



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 21-00816
)
 Applicant for Security Clearance)

Appearances

For Government: Carroll J. Connelley, Esq., Department Counsel
For Applicant: *Pro se*

02/06/2023

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline E (Personal Conduct). Applicant refuted the allegation that he intentionally falsified his security clearance application (SCA). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted an SCA on August 21, 2018. On June 25, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline E. The DCSA 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 November 19, 2021, and requested a hearing before an administrative judge. He provided explanations that were tantamount to denials of the two allegations in the SOR.

Department Counsel was ready to proceed on January 24, 2022, and the case was assigned to me on September 6, 2022. Scheduling of the hearing was delayed by difficulties in contacting Applicant. The case was reassigned to another administrative judge on November 10, 2022, and then reassigned back to me on December 15, 2022, when the assigned judge was unable to travel for medical reasons.

On December 27, 2022, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for January 18, 2023. I convened the hearing as scheduled. Government Exhibits (GX) 1 and 2 were admitted in evidence without objection. GX 3, an unauthenticated summary of a personal subject interview, was not admitted. Applicant testified and presented the testimony of one witness. I kept the record open until January 27, 2023, to enable him to submit documentary evidence. He timely submitted Applicant's Exhibit (AX) A, which was admitted without objection. DOHA received the transcript (Tr.) on January 26, 2023.

Findings of Fact

Applicant is a 57-year-old marine painter employed by a defense contractor since March 2018. His previous jobs, when he was not incarcerated, were all in the private sector. He has never married, but he has three adult children. He has never held a security clearance.

Applicant has an extensive criminal record. During his criminal history, he used 11 aliases and birth dates and six different Social Security numbers. (GX 2.) His criminal record includes 19 arrests and charges for drug offenses, 11 felony convictions, three sentences for imprisonment for terms exceeding one year, and at least one sentence that resulted in incarceration for more than one year.

When Applicant submitted his SCA in August 2018, he answered "Yes" to the question in Section 5 asking if he had used any other names, and he listed one name that he used from January 1990 to January 2000, and he explained that he used the name because of "different life I was living." He did not list all the aliases reflected in his criminal record.

In response to questions in Section 22, he answered "Yes" to questions asking if he had ever been convicted and sentenced to a term of imprisonment exceeding one year and incarcerated for not less than one year; if he had ever been charged with a felony; if he ever had been charged with an offense involving firearms or explosives; or if he had ever been charged with an offense involving alcohol or drugs. He disclosed that he was charged with possession of a controlled dangerous substance (CDS) in June 1990, was sentenced to imprisonment for eight years, and was incarcerated from June 1990 to

October 1992. He did not list any other offenses. The criminal records do not reflect whether he actually served more than one year of his other jail sentences.

SOR ¶ 1.a alleges Applicant falsified his SCA by failing to list all his aliases. SOR ¶ 1.b alleges that he falsified his SCA by failing to disclose his arrests for firearms charges and drug offenses, felony convictions, and sentences to imprisonment for more than one year. The SOR does not allege any security concerns under Guideline H (Drug Involvement and Substance Misuse) or Guideline J (Criminal Conduct).

Applicant testified that he began using drugs around 1984, and he became addicted to heroin around 1990. (Tr. 34.) After he was released from prison in April 2010, he went back to his old neighborhood and same friends and resumed his drug abuse. In November 2010, he was encouraged by his then fiancée to change his environment. He entered an 11-month drug program and then joined Narcotics Anonymous (NA). He now attends NA meetings three or four times a week. He has a sponsor, who has been drug-free for 23 years. He became a sponsor about a year ago. He testified that he does not remember everything he has done, but he knows that it was wrong. He is hoping for an opportunity to progress in his career and be a productive member of society. (Tr. 34-37.)

Applicant testified that he remembered being interviewed in May 2019 and being asked if he had any aliases and he disclosed the one he could remember. He remembered that the investigator confronted him with additional aliases, and he admitted that he had used them. (Tr. 39-40.) He admitted that he disclosed being charged with only one felony, knowing that he had been charged with many more. He testified that he believed that “you guys” knew about his entire record, and he was “just trying to simplify it,” because he knew that he would be questioned about his criminal record. He was nervous and intimidated at the interview with the security investigator, and he had no “people skills,” only “street communication.” He did not understand that when he submitted his SCA, he was required to provide specific information for each incident instead of a general admission that he had been convicted of a felony and spent time in jail. (Tr. 41-44.)

One of Applicant’s coworkers, a quality control technician, submitted a statement supporting his application for a security clearance. He states that Applicant was assigned to a lead position for a major program. Within weeks, his department saw an immediate morale boost, timely turnovers, and a high success rate with returning projects back to the Navy. His coworker states that they “have rarely experienced such precise, reliable workmanship and inclusiveness that [Applicant] has been able to coax out of the subcontractors.” (AX A.)

Applicant presented the testimony of a witness who has known him for about 12 years and participates in NA with him. The witness served on active duty in the U.S. Navy and is a disabled veteran. She was hired by a defense contractor as a welder in 2004, was granted a security clearance, progressed to a management position, and retired in May 2022. Before being hired, she was a convicted felon with a history of drug involvement. She has known Applicant and watched him grow for 12 years. She is not

Applicant's sponsor, but she sees him at NA meetings, sometimes weekly but once a month at a minimum. She recalls her own experience of being questioned by an investigator and trying to answer truthfully in spite of the "haze of addiction." She hopes that Applicant will have an opportunity to obtain a clearance and have a successful career. (Tr. 19-26.)

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 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 relevant disqualifying condition in this case is AG ¶ 16(a):

[D]eliberate 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.

When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). An applicant's experience and level of education are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

Applicant's criminal record and drug involvement were not alleged in the SOR, indicating that the DCSA CAF believed that his drug involvement and criminal conduct were mitigated by the passage of time and evidence of rehabilitation. Thus, his criminal

record and drug involvement may not be a basis for denying his application for a security clearance. However, his record may be considered to assess his credibility; to evaluate the evidence of extenuation, mitigation, or changed circumstances; to consider whether he has demonstrated successful rehabilitation; to decide whether a particular provision of the Adjudicative Guidelines is applicable; or to provide evidence for a whole-person analysis ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered Applicant's criminal record and drug involvement for these limited purposes.

Applicant has a high school education and no experience with the security-clearance adjudication process. He has spent much of his life in jail, in the company of drug users and drug dealers, or in low-level jobs. His completion of the SCA in 2018 required him to recall information that was eight years old. His completion of his SCA was encumbered by the common belief among first-time applicants that the U.S. Government already knows their background or can discover it easily. His memory of his criminal activity and use of aliases was also encumbered by the "haze of addiction." The testimony of his one witness was instructive about the difficulty of accurately recalling a drug-addicted past. He chose to disclose one of his most serious convictions and longest jail sentence.

Applicant was candid, sincere, remorseful, and credible at the hearing. I am satisfied that he believed that his disclosures in his SCA were sufficient to trigger fuller inquiry about his past, and that he did not intend to conceal relevant information. Accordingly, I conclude that no disqualifying conditions under this guideline are established.

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). After weighing the relevant disqualifying

and mitigating condition under Guideline E and evaluating all the evidence in the context of the whole person, I conclude Applicant has refuted the allegations in the SOR.

Formal Findings

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

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

Subparagraphs 1.a and 1.b: For Applicant

Conclusion

I conclude that it is clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is granted.

LeRoy F. Foreman
Administrative Judge