



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 20-00685
)
Applicant for Security Clearance)

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Applicant: *Pro se*

06/02/2021

Decision

COACHER, Robert E., Administrative Judge:

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

History of the Case

On August 31, 2020, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, personal conduct. The DOD acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective on June 8, 2017.

With an undated response, Applicant answered the SOR. A notice of hearing was sent to Applicant on April 7, 2021, setting the hearing for April 21, 2021. This hearing was convened as scheduled using the Defense Collaboration Services (DCS) video teleconferencing capabilities. The Government offered exhibits (GE) 1 through 13, which were admitted into evidence without objection. Department Counsel's discovery letter and exhibit list were marked as hearing exhibits (HE) I-II. Applicant testified at the

hearing, but he did not offer any exhibits at the time. The record remained open until April 30, 2021, and Applicant timely submitted exhibits (AE) A and B (AE A is his transmittal email which also contains factual statements, as well as additional argument; AE B documents his debt to the Government and his payment of said debt) to supplement the record. With no objection, those exhibits were admitted. The Defense Office of Hearings and Appeals (DOHA) received the hearing transcript (Tr.) on May 3, 2021.

Findings of Fact

In his SOR answer, Applicant admitted SOR ¶ 1.a, but denied SOR ¶¶ 1.b and 1.c. His admission is incorporated as a finding of fact. After a review of the pleadings and evidence, I make the following additional findings of fact.

Applicant is a 36-year-old employee of a defense contractor. He began working at his present job in October 2014. He attended a service academy from 2002 to 2006, where he graduated with a bachelor's degree and was commissioned as a second lieutenant in the U.S. Army. He served in the Army as a Captain until he submitted a resignation for the good of the service in lieu of facing charges referred against him at a general court-martial. His resignation was accepted by the Secretary of the Army and he was discharged with an "under other than honorable conditions" discharge on April 5, 2011. He is married, but has no children. (Tr. at 6, 28, 31-32, 46; GE 1; 6, 8)

The SOR alleged that Applicant was discharged from the Army in 2011, with an other than honorable discharge, in lieu of trial by court-martial on the referred charges of violations of Uniform Code of Military Justice (UCMJ) Article 121 (larceny of property valued at \$12,000) and Article 132 (filing a fraudulent claim in excess of \$12,000 in May 2010). The SOR also alleged that Applicant falsified his answers when completing his security clearance application (SCA) in November 2017 when he failed to disclose in **Section 13A** that his separation from the Army was based upon charges or allegations of misconduct (i.e., committing larceny and submitting a false claim contrary to UCMJ Articles 121 and 132); and in **Section 22** when he failed to disclose that he was charged under the UCMJ with the offenses of larceny and filing a false claim (SOR ¶¶ 1.a – 1.c).

In April 2010, Applicant received permanent change of station (PCS) orders to relocate to a new duty station. To move his household goods to his new location, he chose the do-it-yourself (DITY) move option. This option allows a service member to move his household goods himself and then be reimbursed by the government for the move expenses and for the weight of the goods transported up to a certain limit based upon rank and family size. On March 30, 2010, Applicant attended a mandatory briefing about conducting a DITY move that covered such things as what items were not allowable to claim for a DITY move. He also received a checklist of allowable and non-allowable DITY move items. Building material, such as bags of concrete or cement mix, are disallowed for DITY moves. (GE 2, 4)

In April 2010, in preparation for his DITY move, Applicant purchased approximately 60 bags of concrete mix, with each bag weighing approximately 90 pounds. He loaded the bags onto the trailer he would be using for his DITY move. He purchased the concrete mix for the sole purpose of increasing his household goods weight so that he would receive a larger reimbursement from the government after he filed his DITY-move claim. He contracted to have the trailer moved to his new duty location. The trailer arrived on approximately April 29, 2010, and was dropped off at Applicant's new address. The contractor-driver came back the next day to pick up the trailer. He noticed that remaining in the trailer were 18-20 bags of concrete mix weighing approximately 90 pounds each. In early May 2010, someone from the contractor's company reported the incident to the post Inspector General's office. A criminal investigation commenced under the authority of the Army's Criminal Investigation Command (CID). In June 2010, Applicant was interviewed as part of the investigation and in a sworn statement admitted purchasing the concrete bags to intentionally increase his weight for the DITY move so he would be paid more money. (AE 4)

As a result of the CID investigation, on July 23, 2010, three charges under the UCMJ were preferred against Applicant: 1) a violation of UCMJ Article 122—theft of more than \$12,000 of government property; 2) a violation of UCMJ Article 132—making a fraudulent claim against the government for more than \$12,000; 3) a violation of Article 133—conduct unbecoming an officer by wrongfully increasing his household goods weight. A UCMJ Article 32 hearing was held in approximately August 2010, which resulted in a referral of the charges to a general court-martial by the convening authority. In January 2011, Applicant voluntarily tendered his resignation from the Army for the good of the service in lieu of trial by court-martial. The command recommended approval of the resignation for the good of the service with the issuance of an under other than honorable discharge. The Secretary of Army approved the recommendation with an under other than honorable discharge. Applicant was separated from the Army on April 5, 2011, with an under other than honorable discharge. He has filed four applications with the Army Discharge Review Board (DRB) (November 2012, July 2015, August 2017, and June 2019) seeking an upgrade of his discharge. The first three were denied with no relief granted, and the fourth remains unaddressed. (Tr. 26, 56-58; GE 6-13)

On November 29, 2017, Applicant completed and certified as true and accurate his SCA. **Section 13A** of the SCA asked Applicant if any of the following happened in the last seven years concerning his employment activities (it is less than seven-years between Applicant's completed SCA and April 5, 2011, Applicant's date of discharge): 1) been fired from a job; 2) quit after being told you would be fired; 3) left a job by mutual agreement following charges or allegations of misconduct; and 4) left a job by mutual agreement following notice of unsatisfactory performance. Applicant answered "no" to this question. **Section 22** of the SCA asked, *inter alia*, have you ever been charged with any felony offense, including those under the UCMJ and nonmilitary felony offenses. Applicant answered "no" to this question. (GE 1)

In Applicant's DRB applications and during his hearing testimony, he now claims he did nothing wrong by increasing his household goods weight for his DITY move. He

believes he was “set up” by CID; that his military defense attorney was working against him (he had hired his own civilian attorney); he believes the Army was racist when they questioned his mother during the court-martial process; he believes that he received an improper briefing about his DITY move; and that evidence against him was falsified. He also believes that the Army’s acceptance of his resignation in lieu of court-martial was vindication that he did no wrongdoing. In contrast, in his resignation submission to the Secretary of the Army, he apologized to his command and said that he submitted a false claim for selfish monetary reasons and his actions were shameful and regrettable. (Tr. 29-30, 41-42, 50, 63; GE 7, 9, 10, 11, 13)

Also during his testimony, Applicant admitted that what he did was wrong (to increase his household good weight), but claims he had no intent to deceive the government when he answered “no” to the relevant questions in **Sections 13A and 22** of his SCA. He believed that once his resignation was accepted and his court-martial charges were dismissed, he did not have to answer “yes” to those questions. He stated that his attorney, who represented him during his Army legal proceedings, told him that as well. He admitted giving considerable thought to those questions. I did not find Applicant to be credible. (Tr. 33, 48, 51-52, 60)

Applicant documented that he made restitution to the government for the amount of his fraudulent claim. He paid this amount in August 2010. (Tr. 58; AE B)

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 are 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, 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 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.” 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, an “applicant is

responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and 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 that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that 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

AG ¶ 15 expresses the personal conduct security concern:

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 in this case. 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;

(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

(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 person may not properly safeguard protected 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 other government protected information:

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources.

Applicant's discharge from the Army based upon his voluntary resignation in lieu of facing court-martial charges for theft and filing a false statement support the application of AG ¶¶ 16(c) and 16(d). Neither AG apply under these facts because Applicant's conduct is "explicitly covered under" Guideline J, and his conduct is sufficient for an adverse determination under the same guideline. However, Applicant's conduct involved questionable judgment, lack of candor, dishonesty, and unwillingness to comply with rules and regulations raises questions about an his reliability, trustworthiness and ability to protect classified information. The general concern expressed in AG ¶ 15 applies.

He deliberately failed to disclose the information as alleged in SOR ¶¶ 1.b and 1.c, which supports the application of AG ¶ 16(a)

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and found the following relevant:

(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; 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.

Applicant was not credible when he testified that he did not deliberately provide false information on his SCA about how he left the Army and whether he had been charged with an offense under the UCMJ. He specifically testified that he gave considerable thought to the questions at the time he completed the SCA. He justified his action by saying he was advised by his attorney, who represented him during the legal proceedings when he was in the Army, that the dismissal of charges ended that process. He did not state whether he consulted an attorney concurrently with filling out his SCA. It is apparent from aspects of his testimony and from his DRB applications that he has not accepted responsibility for his actions. While the conduct that led to his under than honorable discharge occurred about 10 years ago, he has not fully accepted the wrongfulness of his actions, which causes me concern about his overall judgment. AG ¶¶ 17(c) and 17(d) do not apply, but AG ¶ 17(b) has minimal application due to the passage of time. However, his offense was not minor and casts doubt on his judgment.

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 commonsense judgment based upon careful consideration of the guideline and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all relevant facts and circumstances surrounding this case. I have incorporated my

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

I considered Applicant's military and federal contractor service and his restitution of the money he fraudulently claimed. However, I also considered that he was discharged from the Army with an other than honorable discharge based upon attempting to steal money through a fraudulent claim he orchestrated against the government. He also has not accepted responsibility for his actions. Additionally, he deliberately failed to disclose material information on his SCA.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not 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, Guideline E:	AGAINST APPLICANT
Subparagraphs: 1.a – 1.c	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, 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.

Robert E. Coacher
Administrative Judge