went to court with this drill sergeant. The charges were dropped and no further action was taken. (Ex. 3) He said he did not list the incident because the charges were dropped and he was told there would be no record of the incident because the charges were dropped. (Ex. 3)

Applicant asserted the first chance he had to correct the information was during his December 2014 interview. (Tr. 80) During the interview, he corrected and thoroughly explained his actions. At the hearing, he asserted it was never his intent to deceive the Government, and he has done what he could to remedy the mistake (Tr. 80)

After leaving the military, Applicant was working at an aircraft company when fellow technicians told him that military courses would be accepted for college credits at a university. In 1996, he enrolled at the university. (Tr. 30) In February 2002, he graduated from the university after completing a series of correspondence courses over a six-year period. (Ex. 7, Tr. 29, 30) The correspondence course were received in the mail and completed. This was prior to correspondence courses being routinely done through the internet. (Tr. 72) The correspondence courses he took with the university were similar in nature to the correspondence courses he took while he was in the military. (Ex. 7, Tr. 31) Some of the 24 courses listed on his university transcript were courses taken while he was on active duty. He was unaware of any accreditation problem with the university until informed by his employer. (Tr. 37)

In 2006, Applicant started working at company X. (Tr. 41) While working at the company, the company had enough confidence in him to promote him to a management position. (Tr. 68) In July 2011, after being employed for six years, he was terminated by his employer. The company's stated reason for termination was he had stated he had an Electrical Engineering (Bachelors) Degree from "X' University on his employment application. (Ex. 8) The company had learned the university was not licensed or accredited. He was unaware of any accreditation problems with the university until informed by his employer. (Tr. 37)

The company stated:

> It has come to our attention that you do not have a Bachelor's Degree from a licensed and authorized educational institution. You indicated on your employment application that you had an Electrical Engineering degree from

> [X] University that was acquired after completing 4 years of study. [X] University is neither licensed nor accredited. A BS in Engineering is a requirement for the Engineer V position that you were hired into at [company]. Because you do not meet the requirements of your positon, your employment with [company] Corporation is terminated effective today, July 27, 2011. (Ex. 9)

On his October 2014 e-QIP, Applicant listed the reason for leaving as "contract ended" and did not list he had been terminated. (Ex. 2, Tr. 47) In July 2011, the contract he was working on was coming to an end. He believes the reason given by the company, *i.e.* his educational degree, was simply an excuse and not the real reason for his termination. While working on a government contract he told his company he did not need three employees to work full time on the contract. Company management then told him he was not a "company man" and it was time for him to leave the company. (Tr. 48, 68) He gave up his management position with the company when his support of the government conflicted with the company's views. (Tr. 48) The company eventually lost the contract he was working on. (Tr. 68)

In Applicant's June 2016 enhanced subject interview, he explained his 2011 termination. He admitted he had been "let go" from his former employer. He told the investigator that the company terminated him because his degree was not from an accredited school. (Ex. 4) On his November 2017 e-QIP, he listed he had been terminated from X company. (Ex. C, Tr. 49) He indicated he had been fired in 2011 and stated the reason as "discrepancy with my degree. I filled out a 'request for transcript' for as part of my hiring packet. It wasn't until almost six years later I was notified there was a problems with my degree." (Ex. C)

When Applicant was told by the company that the university he attended was not an accredited university, he conducted an on-line computer search of the university and received conflicting information. (Ex. 4) So he did not know what to believe. Because of his confusion, he listed the university on his application for his next job. The job lasted until October 2014, at which time he began employment with his current employer. (Ex. 2). While employed at his next job, a member of management told him his degree was not considered valid; however, the employer would substituted his years of experience for any educational requirement. (Ex. 4) He did not list the university on his 2014 e-QIP or on his 2017 e-QIP. (Ex. 2, Ex. 4, Ex. C, Tr. 49)

Following Applicant's 2011 termination, he received unemployment compensation. (Tr. 46) He testified that he believed if the termination had been justified he would not have been eligible to receive unemployment benefits. (Tr. 46) However, his former employer did challenged his receiving unemployment compensation. Applicant had moved to another state, and the out-of-state unemployment office sent notices of hearings to his previous address. (Ex. 3) He received the notices after the hearing dates had passed. After two or three unsuccessfully attempted to reschedule the hearings, he reached a repayment agreement to repay benefits received. (Ex. 3, Tr. 74)

In 2014, Applicant started a master's program with [State] Institute of Technology and completed his first class. (Tr. 72) However he did not have time to continue the program. He believes that if there was a problem with his X University's degree it would have been brought to his attention when he enrolled in the master's program, as completion of a bachelor's degree is a prerequisite to enrollment in a master's degree. (Tr. 72)

In December 2016, Applicant started a job with a different company. (Ex. A) The company stopped the process for his security clearance. He was informed the processing "was stopped on this case due to the fact you are not in a position that requires a security clearance." (Tr. 2)

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 list potentially disqualifying conditions and mitigating conditions, which must be considered 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, these guidelines are applied 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(a), the adjudication process is an examination of a sufficient period and a careful weight of a number of variables of an individual's life to make an affirmative determination that the individual is an acceptable security risk. This is known as the whole-person concept.

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." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

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 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 Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination of 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 concerns about personal conduct are set forth in AG ¶ 15 of the Adjudicative Guidelines (AG):

> 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.

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 national security eligibility or trustworthiness, or award fiduciary responsibilities; and
>
> (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government, when applying for a security clearance, is a security concern. But every inaccurate statement is not a falsification. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully. Applicant denies that he intentionally lied to deceive the Government. He said he made a mistake by going through the application faster than he should have and based on faulty reasoning.

A judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. If determined to be a deliberate omission, concealment,

or falsification, the burden of persuasion shifts to the applicant to present evidence to explain the omission.

Applicant failed to list his 1991 arrest on his 2003 SF 86 and failed to list his 1991 arrest and 2011 termination when he completed his 2014 e-QIP. In 1991, he went to a party and spent the night with a female Marine. The next day he was charged with rape. He provided a plausible explanation to avert the reasonable inference that he falsified his SF 86 by not listing this arrest. He answered as he did because, first, he did not know the charge was a felony and second, he assumed that other individual had made a false allegation. When he went to court, the charges were dropped by the accuser, and the state attorney said there was no evidence to file charges or continue the case. He assumed the matter was finished. He now understands that similar questions on security forms requires an affirmative answer, and he has answered affirmatively on a subsequent e-QIP.

AG ¶ 16(a) is not established when omissions are due to misunderstanding, inadvertent mistake, or other cause that could negate the willful intent. Applicant did not list his 2011 termination, because he believes the company was using his lack of education as an excuse to fire someone who was not a "company man" when he refused to add unnecessary personnel to a government contract. He was with the company almost six years before the educational problem arose. On his employment application he listed the university he attended. He had a duty to list his education on the application. He was not required to vouch for the accreditation of the university.

AG ¶ 17. Conditions that could mitigate security concerns include:

> (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
>
> (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.

During his 2014 interview, Applicant volunteered details of his 1991 arrest and corrected his previous mistake by listing it when he completed his 2017 e-QIP. In his 2016 interview he explained his 2011 termination. In his 2017 e-QIP and interviews, he fully explained both issues. The December 2014 subject interview states he volunteered the information about his arrest. He made good-faith efforts to correct the mistakes on his October 2014 e-QIP concerning his 1991 arrest. It was during his 2016 interview, when

he discussed his 2011 termination. He asserts these interviews were his first opportunity he had to correct the omissions on his 2003 SF 86 and 2014 e-QIP. As previously stated, Applicant did not list the 1991 arrest because he did not think it was a felony and because he believes a false allegation had been made against him.

AG ¶ 17(c) provides mitigation where "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. The conduct is infrequent and it has been more than 17 years since his arrest and four years since his termination. His arrest was in 1991, his termination was in 2011, he executed his SF 86 in 2003, and executed the e-QIP in question in 2014. The conduct in limited to a single question on his 2003 SF 86 and two questions on the 2014 e-QIP, which makes the conduct infrequent. He has fully disclosed and explained what happened regarding each incident. The mitigating conditions in AG ¶ 17(c) applies.

Although Applicant has not received counseling, he has fully explained his 1991 arrest and his 2011 termination, and has listed each on his 2017 e-QIP. Thus, his conduct is unlikely to recur. The mitigating conditions in AG ¶ 17(d) applies. Having observed Applicant's demeanor and listened to his testimony, I find his answer on his 2003 SF 86 and his answers on his 2014 e-QIP were not deliberate omissions, concealments, or falsifications.

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 the 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 common sense 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. 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.

Applicant is a 46-year-old senior engineer who has worked for a defense contractor since November 2017. (Ex. 2) From June 1991 to June 1997, he honorably served in the U.S. Army. His military service merits considerable respect.

A security clearance adjudication is an evaluation of an individual's judgment, reliability, and trustworthiness. When Applicant completed his job application, he listed the university he attended. Almost six years later, he was terminated because the university was not accredited. He has no duty to vouch for the university's accreditation. He did not list the 1991 arrest because he did not know it was a felony and believed the matter dropped when the case was *nolle prosequi*ed. He assumed he was the victim of false allegations and the matter was over. He has explained each incident on his most recent e-QIP and in his interviews.

I have carefully applied the law, as set forth in *Egan,* Exec. Or. 10865, the Directive, DOD Manual 5200.02, and the AGs, to the facts and circumstances in the context of the whole person. The issue is whether his single response on a 2003 SF 86, his 2011 termination, and his two responses on a 2014 e-QIP raises concerns about his fitness to hold a security clearance. (*See* AG ¶ 2(c)) Overall, the record evidence leaves me without questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated 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, Personal Conduct:	FOR APPLICANT
Subparagraphs 1.a –1.d:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is granted.

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CLAUDE R. HEINY II
Administrative Judge