



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 19-01436
)	
Applicant for Security Clearance)	

Appearances

For Government: Andre M. Gregorian, Esq., Department Counsel
For Applicant: Jacalyn Crecelius, Esq.

04/07/2022

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on August 15, 2017. On September 9, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline E. The DOD CAF acted under Executive Order (Exec. Or.) 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) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on October 22, 2019, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on September 28, 2020, and the case was assigned to me on October 26, 2020. Scheduling of the hearing

was delayed by the COVID-19 pandemic. A hearing by video teleconference was scheduled for July 8, 2021, but it was delayed because Applicant's attorney contracted COVID-19. The hearing was delayed to allow the attorney to recover, and it was rescheduled for December 9, 2021. Applicant retained a new attorney on November 28, 2021. His new attorney requested a postponement, and the hearing was rescheduled for January 15, 2022. I conducted the hearing by video teleconference as rescheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through G, which were admitted without objection. DOHA received the transcript (Tr.) on February 4, 2022.

Findings of Fact

In Applicant's answer to the SOR, he admitted all the allegations. His admissions are incorporated in my findings of fact.

Applicant is a 47-year-old information security engineer employed by a defense contractor since June 2013. He has been employed by defense contractors since January 2006, and he received a security clearance in August 2007.

Applicant married in November 1996, divorced in August 2015, and remarried in June 2017. He has a 12-year-old daughter, a 17-year-old stepdaughter, and two 22-year-old stepsons. (Tr. 15.) He earned an associate's degree in information systems in May 2006 and an associate's degree in network security in June 2012. (AX D.) He earned numerous professional certificates in 2008 and 2009. (AX E.)

Applicant served on active duty in the U.S. Navy from March 1993 to May 1997. (Tr. 32; AX A.) In December 1995, he was interviewed by criminal investigators concerning his involvement in thefts from a Navy ship's store where he worked. He admitted stealing two compact discs in October 1995; 18 compact discs, two magazines, two comic books, a compact disc holder, three oriental carvings, and a stereo system in November 1995; and 11 video tapes between mid-October and mid-November 1995. His statement was typed, he initialed the beginning and end of each paragraph, and he stated under oath that the typed statement was true and correct to the best of his knowledge and belief. (GX 4 at 11-12.)

Based on Applicant's sworn statement, he was tried by court-martial in March 1996 and convicted of larceny. He was sentenced to a bad conduct discharge, reduction to the lowest enlisted pay grade, and confinement for three months. (GX 4 at 1.)

When Applicant submitted an SCA in March 2007, he answered "No" to the question, "Have you ever served in the U.S. Military?" He also answered "No" to the question, "Have you ever received [an] other than honorable discharge from the military?" (GX 2 at 30-31.) He submitted another SCA in August 2017, seeking to continue his clearance, and he again answered "No" to the question about military service and did not disclose his bad conduct discharge. (GX 1 at 27.)

On December 17, 2017, Applicant was interviewed by a security investigator. The summary of the interview reflects that the investigator questioned him about the information in his August 2017 SCA, including his educational background, employment record, family and associates, criminal history, and delinquent debts. The summary does not reflect any questions about military service, and Applicant did not volunteer any information about it. (GX 3 at 5-13.)

On July 16, 2018, Applicant was interviewed again by a security investigator. The investigator asked him if he had ever served in the military, and he responded that he had served in the Navy. Initially, he did not disclose that he had received a bad conduct discharge. The investigator then confronted him with the evidence of his conviction of larceny from the ship's store, and he admitted that he had been convicted of larceny and received a bad conduct discharge. He claimed that his only involvement in the thefts was purchasing some of the stolen items from a member of the team without knowing that they were stolen. (GX 3 at 13-14.) He told the investigator that he had been advised by his lawyer at the court-martial to admit being part of a team that was stealing from the ship's store so that he would receive a lesser sentence. He pleaded guilty pursuant to a plea agreement limiting his punishment to a bad conduct discharge and confinement for three months. (Tr. 54.)

Applicant's July 2018 exculpatory description of his involvement in the thefts was inconsistent with his December 1995 sworn statement admitting the theft of multiple items over a two-month period. During the July 2018 interview, he admitted to the investigator that he did not disclose his military service because he did not want his disciplinary record to adversely affect his career with the government. (GX 3 at 13-14.)

At the hearing, Applicant testified that he was questioned by Navy criminal investigators for several hours, and they told him that if he confessed to larceny he would be confined for about 30 days and some of his pay would be taken, but he would not be discharged from the Navy. He waived his right to an attorney during the questioning. The questions were open-ended as in "what did you steal," as opposed to leading questions asking him if he stole specific items. (Tr. 64.) At the hearing, he asserted that he confessed to something he did not do so that he could stay in the Navy. (Tr. 24-25.)

Applicant submitted two evaluation reports for November-December 2020 and April-May 2021, reflecting that he is held in high regard by supervisors. (AX C.) Three coworkers submitted statements vouching for Applicant's honesty, integrity, trustworthiness, and technical skill. (AX B-1, B-2, and B-4.) Applicant's senior manager for the past six years describes him as an exemplary team player with strong technical knowledge. (AX B-3.) None of these four statements indicate awareness of the conduct alleged in the SOR.

Applicant's spouse is the assistant principal of an elementary school. She submitted a statement attesting to Applicant's participation in and support of student activities at the school. (AX B-5.) Applicant also is active in Eagle Scout projects and projects for elementary school girls. (AX F.)

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to “control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the 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.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition,

and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

Analysis

Guideline E, Personal Conduct

The SOR alleges that falsified his SCAs in August 2017 and March 2007 by intentionally answering “No” to the question in each SCA asking whether he had ever served in the U.S. military (SOR ¶¶ 1.a and 1.b). It alleges that Applicant provided materially false information during a December 2017 security interview and a follow-up interview in July 2018 by intentionally failing to disclose that he had served in the U.S. military and had received a bad conduct discharge for larceny (SOR ¶¶ 1.c and 1.d). Finally, it alleges that he provided materially false information in the follow-up interview in July 2018 by claiming that he unknowingly purchased stolen items from teammates, even though he had admitted in a December 1995 statement that he had personally stolen items from the ship’s store for his personal use (SOR ¶ 1.e).

The security concern under this guideline is set out in AG ¶ 15:

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. . . .

The following disqualifying conditions under this guideline are relevant:

AG ¶16(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

AG ¶16(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.

Applicant's admissions and the evidence submitted at the hearing are sufficient to establish the allegations in SOR ¶¶ 1.a, 1.b, 1.c, and 1.e. The evidence of Applicant's conversations with security investigators is contained in summaries, not transcripts, making it impossible to determine the specific questions that were asked and the precise answers that were given. The summary of the December 2017 interview reflects that the investigator questioned Applicant about the information reflected in the SCA. It does not specifically reflect whether the investigator asked Applicant about military service during that interview. However, Applicant admitted in his answer to the SOR that he intentionally did not disclose the bad conduct discharge.

Although Applicant admitted the allegation in SOR ¶ 1.d in his answer to the SOR, the summary of the July 2018 interview reflects that Applicant disclosed his military service and bad conduct discharge in response to questions during that interview, albeit reluctantly. He then proceeded to falsely describe his involvement in the thefts from the ship's store, as alleged in SOR ¶ 1.e.

The following mitigating conditions are relevant:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

AG ¶ 17(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.

AG ¶ 17(a) is not established. Applicant did not correct his omissions from his 2007 SCA, 2017 SCA, and his December 2017 interview until he was confronted with the evidence in July 2018.

AG ¶ 17(c) is not established. Applicant's falsifications were frequent and did not occur under unusual circumstances. At the hearing, he admitted falsifying two SCAs and giving false information during two security interviews. He asserted that his statement to criminal investigators in December 2005 was coerced and false, and he admitted that he gave false answers to the military judge who inquired into the factual basis for his guilty plea in order to protect his pretrial agreement.

Applicant's falsification of two SCAs and false answers during the security interviews are not minor. Falsification of a security clearance application "strikes at the heart of the security clearance process." ISCR Case No. 09-01652 (App. Bd. Aug. 8, 2011.) It is a felony, punishable by a fine or imprisonment for not more than five years, or both, to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of the executive branch of the Government of the United States. 18 U.S.C. § 1001. Security clearances are matters within the jurisdiction of the executive branch of the Government of the United States.

Applicant's falsifications are not mitigated by the passage of time. The second prong of AG ¶ 17(c) focuses on whether the conduct was recent. There are no bright line rules for determining when conduct is recent. The determination must be based on a careful evaluation of the totality of the evidence. See ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows a significant period of time has passed without any evidence of misconduct, then an administrative judge must determine whether that period of time demonstrates changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation. *Id.*

Applicant's falsification of his SCAs and answers during security interviews were more than three years ago, which is a significant period of time. However, he has been under the pressure of retaining his security clearance since he received the SOR in September 2019. He has not taken responsibility for his conduct. At the hearing, he persisted in his unconvincing claim that his confession in 1995 was coerced, that he was not guilty of larceny, and that his bad conduct discharge was undeserved. Based on all the evidence, I conclude that Applicant's lack of candor during the security clearance process has not been mitigated.

Whole-Person Concept

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. In applying the whole-person concept, an 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. An 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.

I have incorporated my comments under Guideline E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). I have considered the statements vouching for his honesty and integrity. I have also considered that he was granted a security clearance since 2007, albeit by submitting a false SCA, and that he has no record of security violations. However, his favorable evidence is outweighed by his repeated lack of candor during the security clearance process. After weighing the disqualifying and mitigating conditions under that guideline, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his personal conduct.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraphs 1.a-1.c: Against Applicant

Subparagraph 1.d: For Applicant

Subparagraph 1.e: Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman
Administrative Judge