



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



In the matter of:)
)
XXXXXXXXXX, XXXXX) ISCR Case No. 13-00719
)
Applicant for Security Clearance)

Appearances

For Government: Gina L. Marine, Esq., Department Counsel
For Applicant: *Pro se*

04/15/2014

Decision

Tuider, Robert J., Administrative Judge:

Applicant committed about 20 mostly traffic-related offenses from 1998 to 2011, and he was fined about \$3,868. He intentionally omitted derogatory information from his October 1, 2012 Electronic Questionnaire for Investigations Processing (e-QIP) version of a security clearance application (SF 86). Personal conduct concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On October 1, 2012, Applicant submitted an SF 86. (Item 4) On July 31, 2013, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a statement of reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guideline E (personal conduct). (Item 1) The SOR detailed reasons why DOD could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant and recommended referral to an

administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked. (Item 1)

On August 21, 2013, Applicant responded to the SOR allegations and waived his right to a hearing. (Item 3) A complete copy of the file of relevant material (FORM), dated November 1, 2013, was provided to him on November 8, 2013.¹ Applicant did not respond to the FORM. The case was assigned to me on March 7, 2014.

Findings of Fact²

In Applicant's SOR response, he admitted all of the SOR allegations relating to his history of arrests and fines, and he admitted that he failed to provide some derogatory information on his October 1, 2012 SF 86. (Item 3) He also provided some mitigating information. (Item 3) His admissions are accepted as findings of fact.

Applicant is 31 years old, and he has worked as an engineering technician for a defense contractor since April 2012.³ He also worked from October 2008 to January 2010 as a senior engineering technician. He was employee of the month for May 2013.

Applicant graduated from high school in 2001. He attended a community college from August 2003 to May 2004. He received a certificate of completion for Machine Shop Technician in 2004, and he returned to college in 2010. He does not have a college degree. He has never served in the military. He has never married, and he does not have any children.

Personal Conduct

In 1998, Applicant was fined \$75 for running a stop sign. In 1999, he was fined \$80 for speeding. In 2000, he was fined \$540 for shoplifting and failing to wear his seatbelt. In 2001, he was fined \$85 for speeding.

In 2002, Applicant was fined \$110 for speeding and failing to wear his seat belt; he was fined \$172 for disorderly conduct; and he was fined for careless driving. In 2002, he was fined \$310 for driving with improper equipment and expired tags. In 2002, he was charged with operating a vehicle while intoxicated (OWI) and speeding. The OWI charge was dismissed. (December 5, 2012 Office of Personnel Management (OPM) personal subject interview (PSI), Item 5 at 6)

¹The DOHA transmittal letter is dated November 4, 2013, and Applicant's receipt is dated November 8, 2013. The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to submit information.

²Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits. Unless stated otherwise, Applicant's October 1, 2012 SF 86 and/or his December 5, 2012 Office of Personnel Management (OPM) personal subject interview (PSI) and SOR response are the primary sources for the facts in the Statement of Facts. (Items 3-5)

³The facts in this paragraph are from Applicant's October 1, 2012 SF 86. (Item 4)

In 2003, Applicant was fined \$102 for contempt of court; he was fined \$421 for assault/battery; and he was fined \$216 for not having liability insurance. In 2003, Applicant was working at a car wash. (December 5, 2012 OPM PSI, Item 5 at 4) More than \$1,000 in valuables were stolen from a vehicle. (Item 5 at 4) Applicant and four other workers were arrested and charged with grand larceny, a felony, and contempt of court. (Item 5 at 4) After the victim's property was returned, the charges were dismissed, and Applicant was advised that his charge of grand larceny was expunged from his record. (Item 3, Item 5 at 5)

In 2004, Applicant was fined \$350 for driving while license suspended; and he was fined \$123 for contempt of court. In 2004, he was arrested and charged with possession of marijuana. Applicant was a passenger in a vehicle where the police found marijuana. (Item 3) The driver pleaded guilty to possession of marijuana, and the charge against Applicant was dismissed. (Item 3)

In 2006, Applicant was fined \$145 for improper equipment; he was fined \$185 for speeding and driving while license suspended; he was fined \$315 for driving without liability insurance; and he was fined \$175 for driving without a license tag.

In 2007, Applicant was fined \$127 for careless driving. In 2010, Applicant was fined \$240 for speeding. In 2011, Applicant was fined \$97 for driving with an expired license.

Accuracy of SF 86

Section 22 **Police Record** of Applicant's October 1, 2012 SF 86 asked, "Other than those offenses already listed by you, have you **EVER** had the following happen to you? . . . Have you **EVER** been charged with any felony offense? . . . Have you **EVER** been charged with an offense involving alcohol or drugs?" Applicant answered, "Yes" and disclosed in that in March 2003 he was "[c]harged with Grand Larceny along with 4 others. While in custody property reappeared all charges drop[p]ed and expunged from record." However, he failed to disclose that he was charged with OWI in 2002, and he was charged with possession of marijuana in 2004.

Applicant said the 2002 arrest and charge of OWI "slipped his mind." (Item 3) He said he did not disclose the 2004 arrest and charge of possession of marijuana "because I was found not guilty of the charges and I did not think that it counted. I misunderstood the question since I was not guilty of the charge I did not think I had to list it." (Item 3)

Applicant answered, "No" to Section 13C "**Employment Record**" of his October 1, 2012 SF 86, which asked:

Have any of the following happened to you in the last seven (7) years at employment activities that you have not previously listed? Fired from a job? Quit a job after being told you would be fired? Have you left a job by mutual agreement following charges or allegations of misconduct? Left a

job by mutual agreement following notice of unsatisfactory performance?
(Item 4)

Applicant indicated on his SF 86 that his reason for leaving employment in 2003 was “school.” (Item 4) He acknowledged that he was told initially by his employer that he “was fired for my arrest” for grand larceny. (Item 3) Applicant explained he did not disclose his firing because his employer offered to rehire Applicant; however, Applicant did not accept the position because he wanted to return to college. (Item 3)

Applicant indicated on his SF 86 that his reason for leaving employment in January 2004 was “laid off.” (Item 4) He explained during his December 5, 2012 OPM PSI that “he was called in by his supervisor [name omitted] and was told that he was not performing up to what was expected and he was fired.” (Item 5) However, in response to the SOR, he said, “To the best of my knowledge I was ‘laid off’. Upon coming to work for my scheduled shift on 01/2004, I was instructed to pack my tools and that I no longer had a job. No reason was given at that time.” (Item 3)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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 applicant’s 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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

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, these guidelines are applied 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, 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 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 “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision

should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant's allegiance, loyalty, or patriotism. It 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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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.

Three personal conduct disqualifying conditions under AG ¶ 16 are potentially applicable. Those three disqualifying conditions provide:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . used to conduct investigations, . . . [to] determine security clearance eligibility or trustworthiness;⁴

⁴The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(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 . . . 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. . . .

AG ¶ 16(a) is established. Applicant's SOR alleges that he failed to disclose on his October 1, 2012 SF 86 an arrest for possession of marijuana, an arrest for OWI, and termination of employment on two occasions under adverse circumstances. He read the questions and provided non-derogatory explanations for resolution of his larceny charge and his employment history. He has sufficient education to understand the plain meaning of the questions. His failure to disclose derogatory information was a deliberate decision made with intent to conceal adverse information about his worthiness to receive access to classified information.

AG ¶ 16(d) applies. Applicant's approximately 20 mostly traffic-related offenses committed from 1998 to 2011, resulting in about \$3,868 in fines raise security concerns about his pattern of rule violations.

AG ¶ 16(e) applies. There is substantial evidence that Applicant engaged in conduct that adversely affects his personal, professional, and community standing. Further analysis concerning applicability of mitigating conditions is required.

Five mitigating conditions under AG ¶ 17 are potentially applicable:

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

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

(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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

AG ¶ 17(e) mitigates the security concern raised under AG ¶ 16(e). I do not believe Applicant could be coerced or pressured into release of classified information by threats of public disclosure of his history of mostly traffic-related offenses. Those offenses are matters of public record and are documented in his security file.

Applicant's 2002 OWI, 2003 grand larceny, and 2004 possession of marijuana charges were all dismissed. He denied culpability for these three criminal offenses. SOR ¶¶ 1.b to 1.d are found for Applicant. Even though these charges were dismissed, they must still be disclosed upon request on his SF 86.

None of the other mitigating conditions apply. Although Applicant has not had any traffic violations since 2011, his 20 mostly traffic-related offenses cannot be considered in isolation. His false statements on his October 1, 2012 SF 86 are recent and serious. Personal conduct concerns are not mitigated.

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 the 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 have incorporated my comments under Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

There are some facts supporting mitigation of security concerns under the whole-person concept; however, they are insufficient to fully mitigate security concerns. Applicant is 31 years old, and since April 2012, he has worked as an engineering technician for a defense contractor. He was employee of the month for May 2013. He graduated from high school and attended a community college from August 2003 to May 2004. He received a certificate of completion for Machine Shop Technician in 2004, and he returned to college in 2010. He received about 20 tickets or charges for mostly driving-related offenses from 1998 to 2011, and he was fined about \$3,868. For the last six years, he has only been charged with speeding and driving with an expired license. For more than two years he had not received any tickets. He is credited with driving more responsibly and showing greater maturity and judgment in his driving practices over the last several years.

The evidence against approval of Applicant's clearance is more substantial at this time. Applicant made false statements on October 1, 2012, on his SF 86, about ending his employment under adverse circumstances, his arrest for marijuana possession and an OWI arrest. Security clearance holders are relied upon to provide accurate information especially in a security context. Accurate information is crucial to safeguarding national security. His false statements show lack of judgment and raise unresolved questions about Applicant's reliability, trustworthiness, and ability to protect classified information.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Personal conduct concerns are not mitigated. For the reasons stated, I conclude Applicant is not eligible for access to classified information at this time.

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:	Against Applicant
Subparagraphs 1.b-1.d:	For Applicant
Subparagraphs 1.e-1.g.	Against Applicant

Conclusion

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

Robert J. Tuidor
Administrative Judge