



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



In the matter of:)
)
 REDACTED) ISCR Case No. 14-00271
)
 Applicant for Security Clearance)

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: *Pro se*

05/28/2014

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant established his eligibility for access to classified information. He mitigated the criminal and personal conduct security concerns. Clearance is granted.

Statement of the Case

On March 3, 2014, the Department of Defense (DOD), in accordance with DOD Directive 5220.6, as amended (Directive), issued Applicant a Statement of Reasons (SOR), alleging security concerns under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). Applicant promptly answered the SOR and requested a hearing to establish his eligibility for access to classified information (Answer).

On April 11, 2014, I was assigned Applicant's case. After coordinating with the parties, I scheduled the hearing for May 12, 2014. The hearing was held as scheduled. Applicant testified and the Government offered exhibits (Gx.) 1 – 10, which were

admitted into evidence without objection. The hearing transcript (Tr.) was received on May 20, 2014, and the record closed on May 27, 2014.¹

Findings of Fact

Applicant, 29, has been employed as a merchant seaman since 2009, and has been working for his current employer since about August 2013. He has never been married, but has a young child from a prior relationship who he financially supports. He graduated high school in 2003 and then attended college, but did not receive a degree. He spends about six to eight months of the year working and living on ships out at sea. When not out at sea, he lives with his mother and spends his time caring for his son and playing music. He is seeking a security clearance for the first time to work as a defense contractor. He has been entrusted with classified information over the past fourteen months, and reports no issues in handling and safeguarding such information. (Tr. at 47-49, 63, 75-78; Gx. 1)

In March 2006, Applicant was involved in a fistfight with a childhood friend. During the fight, Applicant's friend suffered a small cut on his wrist. No weapons were involved in the fight. Applicant was arrested and charged with malicious wounding, a felony. Less than two weeks later the charge was *nolle prosequi*. (Tr. at 32-34, 49-50; Answer; Gx. 4)

In July 2008, Applicant was giving a ride to a recent acquaintance when he was pulled over by the police for a traffic violation. The police then conducted a search of the car, as well as Applicant and his passenger. The police uncovered drugs on the passenger. Applicant and the passenger were arrested. Applicant was charged with two felony drug offenses. Applicant testified that he was unaware that his passenger had drugs on his person or was involved with drugs. He stopped associating with the individual after the arrest. He further testified that he has never been involved with illegal drugs. Both charges were *nolle prosequi*. (Tr. at 34-35, 51-57; Answer; Gx. 5 – 8)

In May 2009, Applicant and a few friends were fishing when they were briefly detained by the police. Applicant provided his identification and answered the police officer's questions. While he was being questioned, one of the police officers purportedly saw an open beer can in Applicant's car. The police officer reached in and unlocked the car through an open car window. The police then conducted a search of the car. Applicant became upset and vehemently objected to the search of his car without his permission. He was cited for obstruction of justice, a misdemeanor. The search of Applicant's car did not uncover any drugs or other fruits of a crime. Applicant appeared in court, without counsel, and was convicted of the misdemeanor charge. He was sentenced to six months in jail (all but four days suspended) and two years of unsupervised probation. He successfully completed all terms of his sentence. He has

¹ Applicant requested to hold the record open until May 26, 2014, to submit post-hearing matters. I granted his request and, in recognition of the federal holiday, *sua sponte* extended the original deadline by one day. No documents were received prior to the close of the record.

not been arrested, charged, or involved in any other incident involving law enforcement since this incident. (Tr. at 35-36, 57-62; Answer; Gx. 9)

In August 2013, Applicant was hired by his current employer. He was given 24 hours before shipping out to complete and submit a security clearance application (SCA). Applicant, who was filling out a SCA for the first time, went through the process of setting up an account electronically and completed the application. He reviewed the questions and filled out the SCA at approximately 0200. In responding to questions about his criminal history, Applicant mistakenly omitted his prior arrests and misdemeanor conviction. Applicant testified that he had filled out numerous employment applications in the past and such applications only required information about arrests resulting in felony convictions. He mistakenly assumed the questions on the SCA also only required information about felony convictions. He now realizes that, notwithstanding the pressures of starting a new job and the 24-hour deadline, he should have taken his time and more carefully reviewed the questions.

Applicant voluntarily sat down for a background interview about a month after submitting his SCA. During the interview, the investigator reviewed with Applicant all the SCA questions, to include those regarding potential criminal history. The investigator explained to Applicant the extent of the matters that needed to be disclosed, to include any felony arrests and misdemeanor convictions. Applicant then disclosed and fully discussed with the investigator his 2006 and 2008 arrests, as well as his 2009 misdemeanor conviction. (Tr. at 28-32, 36-47; Answer; Gx. 1 – 3)

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are only eligible for access to classified information “only upon a finding that it is clearly consistent with the national interest” to authorize such access. Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry*, § 2 (Feb. 20, 1960), as amended.

When evaluating an applicant’s eligibility, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a common sense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

The Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. On the other hand, an 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.” Directive ¶ E3.1.15. An applicant has the ultimate burden of persuasion to establish their eligibility.

In resolving the ultimate question regarding an applicant’s eligibility, an administrative judge must resolve “[a]ny doubt concerning personnel being considered

for access to classified information . . . in favor of national security.” AG ¶ 2(b). Moreover, “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.²

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. 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 an 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.³

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.” E.O. 10865 § 7. Thus, a decision to deny a security clearance amounts to a finding that an applicant, at the time the decision was rendered, did not meet the strict guidelines established for determining eligibility for access to classified information.

Analysis

Guideline J, Criminal Conduct

The security concern regarding criminal conduct is addressed at AG ¶ 30:

Criminal activity creates doubt about a person's judgment, reliability and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

Applicant's criminal record raises the above concern and establishes the following disqualifying conditions:

AG ¶ 31(a): a single serious crime or multiple lesser offenses; and

AG ¶ 31(c): allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

² See also, ISCR Case No. 07-16511 at 3 (App. Bd. Dec. 4, 2009) (“Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance.”)

³ See ISCR Case No. 11-13626 (App. Bd. Nov. 7, 2013) (security clearance determinations require administrative judges to make predictive judgments).

An applicant may mitigate the criminal conduct concern by establishing one or more of the mitigating conditions listed under the guideline. I have considered all the mitigating conditions and only the following were potentially raised by the evidence:

AG ¶ 32(a): so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

AG ¶ 32(c): evidence that the person did not commit the offense; and

AG ¶ 32(d): there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Applicant has not been arrested, charged with, or implicated in any criminal matter since his misdemeanor conviction in 2009. In the past five years, he has been steadily employed. He does not associate with others potentially involved in criminal activity. He financially supports and, when not deployed to sea, cares for and is helping to raise his son. He is now a responsible, hard-working adult, who no longer places himself in situations that may raise questions about his judgment or reliability. Furthermore, he has a demonstrated track record of safeguarding and properly handling classified information. AG ¶¶32(a) and 32(d) apply.

Applicant also established that he did not commit the drug offenses for which he was arrested in 2008. The drugs were not found in an area of the car where he had exclusive control over or could easily gain access to, such as, a glove compartment. Instead, the drugs were found by the police on the passenger, a recent acquaintance. Applicant credibly testified that he was unaware the passenger was involved with illegal drugs and, after the arrest, stopped associating with the individual.⁴ AG ¶ 32(c) applies.

Guideline E, Personal Conduct

The personal conduct security concern is explained at 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.

⁴ Although far from dispositive on this issue, the authorities' subsequent decision to drop the drug charges tends to support Applicant's testimony that he was not involved with illegal drug activity.

The SOR alleges that Applicant deliberately falsified his SCA by omitting his 2006 and 2008 felony arrest and 2009 misdemeanor conviction. Applicant denies the allegations. If said allegations were established by substantial evidence, such conduct would raise the disqualifying condition at AG ¶ 16(a).⁵

It is axiomatic that the security clearance process depends upon the honesty of all applicants and begins with the answers provided in the SCA. However, the omission of material, adverse information standing alone is not enough to establish that an individual intentionally falsified his or her SCA. An omission is not deliberate if the person genuinely forgot the information requested, inadvertently overlooked or misunderstood the question, or sincerely thought the information did not need to be reported. An administrative judge must examine the facts and circumstances surrounding the omission to determine an applicant's true intent.⁶

Applicant did not intentionally omit the information about his criminal history in response to the relevant questions on the SCA. Although he is a high school graduate with some college-level education and the questions at issue were not overly complex, he is far from a sophisticated applicant who would be familiar with the questions or matters required to be disclosed on a security clearance application. His previous experience with job applications, which only required disclosure of felony convictions, colored his perception of what information needed to be disclosed about his criminal record. Additionally, Applicant was tired and under the stress of a tight 24-hour deadline, at the end of which he would ship out to sea for several months. These internal and external factors conspired together to lead Applicant to mistakenly conclude that he was not required to disclose his prior arrests and misdemeanor conviction.

Applicant did not understand the extent of the information required to be disclosed regarding his criminal record until he met with the background investigator, which was about a month after he submitted the SCA. After the investigator sat Applicant down and explained to him the questions in detail, he revealed the adverse information and fully cooperated with the interview. Applicant's candor and openness at the interview is inconsistent with the conduct of an individual who is deliberately trying to hide or minimize his criminal record. Furthermore, I had an opportunity to observe Applicant's demeanor as he testified and found him credible.⁷ Accordingly, I find that Applicant did not deliberately falsify his SCA.⁸

⁵ Deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . or similar form used to . . . determine security clearance eligibility.

⁶ See *generally* ISCR Case No. 02-12586 (App. Bd. Jan. 25, 2005); ISCR Case No. 02-15935 (Appl. Bd. Oct. 15, 2003).

⁷ Applicant's hearing was held in a conference room and he was seated no more than an arms-length away, which allowed me to closely observe his demeanor while he testified.

⁸ In reaching this conclusion, I recognize that a judge is not required to accept an applicant's assertions, especially if such assertions are contradicted by record evidence, implausible, or internally inconsistent. In the present case, Applicant's testimony was credible, plausible, and consistent throughout.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a).⁹ Applicant is a young adult who has matured greatly over the past five years. During that time, he has established a career, works tirelessly, and, when not working, lives with his mother and cares for his young child. He no longer engages in conduct, such as the fistfight in 2006, or puts himself in situations, such as the outburst that led to his 2009 misdemeanor conviction, which could raise questions about his judgment, reliability, or trustworthiness. Additionally, he has handled classified information without issue for over a year. Applicant met his heavy burden of mitigating the security concerns at issue. Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility for access to classified information.

Formal Findings

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

Paragraph 1, Guideline J (Criminal Conduct):	FOR APPLICANT
Subparagraphs 1.a – 1.c:	For Applicant
Paragraph 2, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraphs 2.a – 2.b:	For Applicant

Conclusion

In light of the record evidence and for the foregoing reasons, it is clearly consistent with the national interest to grant Applicant access to classified information. Applicant's request for a security clearance is granted.

Francisco Mendez
Administrative Judge

⁹ The non-exhaustive list of adjudicative factors are: (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.