



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



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| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 12-07595 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

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

08/12/2015

Decision

LOUGHRAN, Edward W., Administrative Judge:

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

Statement of the Case

On March 6, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E, personal conduct. The action was taken 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) implemented by the DOD on September 1, 2006.

Applicant responded to the SOR on April 28, 2015, and requested a hearing before an administrative judge. The case was assigned to me on June 25, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on July 2, 2015, scheduling the hearing for July 21, 2015. The hearing was convened as scheduled. DOHA received the hearing transcript (Tr.) on July 29, 2015.

Procedural and Evidentiary Rulings

Evidence

Government Exhibits (GE) 1 through 4 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through H, which were admitted without objection.

Motion to Amend SOR

Department Counsel moved to amend SOR ¶ 1.i by changing the date in the allegation from "July 9, 2013," to "February 26, 2012." The motion was granted without objection.

Findings of Fact

Applicant is a 33-year-old employee of a defense contractor. He has worked for his current employer since 2011. He is applying for a security clearance for the first time. He has a General Educational Development (GED) high school equivalency certificate. He is married with four minor children.¹

Applicant has a history of traffic infractions and criminal behavior. He smoked marijuana about once a week from 2003, or earlier, through 2007.² He also purchased marijuana, which he stated was "only for personal use."³

An FBI identification record indicated that Applicant was arrested in June 2003 and charged with the federal felony offenses of possession of marijuana with intent to distribute (21 U.S.C. § 841) and conspiracy to possess marijuana with the intent to distribute (21 U.S.C. § 846). The identification record indicates the charges were dismissed the next day.⁴

Records from the U.S. District Court indicate that Applicant was arrested on June 24, 2004, with three other individuals, two males and a female, and charged with the federal felony offenses of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(B)(vii), 21 U.S.C. § 846, and 21 U.S.C. § 861(a)(1) for: (1) conspiracy to possess with intent to distribute marijuana; (2) possession with intent to distribute marijuana - aiding and abetting; and (3-5) three counts of possession with intent to distribute marijuana – employment of persons under 18 years of age. Applicant and the other defendants appeared before a

¹ Tr. at 10, 72-74, 84; GE 1, 2.

² The SOR only alleged that Applicant used marijuana before a June 2003 arrest; it did not allege marijuana use through 2007. Any conduct that was not alleged in the SOR will not be used for disqualification purposes. It may be used when assessing Applicant's credibility, in the application of mitigating conditions, and in the whole-person evaluation.

³ Tr. at 54-55, 68-69, 83-84; Applicant's response to SOR; GE 1-3.

⁴ GE 3.

U.S. Magistrate on June 25, 2004, and he appeared again with an attorney on June 29, 2004. A detention hearing was reset for July 1, 2004. On that date, the Magistrate set bond for Applicant at \$10,000, and he was placed in third-party custody of his parents. Applicant and the other defendants were indicted on July 21, 2004, and arraigned on July 29, 2004. The charges were dismissed on December 10, 2004.⁵

The FBI identification record does not report a June 2004 arrest, and the clerk of court certified that there were no records of a 2003 case. Applicant testified that the two above events represent separate events and charges.⁶

Applicant stated that he was at an event at a lake with his family in June 2003. Two unknown individuals were there talking to his sister-in-law (wife's sister). Applicant was drinking beer and got in an argument with his wife. His wife left with the children, and Applicant decided to walk home. He was picked up by his sister-in-law who offered to drive him home. Her car was stopped at a checkpoint where the two unknown individuals were already stopped. Several hundred pounds of marijuana were discovered in his sister-in-law's car (254 pounds by one estimate). Applicant denied knowing there was marijuana in the car. They were all arrested, and Applicant spent the night in a federal facility. He stated that he was released the next day, and any charges were dismissed. When questioned what happened to the case against his sister-in-law, Applicant stated he did not know if she ever went to trial, was convicted, or spent time in prison. He stated that his wife and her sister are not in contact.⁷

Applicant described a separate arrest in June 2004. He stated that two high school friends came to visit him. They lived in a different area than Applicant. They did not have a car. Applicant did not know how they got to his home, so he assumed they must have been dropped off. The three decided to go to a third location, and they drove in Applicant's truck, with one of his friends driving. Applicant stated they were stopped and arrested. He stated that no drugs were found in his truck. Applicant identified the driver as one of the individuals named in the 2004 indictment. When he was asked about the other male identified in the indictment, he testified: "No, he wasn't in the truck with me." He testified that he did not know that individual or the female identified in the indictment. He stated the first name of his other high school friend in the truck is [S], but he did not know S's last name. S is not the first name of the person in the indictment.⁸

Applicant initially stated that S had drugs on his person, but he later denied it. Applicant stated the truck was a 2003 model that belonged to his mother. The truck was seized and never returned to his mother.⁹

⁵ AE G, H.

⁶ Tr. at 37-38; GE 3; AE G, H.

⁷ Tr. at 38-42, 47-54; Applicant's response to SOR; GE 2.

⁸ Tr. at 23-37.

⁹ Tr. at 32-37, 41.

Applicant was arrested in May 2005 and charged with simple assault. He stated a co-worker threw a punch at him, and Applicant reacted in self-defense. He stated he paid a small fine and had to attend 16 hours of anger-management education.¹⁰

Applicant was arrested in March 2007. In June 2008, he pleaded guilty to federal misdemeanor offenses of conspiracy to knowingly hire and continue to employ illegal aliens (8 U.S.C. § 1324a(a)(1)(A) and 8 U.S.C. § 1324a(a)(2)). He was sentenced to time served and 60 days of home confinement with electronic monitoring under the sanction of detention. He was also ordered to pay a \$500 fine and a special assessment of \$10. Applicant stated that he worked for a construction company that employed illegal aliens, and he was arrested when the company was raided by Immigration and Customs Enforcement (ICE). Applicant told a background investigator that he was in charge of a crew, but there were no illegal workers on his crew. He stated that he was charged because he knew the company employed illegal aliens, and he did not notify ICE.¹¹

Applicant was charged with failure to appear in 2002, 2004, and 2010. He was cited for not being in possession of insurance or a driver's license in 2009, and he was cited for driving with a suspended driver's license in 2010. Applicant stated that he did not intentionally fail to appear at trial or traffic court. He also stated that he had insurance and a valid driver's license, but he did not have them with him when he was cited. The disposition of the charges and citations are unclear, but Applicant admitted that he paid fines for other traffic citations.¹²

The SOR alleges that Applicant had three delinquent medical debts totaling \$3,553 and a \$440 charged-off department store account. Applicant admitted owing all the debts. He stated that he was unaware that the debts were charged off or sent to collections. He stated that he contacted the creditors and intends to pay the debts. The department store debt is the only debt listed on the September 2014 credit report, which is the only credit report in evidence.¹³

Applicant submitted a Questionnaire for National Security Positions (SF 86) in February 2012. Section 22 asked:

Section 22 Police Record

For this item, report information regardless of whether the record in your case has been sealed, expunged, or otherwise stricken from the court record, or the charge was dismissed. You need not report convictions under the Federal Controlled Substances Act for which the court issued an

¹⁰ Tr. at 55-56; Applicant's response to SOR; GE 1, 2.

¹¹ Tr. at 57-62; Applicant's response to SOR; GE 1-3; AE A, G.

¹² Tr. at 56-57, 62-71; Applicant's response to SOR; GE 1, 2.

¹³ Tr. at 18, 75-78; Applicant's response to SOR; GE 1, 2, 4; AE B-E.

expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607. Be sure to include all incidents whether occurring in the U.S. or abroad.

Police Record

Have any of the following happened? (If 'Yes' you will be asked to provide details for each offense that pertains to the actions that are identified below.)

- **In the past seven (7) years** have you been issued a summons, citation, or ticket to appear in court in a criminal proceeding against you? (Do not check if all the citations involved traffic infractions where the fine was less than \$300 and did not include alcohol or drugs)
- **In the past seven (7) years** have you been arrested by any police officer, sheriff, marshal or any other type of law enforcement official?
- **In the past seven (7) years** have you been charged, convicted, or sentenced of a crime in any court? (Include all qualifying charges, convictions or sentences in any Federal, state, local, military, or non-U.S. court, even if previously listed on this form).

* * *

Police Record (EVER)

Other than those offenses already listed, have you **EVER** had the following happen to you?

* * *

- Have you **EVER** been charged with any felony offense? (Include those under the Uniform Code of Military Justice and non-military/civilian felony offenses)

* * *

- Have you **EVER** been charged with an offense involving alcohol or drugs?¹⁴ (emphasis in original)

¹⁴ GE 1.

Applicant answered “Yes” to the police record questions that were limited to the last seven years. He reported his 2005 arrest, his 2007 arrest and conviction, and six traffic citations. He answered “No” to the questions asking if he had ever been charged with a felony offense or an offense involving alcohol or drugs. Under other questions, he reported his marijuana use between 2004 and 2007 and a \$2,831 delinquent medical debt. The questions asking about illegal drug involvement only required Applicant to report information from the previous seven years.¹⁵

Applicant denied intentionally providing false information on his SF 86. He stated that he did think that he had been charged in 2003 and 2004. In January 2014, he wrote in response to DOHA interrogatories asking why he did not disclose his 2003 arrest on his SF 86:

The reason that [I] did not disclose the June 2003 incident, [t]o the best of my knowledge I never got charged with anything, yes I was placed under arrest but later released by the agents outside the court house without even stepping foot inside the court house. And was told by the agents that I was being released, at that point I assumed that since I was not summoned to court I was free of all charges, for that reason was that I failed to disclose this incident.¹⁶

Applicant’s explanation fails to address why he did not list his 2004 charges. He testified that he did not know that he was charged because he was not convicted. However, he admitted that his sister-in-law had been charged (“The driver of the car was charged, I was not.”) even though he stated that he did not know if she had ever been convicted. Additionally, Department Counsel asked him if he knew what an indictment was, to which he replied. “Sir, an indictment is when you get charged with something, don’t you?” He stated that he had “never been, not even verbally, told [he] was being charged.”¹⁷ Yet he also testified:

DC: All right. Well you know you were arraigned according to this?

Applicant: Yes.

DC: And what did they tell you you were charged with?

Applicant: For conspiracy.

DC: Conspiracy to do what?

Applicant: For marijuana.

¹⁵ GE 1.

¹⁶ GE 2.

¹⁷ Tr. at 43-47, 87-89; Applicant’s response to SOR; GE 2.

DC: Conspiracy to import marijuana?

Applicant: To have a role to play with marijuana.

DC: Trafficking?

Applicant: Yes.¹⁸

Applicant was interviewed for his background investigation in March 2012. He discussed his marijuana use from 2004 to 2007. He discussed the 2003 arrest involving his sister-in-law. He did not state that he was arrested again in 2004. He did not reveal the information about the 2004 arrest with his high school friends and subsequent charges until the hearing.¹⁹

I did not find Applicant to be a credible witness. There is little in his testimony that I find believable, including his description of the events in 2003 to 2004. I further find that he intentionally provided false information on his SF 86 when he failed to divulge his 2003/2004 arrests and charges.

Applicant submitted several letters attesting to his excellent job performance, dedication, patience, compassion, loyalty, moral character, leadership, honesty, honor, work ethic, trustworthiness, responsibility, dependability, professionalism, reliability, and integrity.²⁰

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 to be 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, administrative judges apply the guidelines 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(c), 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.

¹⁸ Tr. at 35.

¹⁹ Tr. at 38-40; GE 2.

²⁰ AE F.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.”

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 the 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 EO 10865 provides that adverse 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

The security concern for personal conduct 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 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.

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 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;

(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 person may not properly safeguard protected information;

(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:

(3) a pattern of dishonesty or rule violations; 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's marijuana use, criminal conduct, and traffic-related offenses reflect questionable judgment and an unwillingness to comply with rules and regulations. They also created vulnerability to exploitation, manipulation, and duress. AG ¶¶ 16(c), 16(d), and 16(e) are applicable. Applicant intentionally provided false information on his 2012 SF 86 when he answered "No" to the question that asked if he had ever been charged with an offense involving alcohol or drugs. AG ¶ 16(a) is also applicable.

There is insufficient evidence for a determination that Applicant provided the false statement alleged in SOR ¶ 1.k. AG ¶ 16(b) is not applicable. That allegation is concluded for Applicant.

SOR ¶ 1.j alleges that Applicant intentionally falsified his 2012 SF 86 by failing to list his 2003 drug involvement. However, the pertinent question only required him to go back seven years. He had no obligation to report his 2003 drug involvement under that question. SOR ¶ 1.j is concluded for Applicant.

The four delinquent debts, traffic infractions, and failure to arrear charges are mitigated. SOR ¶¶ 1.a, 1.c, 1.f to 1.h, and 1.l are concluded for Applicant.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

- (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;
- (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 caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

There is no evidence of any citations, arrests, or convictions after 2010. The last significant criminal conduct that resulted in criminal proceedings occurred in 2007. Under most circumstances, the conduct would have been mitigated by the passage of time. However, I have serious concerns about Applicant's versions of the events. Moreover, having determined that Applicant intentionally provided false information on his 2012 SF 86, I have also determined that he provided false information when he denied his omission was intentional. It would be inconsistent to find the conduct mitigated.²¹

²¹ See ISCR Case No. 03-22819 at 4 (App. Bd. Mar. 20, 2006), in which the Appeal Board reversed the Administrative Judge's decision to grant the applicant's security clearance:

Once the Administrative Judge found that Applicant deliberately falsified a security clearance application in September 2002, the Judge could not render a favorable security clearance decision without articulating a rational basis for why it would be clearly consistent with the national interest to grant or continue a security clearance for Applicant despite the falsification. Here, the Judge gives reasons as to why he considers the falsification mitigated under a "whole person" analysis, namely that Applicant has matured, has held a position of responsibility, recognizes how important it is to be candid in relation to matters relating to her security clearance, and has changed her behavior so that there is little likelihood of recurrence. However, the Judge's conclusion runs contrary to the Judge's rejection of Applicant's explanations for the security clearance application falsification. At the hearing (after earlier admitting the falsification in her March 2003 written statement to a security investigator), Applicant testified that she had not intentionally falsified her application. Given the Judge's rejection of this explanation as not being credible, it follows that the Judge could not have concluded Applicant now recognizes the importance of candor and has changed her behavior.

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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(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 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. I have incorporated my comments under Guideline E in my whole-person analysis.

I considered Applicant's favorable character evidence. However, he has a troublesome criminal record, and he cannot be counted on to tell the truth.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate 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 |
| Subparagraph 1.a: | For Applicant |
| Subparagraph 1.b: | Against Applicant |
| Subparagraph 1.c: | For Applicant |
| Subparagraphs 1.d-1.e: | Against Applicant |
| Subparagraphs 1.f-1.h: | For Applicant |
| Subparagraph 1.i: | Against Applicant |
| Subparagraphs 1.j-1.l: | For 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.

Edward W. Loughran
Administrative Judge