



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



In the matter of:)
)
) ISCR Case No. 06-23613
)
Applicant for Security Clearance)

Appearances

For Government: Robert J. Kilmartin, Esquire, Department Counsel
For Applicant: *Pro se*

11/02/2012

Decision

RIVERA, Juan J., Administrative Judge:

Applicant’s repeated falsifications and false statements raise questions about his reliability, trustworthiness, and ability to protect classified information. He mitigated the Guideline C security concerns, but failed to mitigate the Guideline E concerns. Clearance is denied.

Statement of the Case

Applicant submitted his most recent security clearance application (SCA) on March 10, 2011. On May 17, 2012, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) listing security concerns under Guideline C (Foreign Preference) and Guideline E (Personal Conduct).¹ Applicant answered the SOR on July 2, 2012, and he requested a hearing before an administrative judge. The case was assigned to me on August 9, 2012.

¹ DOHA acted under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

DOHA issued a notice of hearing on August 21, 2012, convening a hearing for August 29, 2012. At the hearing, the Government offered exhibits (GE) 1 through 10. Applicant testified and submitted exhibits (AE) 1 and 2. All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on September 7, 2012.

Procedural Issue

Applicant requested an expedited hearing. He had sufficient time to prepare, was ready to proceed, and affirmatively waived his right to 15 days notice of the hearing. (Tr. 12-14)

Findings of Fact

Applicant admitted the factual allegations under SOR ¶¶ 1.a, 2.b, and 2.c. He denied all remaining SOR allegations. His admissions are incorporated as findings of fact. After a thorough review of the evidence, and having observed Applicant's demeanor and considered his testimony, I make the following additional findings of fact.

Applicant is a 53-year-old employee of a government contractor. His father was a U.S. servicemember stationed in Panama, and Applicant was born in Panama. As a result, he acquired dual citizenship from Panama and the United States. Applicant and his mother relocated to the United States when he was four years old. At age 16, Applicant started college in the United States. He did not do well in college and enlisted in the U.S. Marine Corps in 1977, at age 18.

He started taking college courses in 1977, and has continued to do so until the present. He is four credits short of his bachelor's degree. He married his first spouse in 1976, and they divorced in 1987. He has two children from that marriage. He married his second spouse in 1989, and they divorced in 2007. He has one child from his second marriage. He married his current spouse in 2008. He has one child from his current marriage.

As a Marine, Applicant did well for some time. However, in 1980, he and a fellow Marine set off some fireworks close to a bar to intimidate some motorcycle riders, and fled the area. He was stopped by a police officer for speeding. A search of the car revealed a plastic gun, pyrotechnics, a nunchaku, a chain, and a bat. Applicant was arrested and charged with inciting a riot, fleeing from a police officer, possession of pyrotechnics, and carrying a concealed weapon. It is not clear from the evidence to what charge(s) Applicant pled guilty. He testified that he pled to a misdemeanor offense and was sentenced to a 30 day suspended sentence, 30 days probation, and a \$30 fine. His weapons were confiscated. (GE 2)

In 1983, Applicant received non-judicial punishment for being absent from his place of duty. In 1984, Applicant (then a staff sergeant (E-6)) illegally smoked marijuana, and 15 days later he tested positive on a urinalysis test. He was offered trial by court-martial; however, he elected an administrative discharge in lieu of trial by a

court-martial. Applicant was administratively discharged and his service was characterized as under other than honorable conditions. (GE 3, GE 4)

In August 1987, Applicant and a friend attended a party and smoked "one or two" marijuana cigarettes. While waiting for his friend in his truck, Applicant saw police officers approaching his truck and sped away. He was pursued by police officers. The police observed Applicant throwing plastic bags out of his truck and emptying a plastic bag while fleeing. Police officers recovered two plastic zip lock bags containing marijuana. They seized from his vehicle another plastic zip lock bag with marijuana residue and one pipe with marijuana residue. Applicant was charged with possession of marijuana with intent to distribute, possession of a controlled dangerous substance, possession of drug paraphernalia, and conspiracy. Applicant pled guilty to possession of a controlled dangerous substance. He was sentenced to one year probation and to pay a fine. (GE 4, GE 7)

In 1991, Applicant purchased a vehicle and used his employer as a cosigner on the loan. When Applicant decided to leave the job, his employer falsely accused him of stealing the vehicle. He was arrested and charged with grand theft auto, a felony. The charge was later *nolle prossed*. Applicant filed and won a civil suit against his employer, and he was awarded \$10,000 in damages. (AE 2) I find allegation in SOR ¶ 2.d unsubstantiated.

Applicant was granted a security clearance at the secret level in 1980, while he was serving in the Marine Corps. His access to classified information was terminated upon his discharge. In November 1987, Applicant started working for a government contractor and submitted a security clearance application (SCA). In his November 1987 SCA, Applicant disclosed his criminal history, including his August 1987 arrest, charges, and conviction related to the illegal possession of marijuana. Additionally, he disclosed that in 1984, he illegally smoked marijuana, tested positive on a drug-screening test, and lost his career in the Marine Corps. Applicant disclosed that he asked for an administrative discharge in lieu of a court-martial, and that his discharge was characterized as under other than honorable conditions.

A review of Applicant's past SCAs revealed that he repeatedly falsified his answers to certain SCA questions. In Section 9 of his November 1993 SCA, Section 19 of his August 2005 SCA, and Section 15 of his March 2011 SCA, Applicant was asked to state the type of discharge he received when he was discharged from the Marine Corps in 1984. In his 1993 SCA Applicant stated that he received an honorable discharge. In his 2005 SCA he answered "No" to the question of whether he had ever received other than an honorable discharge from the military. And, in his 2011 SCA he stated that he received a general discharge.

Section 20 of his November 1993 SCA asked Applicant whether he had ever used or possessed any illegal drugs, including marijuana. He answered "No" and failed to disclose his 1984 and 1987 use and possession of marijuana. He also was asked whether he had consulted or been counseled by any mental health professional.

Applicant answered “No” and failed to disclose that he consulted with a mental health professional in 1984.

On June 19, 1994, Applicant provided a sworn statement to a government investigator explaining the circumstances that led to his 1980 charges and conviction, his 1987 conviction for possession of marijuana, his 1991 charge for grand theft auto, the characterization of his 1984 discharge, his psychological evaluation and treatment while in the service, and his use of illegal drugs in the service. During the interview, Applicant told the investigator that he “never possessed nor sold any illegal substances,” and “as to use of drugs, I have never used or in any other way been involved with any drugs, narcotics, or controlled substances, except for prescription drugs for medication.” He also stated that because he was an E-6, he was discharged with a general discharge under honorable conditions.

In October 1994, Applicant participated in a polygraph-assisted interview. During the initial part of the interview, Applicant claimed that he received a general discharge under honorable conditions in 1984, denied receiving any treatment with a mental health professional, and denied any use or involvement with any illegal drugs. During the post-polygraph interview, Applicant admitted smoking marijuana two weeks before his 1984 urinalysis test, and knowingly receiving a discharge under other than honorable conditions in 1984. Applicant also admitted smoking three marijuana cigarettes before he was approached by the police in October 1987, and throwing the plastic bags containing marijuana from his vehicle. He claimed the marijuana belonged to a friend. In his post-polygraph sworn statement, Applicant apologized for not relaying all the events in his SCA. (GE 10)

Section 23 of his August 2005 SCA and Section 22 of his March 2011 SCA asked Applicant whether he had ever been charged with or convicted of any felony offense or of any offenses related to alcohol or drugs. Applicant answered “No” to these questions on both SCAs and failed to disclose that in 1980 he was charged with carrying a concealed weapon. Additionally, he failed to disclose that in 1987 he was arrested and charged with possession of a controlled dangerous substance (marijuana), possession with the intent to distribute marijuana, possession of drug paraphernalia, and conspiracy, and that he pled guilty and was convicted of possession of marijuana.

Section 24 of Applicant’s August 2005 SCA and Section 23 of his March 2011 SCA asked (in pertinent parts) whether he had ever illegally used a controlled substance while possessing a security clearance. Applicant answered “No” to both SCA questions and failed to disclose that in 1984 he used marijuana while possessing a security clearance.

In 2007, Applicant requested and was issued Panamanian passport to facilitate leaving his minor daughter with her mother, a citizen and resident of Panama, while he was deployed to Kuwait in support of U.S. troops. Applicant was first informed of the Government’s foreign preference concerns raised by his possession of the foreign

passport when he received the SOR in May 2012. In June 2012, he renounced his Panamanian citizenship and surrendered his passport. (Answer to the SOR)

In November 2011, Applicant submitted sworn answers to a DOHA interrogatory. He was asked whether he had ever illegally used drugs, including marijuana. Applicant disclosed he used marijuana in 1987; however, he failed to disclose his 1984 use of marijuana. Applicant was also asked to give information regarding his 1987 arrest and charges for possession and distribution of marijuana, possession of drug paraphernalia, and conspiracy. He stated that the only item found in his vehicle was a pipe with marijuana residue. He failed to disclose that in addition to the pipe, the police seized two plastic zip lock bags containing marijuana that he threw from the truck and one found in his truck.

Applicant has worked for government contractors, and possessed a security clearance, from 1987 to present. He was hired by his current employer, a government contractor, in September 2009. He performs duties as an information technology technician. He has over 27 years of service to the government, including his time in the service. After 1987, he dedicated his life to work for several government contractors supporting the U.S. wars against illegal drugs and terrorism. He averred that he made honest mistakes in his answers to the SCAs because he either did not remember the facts, misunderstood the questions asked, or believed the charges were dismissed and he did not have to disclose the requested information. He also claimed that he was told that his discharge from the Marine Corps would be automatically upgraded. Applicant was less than candid and forthcoming at his hearing, sometimes contradicting the evidence and his own testimony. (Tr. 75, 106-107)

Applicant submitted numerous certificates of achievement and training certificates. These documents and his character statements establish that he is considered to be a dedicated professional and an asset to his employer. He has demonstrated a pattern of loyalty, dedication, competence, and reliability.

Policies

Eligibility for access to classified information may be granted “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense

consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Guideline C, Foreign Preference

AG ¶ 9 explains the security concern about foreign preference stating:

When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

AG ¶ 10 indicates four conditions that could raise a security concern and may be disqualifying in this case:

(a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to:

- (1) possession of a current foreign passport;
- (2) military service or a willingness to bear arms for a foreign country;

(3) accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country;

(4) residence in a foreign country to meet citizenship requirements;

(5) using foreign citizenship to protect financial or business interests in another country;

(6) seeking or holding political office in a foreign country;

(7) voting in a foreign election;

(b) action to acquire or obtain recognition of a foreign citizenship by an American citizen;

(c) performing or attempting to perform duties, or otherwise acting, so as to serve the interests of a foreign person, group, organization, or government in conflict with the national security interest; and

(d) any statement or action that shows allegiance to a country other than the United States: for example, declaration of intent to renounce United States citizenship; renunciation of United States citizenship.

In 2007, Applicant, a U.S. citizen, applied for and was issued a Panamanian passport. Foreign preference disqualifying conditions AG ¶¶ 10(a) and (b) are supported by the evidence. If these conditions are not mitigated they would disqualify Applicant from possessing a security clearance.

AG ¶ 11 provides six conditions that could mitigate the security concerns for foreign preference:

(a) dual citizenship is based solely on parents' citizenship or birth in a foreign country;

(b) the individual has expressed a willingness to renounce dual citizenship;

(c) exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor;

(d) use of a foreign passport is approved by the cognizant security authority;

(e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated; and

(f) the vote in a foreign election was encouraged by the United States Government.

Applicant became aware of the Government's foreign preference concerns raised by his possession of the foreign passport when he received the SOR in May 2012. In June 2012, he renounced his Panamanian citizenship and surrendered his passport. (Answer to the SOR) Foreign preference mitigating conditions AG ¶¶ 11(b) and (e) apply and mitigate the security concern.

Guideline E, Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

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.

Between 1980 and 1987, Applicant was involved in criminal misconduct that included carrying a concealed weapon, and the illegal possession and use of marijuana. He was administratively discharged from the Marine Corps with a discharge characterized as under other than honorable conditions. Thereafter, Applicant falsified SCAs in 1993, 2005, 2011 when he deliberately omitted or made false statements about the circumstances related to the 1980, 1984, and 1987 criminal incidents, and the characterization of his 1984 discharge. Additionally, Applicant made false statements to a government investigator in 1994, and falsified answers to a DOHA interrogatory in 2011 minimizing his past criminal behavior.

Applicant's false statements and falsifications trigger the applicability of the following disqualifying conditions under 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 security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant claimed that his omissions and falsifications were caused by honest mistakes because he was either confused by the questions, did not remember the incidents, or was due to the mistaken believe that his discharge would be automatically upgraded. Having observed his demeanor while testifying and analyzed his testimony in light of all the evidence available, Applicant's claims of honest mistakes are not credible.

In his November 1987 SCA Applicant disclosed that he illegally smoked marijuana in 1984, tested positive on a drug screening test, and was administratively discharged under other than honorable conditions. He also disclosed the circumstances related to his August 1987 arrest, charges, and conviction for illegal possession of marijuana. Notwithstanding, in his 1993, 2005, and 2011 SCAs, Applicant omitted or made false statements about the characterization of his discharge, and the circumstances related to his use and possession of marijuana in 1984 and 1987. Additionally, in June 1994 and October 1994, Applicant made similar false statements to government investigators.

After a polygraph-assisted interview in October 1994, Applicant admitted making false statements to government investigators regarding the characterization of his discharge and the circumstances related to his use and possession of marijuana in 1984 and 1987. Notwithstanding his November 1987 SCA disclosures and his admission to making false statements in October 1994, Applicant continued his omissions and false statements in his 2005 and 2011 SCAs and in his answers to DOHA interrogatories in 2011.

AG ¶ 17 provides seven conditions that could mitigate the personal conduct security concerns. Considering the record as a whole, I find that none of the Guideline E mitigating conditions apply. AG ¶ 17(a) does not apply because he did not correct his falsifications before he was confronted with the facts. On the contrary, even after he was confronted during post-polygraph interviews with his falsifications in 1994, Applicant continued to make false statements and falsified SCAs in 2005 and 2011. AG ¶ 17(c) does not apply because making a false statement is a felony in violation of 18 U.S.C. § 1001. Additionally, he repeatedly falsified his SCAs and made false statements to government investigators. The remaining mitigating conditions are not raised by the facts and are not applicable.

Applicant's false statements and falsifications show lack of judgment, lack of candor, dishonesty, and an unwillingness or inability to comply with rules and regulations. His questionable behavior raises questions about his reliability, trustworthiness, and ability to protect classified information.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case and under the whole-person concept. AG ¶ 2(c). Applicant is a dedicated father. He has approximately 27 years of service to the U.S. Government. He is considered to be an outstanding employee and made significant contributions to his employers. He is dedicated, diligent, and displays excellent professional knowledge and abilities.

Notwithstanding his favorable evidence, Applicant's repeated falsifications and false statements raise questions about his reliability, trustworthiness, and ability to protect classified information. He mitigated the Guideline C security concern, but failed to mitigate the Guideline E 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 C:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a - 2.c:	Against Applicant
Subparagraph 2.d:	For Applicant
Subparagraphs 2.e - 2.o:	Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Eligibility for a security clearance is denied.

JUAN J. RIVERA
Administrative Judge