



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 12-10636
)
Applicant for Security Clearance)

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: *Pro se*

01/21/2016

Decision

CREAN, Thomas M., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted. Applicant presented sufficient information to mitigate personal conduct security concerns.

Statement of the Case

On June 5, 2012, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for a position with a defense contractor. After an investigation conducted by the Office of Personnel Management (OPM), the Department of Defense (DOD) could not make the affirmative findings required to issue a security clearance. DOD issued Applicant a Statement of Reasons (SOR), dated May 18, 2015, detailing security concerns for personal conduct under Guideline E. The action was taken under Executive Order 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 in the DOD on September 1, 2006.

Applicant answered the SOR on June 20, 2015. He denied the two allegations of falsification of his security clearance application. Department Counsel was prepared to proceed on July 29, 2015, and the case was assigned to me on September 29, 2015. DOD issued a notice of hearing on October 22, 2015, scheduling a hearing for November 2, 2015. I convened the hearing as scheduled. The Government offered three exhibits that I marked and admitted into the record without objection as Government Exhibits (GX) 1 through 3. Applicant testified and submitted one exhibit that I marked and admitted into the record without objection as Applicant Exhibit (AX) A. I received the transcript of the hearing (Tr.) on November 16, 2015.

Findings of Fact

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact.

Applicant is 40 years old and has been employed as a pipefitter in a government contracted shipyard since 2006. He has two years of college credit. Applicant first married on June 19, 1999, and divorced on July 5, 2006. He married his present wife on April 11, 2009. He has no children. (Tr. 11-12, 40-41; GX 1, e-QIP, dated June 4, 2012; GX 2, Personal Subject Interview, dated July 11, 2012)

Federal Bureau of Investigations (FBI) records show that Applicant was arrested on September 23, 2005, and charge with possession of marijuana. The records also show that Applicant was arrested for possession of marijuana on November 28, 2011. (GX 3, FBI Identification Record, date May 3, 2012) The SOR alleges that in response to a police records question on the security clearance application asking if Applicant had been charged, convicted, or sentenced in the last seven years for a crime in any court, or is he currently on probation or parole, Applicant responded "no." He did not report his September 2005 and November 2011 arrests for possession of marijuana. (SOR 1.a) The SOR also alleges that Applicant answered falsely to another question concerning his police record on the security clearance application when he responded "no" to a questions asking if he had ever been charged with a felony. Applicant was arrested on July 7, 1995, and charge with four counts of felony forgery and four counts of felony uttering. (SOR 1.b)

Applicant volunteered during his interview with an OPM security investigator that in November 2011 he was stopped by police for driving on a suspended license. He admitted to the arresting officer that he had a blunt of marijuana in his pocket. Applicant was issued a citation for possession of marijuana and allowed to proceed to work. He was sentence to a fine; his driver's license was suspended; and he was placed on probation for a year. He also admitted he was arrested on September 23, 2005, for possession of a blunt of marijuana in his car. Applicant was sentenced to a fine and six months of probation. He completed all requirements of both sentences. (Tr. 41-44)

Applicant admitted that he was arrested on July 7, 1995, on four counts of felony forgery and uttering. Applicant took checks from his neighbor and wrote his own name

on the checks and cashed them. Applicant pled guilty to the felony charges. The charges were later dismissed after Applicant paid a fine and completed probation. (GX 2, Personal Subject Interview, dated July 11, 2012; AX A, Court Documents, dated December 9, 1996)

Applicant denied intentional falsification claiming that he made an honest mistake when completing his security clearance application. It was the first security clearance application he submitted. He was provided a paper copy of the application to complete a draft. He had to make phone calls to get some information he required for the form. He did not list his arrests for possession of marijuana on his draft copy because he did not believe that he had been arrested on both occasions since he was not taken to a police station, but merely issued a summons to appear in court. After completing the draft copy of the security application, Applicant discussed the application with a clerk in the company's security office. Applicant informed her of the possession of marijuana offenses, and they discussed his reasons for not including them on the application. Applicant thought the clerk was making changes to his handwritten application. The clerk actually entered the data from the form to the electronic application. Applicant was provided a copy of the electronic application, but he did not read it carefully before signing the signature page. Applicant did not receive a paper copy of the electronic application until a month later. (Tr. 23-35)

Applicant did not list the felony forgery and uttering offenses. His 1995 forgery offense came to mind when he completed the application, but he thought since it had been dismissed, he did not have to list the offense. He thought the offenses were no longer considered part of his criminal record. He read the part of the question that said to list charges even if dismissed. He made an honest mistake in believing that he did not have to list the offense. He thought the question was irrelevant since the offenses were dismissed. (Tr. 35-36)

The security investigator asked him for details about the November 2011 possession of marijuana charge during her interview with Applicant. He then told her that he was still on probation for the November 2011 offense. This line of questioning triggered his memory that he should tell her about both the September 2005 marijuana possession charge and the 1995 forgery and uttering felony. He told her about the 1995 felony forgery charges that were dismissed. He told her the offenses were "gone" since it was dismissed. (Tr. 36-40)

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 must be considered 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(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.

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." 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, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion in seeking 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Analysis

Personal Conduct

Personal conduct is a security concern because conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified and sensitive information. Of special interest is any failure to provide truthful and candid answers during the process to determine eligibility for access to classified information or any other failure to cooperate with the process (AG ¶ 15) Personal conduct is always a security concern because it asks whether the person's past conduct justifies confidence the person can be trusted to properly safeguard classified or sensitive information. Authorization for a security clearance depends on the individual providing correct and accurate information. If a person conceals relevant information or provides false information, the security clearance process cannot function

properly to ensure that granting access to classified or sensitive information is in the best interest of the United States Government.

Applicant did not provide any derogatory criminal history information on his security clearance application. Applicant had two convictions for marijuana possession, and a felony conviction for forgery and uttering. While there is a security concern for a deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government when applying for a security clearance, not every omission, concealment or inaccurate statement is a falsification. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully with intent to deceive. Applicant's omission of the possession of marijuana and forgery offenses may raise a security concern under Personal Conduct Disqualifying Condition AG ¶ 16(a) (the 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 eligibility or trustworthiness, or award fiduciary responsibilities).

For AG ¶ 16(a) to apply, Applicant's omission must be deliberate. The Government established that Applicant admitted facts from his June 5, 2012 e-QIP when he failed to list the possession of marijuana and forgery offenses. In his response to the SOR and at the hearing, Applicant denied intentional falsifying information on the e-QIP. When the allegation of falsification is controverted, the Government has the burden of proving it. Prove of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concern an applicant's intent or state of mind at the time of the omission.

Applicant did not deliberately fail to provide correct and accurate information on the security clearance application. His testimony as to how the security clearance application was completed is credible. He discussed some of the information with the clerk assisting him in completing the application, but she did not include all of the information in the electronic version of the application. In spite of the guidance on the form for what information to include on the form, Applicant did not list the drug and forgery offenses. As a lay person completing the security clearance application for the first time, Applicant's reasons for not listing the offenses are consistent, logical, and reasonable. When the general question on drug offenses was raised during the security interview, he voluntarily told the security investigator about the drug offenses and the forgery offense. He explained why he did not include the information on the application. In his response to the SOR and at the hearing, he provided the same explanation. He did not believe that he was arrested for the possession of marijuana since he was never taken to the police station but just issued a summons. He does now acknowledge that he was charged with drug possession and sentenced. Since the forgery charge had been dismissed, he did not believe the offense was still relevant. He had logical and fact-based reasons for not including the offenses on the security clearance application

establishing that his failure was not deliberate. Therefore, the Government has not established a prima facie case. Even if it did, Applicant voluntarily provided sufficient information to mitigate the potential failure to provide complete and accurate information in the security clearance process under the provisions of personal conduct mitigating condition A ¶ 17(b) (the refusal failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperate fully and truthfully).

Whole-Person Analysis

Under the whole-person concept, the administrative judge must evaluate an applicant's security eligibility 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(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 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. Applicant presented sufficient information to establish that he did not deliberately provide false or inaccurate information on his security clearance application. His reasons for not including the drug and forgery information are reasonable and logical. Overall, the record evidence leaves me without questions and doubts as to Applicant's judgment, reliability, trustworthiness, and eligibility and suitability for a security clearance. For all these reasons, I conclude that Applicant has mitigated security concerns arising under the personal conduct guidelines.

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:

FOR APPLICANT

Subparagraphs 1.a – 1.b:

For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

THOMAS M. CREAN
Administrative Judge