



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



In the matter of:)	
)	
)	ISCR Case No. 14-01074
)	
Applicant for Security Clearance)	

Appearances

For Government: Christopher Morin, Esq., Department Counsel
For Applicant: *Pro se*

09/18/2014

Decision

DUFFY, James F., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline E, personal conduct. Eligibility for access to classified information is denied.

Statement of the Case

On May 1, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E. This action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented on September 1, 2006.

The SOR set forth reasons why DOD CAF could not make the affirmative finding under the Directive that it is clearly consistent with the national interest to grant Applicant a security clearance. On May 19, 2014, Applicant answered the SOR allegations and elected to have his case decided on the written record in lieu of a hearing. Department Counsel requested a hearing. This case was assigned to me on

July 18, 2014. On July 22, 2014, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing scheduling the hearing for August 14, 2014. The hearing was held as scheduled.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 3 that were admitted into evidence without objection. Applicant testified, called no witnesses, and offered no exhibits. The prehearing guidance letter sent to Applicant was marked as Hearing Exhibit (HE 1) and Department Counsel's list of exhibits was marked as HE 2. The transcript (Tr.) of the hearing was received on August 26, 2014.

Findings of Fact

Applicant is a 32-year-old truck driver who works for a defense contractor. He has been working for his current employer since August 2013. He graduated from high school in 2000 and earned a certificate from a technical school in 2012. He is married and has two children, ages one and three. This is the first time that Applicant is seeking to obtain a security clearance.¹

The SOR listed four Guideline E allegations. They asserted that Applicant's employment at a security firm (hereafter referred to a Company A) was terminated in January 2007 for falsifying documentation and not performing security checks (SOR ¶ 1.a); that he falsified his Electronic Questionnaire for Investigations Processing (e-QIP) of August 29, 2013, by failing to disclose his termination of employment from Company A and from two other companies (hereafter referred to as Company B and Company C) (SOR ¶ 1.b); that, during a personal subject interview, he stated that he was fired from Company C because he failed to disclose to that company his termination of employment from Company B (SOR ¶ 1.c); and that he made a false statement during an Office of Personnel Management (OPM) interview by claiming he forgot to report his termination of employment for cause from Company B when he filled out his e-QIP (SOR ¶ 1.d). In his Answer to the SOR, Applicant admitted each allegation. However, he stated that he was fired from Company A for no reason and claimed he neither falsified documentation nor failed to perform his security checks. His comments regarding SOR ¶ 1.a are considered a denial of that allegation.²

From September 2004 to January 2007, Applicant was employed full time as a security guard at Company A. In that job, his duties included patrolling different floors of a building and recording his presence on the floors through an access card. The access card apparently showed that he was on a floor too long. He stated that he was terminated from that job for false documentation and not doing his security checks. As noted above, he claimed Company A had no valid basis for firing him. He stated that he performed the security checks and did not submit false documentation.³

¹ Tr. 6-7, 29-30, 34; GE 1, 3.

² Applicant's Answer to the SOR.

³ Tr. 30-32; GE 1, 3; Applicant's Answer to the SOR.

Later in 2007, Applicant worked for a trucking company, Company B, for about one month. While working as a truck driver at Company B, he was involved in two mishaps in which he damaged trucks. In one mishap, he scraped a truck along a fence at a customer's location. His supervisor gave him a warning for that first mishap. A couple of weeks later while backing a truck into a loading dock, he scraped another truck parked at the loading dock. He was fired from that job because of the second mishap.⁴

Following his termination from Company B, he began working for another trucking company, Company C, in 2007. At the start of that job, he was assigned to take a driver refresher class. He was fired from Company C before the refresher class was completed because that company learned he was fired from Company B and he had not reported that earlier firing to Company C. In an OPM interview on October 14, 2013, the OPM investigator reported, "He [Applicant] did not report working for this company [Company B] because he forgot about it."⁵

On August 29, 2013, Applicant submitted an e-QIP. In Section 13C of the e-QIP, he was asked if, within the last seven years, he was fired from a job; quit a job after being told he would be fired; left a job by mutual agreement following charges or allegations of misconduct; left a job by mutual agreement following notice of unsatisfactory performance; or received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace. He responded "No" to those questions and failed to disclose that he was fired from jobs at Companies A, B, and C in 2007.⁶

In Section 13A of that e-QIP, Applicant was asked to list his employment in the preceding 10 years. In Section 13A, he listed his employment with Company A and indicated that the reason he left that job was "to work for another company." Section 13A also specifically asked if he was fired from his job at Company A and he responded, "No." In Section 13A, he did not list his employment with either Company B or Company C.⁷

⁴ Tr. 32-34; GE 3; Applicant's Answer to the SOR.

⁵ Tr. 32-34; GE 3; Applicant's Answer to the SOR.

⁶ Tr. 34-39; GE 1. In the SOR, the language from Section 13C is not quoted accurately. Apparently, the drafter of the SOR was using a different version of the e-QIP in drafting the SOR than the one Applicant signed. This variance is a harmless error, however, because the pertinent language in the SOR that asked whether Applicant was "Fired from a job" is the same in the signed e-QIP. Applicant was not misled by this SOR drafting error.

⁷ Tr. 34-39; GE 1. Applicant's failure to list his employment with Companies B and C in Section 13A is not alleged as a falsification in the SOR. Conduct not alleged in the SOR cannot be used as a basis for denying a security clearance. Non-alleged conduct, however, may be considered to assess an applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of the whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct 26, 2006).

At the hearing, Applicant testified in part as follows:

[Department Counsel]: All right. So the reason you didn't list the prior firings in this security clearance application was because you didn't want [your current employer] to know you had been fired previously. Right?

[Applicant]: Yes. I didn't want them to know because most likely when you put, you know, you've been fired, you won't get the job so I just didn't put them on.

* * *

[Department Counsel]: Okay. All right. Let's go back to that then. Whether it was during the first [OPM] interview on the 11th of October or the follow-up phone call on the 14th, you intentionally omitted the information [about the firings] because you didn't want your employer to know about it because you were afraid you might be fired?

[Applicant]: I was afraid I wasn't going to get the job.

[Department Counsel]: So you lied. It doesn't matter about the timing, I guess. In the end you lied.

[Applicant]: Yes.⁸

Applicant holds a Class A commercial driver's license that authorizes him to drive 18-wheel trucks. He testified that, if his supervisor was called as a witness, she would praise his performance and state he was a hard worker.⁹

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AGs. In addition to brief introductory explanations for each guideline, the AGs 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

⁸ Tr. 35-43.

⁹ Tr. 43-46.

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 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, as follows:

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;

(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 including that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (1) untrustworthy or unreliable behavior . . . ; (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

In 2007, Applicant was fired from three jobs (SOR ¶ 1.a and 1.c). In 2013, he intentionally failed to disclose information about those firings in response to a question on his e-QIP (SOR 1.b).¹⁰ AG ¶¶ 16(a), 16(d), and 16(e) apply.

SOR ¶ 1.d alleged that Applicant made a false statement to an OPM investigator on October 14, 2013, by stating he was fired by Company B for cause and forgot to report his employment with Company B when filling out his e-QIP. The summary of the October 14, 2013 interview reflected that Applicant told the investigator that he forgot to inform his next employer that he had worked for Company B. The summary makes no mention of him forgetting to disclose that he worked for Company B on his e-QIP. In fact, the summary does not mention the e-QIP. Even though Applicant admitted the allegation in SOR ¶ 1.d, it is inaccurate and misleading. Because this allegation did not provide Applicant adequate notice of the purported false statement in the OPM interview, I find in favor of Applicant on SOR ¶ 1.d.

¹⁰ SOR ¶ 1.b incorrectly alleged that Applicant responded to Section 13C of the e-QIP by indicating he left the employment of Company A by mutual agreement following notice of unsatisfactory performance. However, he made no statement of that nature in the e-QIP. In Section 13A, he indicated that he left the employment of Company A "to work for another company." The incorrect statement in SOR ¶ 1.b is harmless error because there is no reason to believe Applicant was confused or misled by that statement.

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;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of unauthorized 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 information, the individual cooperated fully and truthfully;
- (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.

Applicant was terminated from a job for submitting false documentation and not performing his duties as required. He intentionally concealed material information about being fired from a job from an employer and from the Federal Government. Such misconduct raises serious questions about his reliability, trustworthiness, and good judgment. He receives credit for admitting his wrongdoing at the hearing. Nonetheless, insufficient time has passed to conclude that he has reformed and rehabilitated himself. None of the above mitigating conditions apply.

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.

In the considering the evidence presented in light of the factors in AG ¶ 2(a), I conclude that Applicant failed to establish that he has reformed and rehabilitated himself. His falsifications remain a security concern. Overall, the record evidence leaves me with questions and doubts about his eligibility and suitability for a security clearance. For these reasons, I conclude Applicant has failed to mitigate the security concerns under the personal conduct guideline.

Formal Findings

Formal findings 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
Subparagraphs 1.a–1.c:	Against Applicant
Subparagraph 1.d:	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.

James F. Duffy
Administrative Judge