



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



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| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 09-04546 |
| |) | |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Franciso Mendez, Esq., Department Counsel
For Applicant: Kehinde Watford, Esq.

February 8, 2011

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline E, Personal Conduct, and Guideline J, Criminal Conduct. Applicant’s eligibility for a security clearance is denied.

On September 10, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines E and J. The action was taken under Executive Order 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) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR on September 20, 2010, and requested a hearing before an administrative judge. The case was assigned to me on November 19, 2010. DOHA issued a Notice of Hearing on December 13, 2010. I convened the hearing as scheduled on January 13, 2010. The Government offered Exhibits (GE) 1 through 17.

Applicant objected to GE 1. The objection was overruled and all of the exhibits were admitted. Applicant offered Exhibits (AE) A through E, which were admitted without objections. DOHA received the hearing transcript (Tr.) on January 18, 2010.

Procedural Issues

Government withdrew SOR ¶1. b and amended ¶1.i by deleting “1.h” and inserting to “1.g.” There was no objection by Applicant’s counsel.

Findings of Fact

Applicant denied all of the allegations in SOR except ¶¶ 1.d and 1.e. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is a 31 years old. He has never been married. He has two children, ages seven and four. He has earned an associate’s, bachelor’s, and master’s degrees. He was in the Army from 1997 to 2000.¹

In approximately October 1998, while in the Army, Applicant was accused of being involved in a car accident and fleeing the scene of the accident. He was questioned by military police and denied any involvement. He admitted he did not recall the accident until it was brought to his attention through the documents he received in discovery. His initial testimony was that he was involved in a car accident, but he did not flee the scene.² He then testified he told the police he was not involved in the accident. When asked to explain the discrepancy he stated: “I was in the car, but I did not flee the scene.”³ At the time, a sergeant made a statement to the military police that he observed Applicant back up and hit another car and then flee the scene. Applicant stated he was a passenger in the car and he did not recall anyone hitting another car. He could not recall, but believed he might have been drinking so his friend was driving. He did not recall his friend getting into an accident. He could not recall why there would have been damage to his car. He stated he did not recall if he was in the car that night. He stated he lent his car to a friend. He did not think his friend was in an accident. He had no explanation for how the police matched the damage on his car to the vehicle involved in the accident. He did not think his car had damage. He stated that he received points on his driving.”⁴ He did not dispute the points because he stated, “I do believe at the time, ma’am the vehicle was mine and agreed to follow the First Sergeant’s advice to accept the points and move on.” Applicant then testified that he did not recall the accident, but was trying to recall the specifics from the documents that

¹ Tr. 44, 48-49.

² Tr. 34.

³ Tr. 37.

⁴ Tr. 58-62.

were provided by the Government. Applicant's testimony was convoluted, contradictory, and not believable.⁵

In 1999, while in the Army, Applicant used another soldier's credit card without authorization to make purchases. Applicant testified he was told by SPC L that the card belonged to another soldier with whom SPC L had a sexual relationship and who was deployed. Applicant explained that SPC L was given the card from the owner for sexual favors. He referred to SPC L as the boyfriend of the other soldier and she did anything he asked of her. Applicant stated that SPC L told him he could use the card. He stated SPC L accompanied him when he made his purchases. Applicant signed the credit card receipts. He told the Criminal Investigative Division (CID) investigator that he just scribbled something. At this hearing, he stated that when he used the credit card receipts he signed his own name because he believed he was authorized to use the credit card. He stated he received permission to use the card from SPC L because he was his "home-boy" and SPC L would buy him things, which he did not have to pay him back. He believed SPC L was giving him the credit card as a gift, so he could buy whatever he wanted and have unlimited use of it without paying. He threw the card away when he tried to use it and discovered it was over its limit. He stated that after he talked to CID he came to the conclusion that he did not have permission to use the credit card. He understands today that he should not have used the card. Applicant's explanation was not credible.⁶

In December 1999, Applicant was charged under the Uniform Code of Military Justice (UCMJ) with seven specifications of larceny. He hired a civilian attorney. He later fired the civilian lawyer and obtained a military lawyer to represent him. On January 7, 2000, Applicant submitted a signed request to be discharged from the Army in lieu of a trial by general court-martial for the larceny charges. He was advised that he may receive an other than honorable discharge. Applicant was aware that there was a difference between an "honorable discharge" and a "general discharge under honorable conditions." He was also aware that there was a difference between an "other than honorable discharge" and a "general discharge under honorable conditions." On January 26, 2000, Applicant's request to be discharged in lieu of a general court-martial was granted by the commanding general. Applicant was subsequently barred entry onto all U.S. Government controlled property and facilities under the jurisdiction of the commanding general.⁷

On November 24, 2009, Applicant made a sworn statement to an Office of Personnel Management (OPM) investigator. He stated:

My military lawyer informed [me] that I must pay restitution. I paid \$400 that was provided to me by other soldiers who had used the card. I had

⁵ Tr. 34-50, 142-143, 151-156; GE 5.

⁶ Tr. 37-39, 62-87; 143-145; GE 6.

⁷ Tr. 87-97; 145-146; GE 6, 7, 8, 9, 10.

also purchased items for them. The soldiers mostly NCOs threaten me with bodily harm if I involved them. Out of fear, I took the rap for all the parties.

* * *

I did not appear before my commanding officer and there was no UCMJ action.⁸

Applicant's statement to the OPM investigator was false and misleading. Applicant's statement that he was afraid because others were involved with fraudulently purchasing items, contradicts his testimony that he was unaware that he did not have authorization to use the card.⁹

In December 2000, Applicant was sitting in a car with a computer, a computer chair and a vacuum. The police came up to him and told him that those items were stolen. Applicant stated at his hearing that the property belonged to his roommate. Applicant allowed the police to search his apartment and additional stolen items are found. Applicant denied stealing the property. Applicant was arrested for breaking and entering, and larceny. He pled guilty to breaking and entering and was sentenced to a fine, community service, and was to pay restitution. Applicant's explanations about his involvement lacked candor, was contradictory, and not credible.¹⁰

In approximately April 2001, Applicant was cited for writing a bad check. He admitted that he wrote the check, but thought he had sufficient funds in his account and did not. He stated he made the payment for the check.¹¹

In approximately July 2001, Applicant was cited for writing a bad check.¹² He stated he made a down payment on a car and an employee of the car dealership agreed to hold the check and not cash it. The check was cashed. Applicant stated that the dealer contacted him and agreed he could make the payment. Applicant stated the police were not involved.¹³

In December 2005, Applicant was apprehended after he left a bar where a fight had broken out. The police asked to search him and he consented. They found marijuana in his pocket. Applicant stated he had mistakenly picked up the wrong coat

⁸ GE 3 at 5.

⁹ Tr. 70-75.

¹⁰ Tr. 39-41, 99-108, 148; GE 11, 12.

¹¹ Tr. 41.

¹² *Id.*

¹³ *Id.*

when he left the bar after the fight and the drugs did not belong to him. He was given a citation for possession of marijuana. He hired an attorney, who went to court for him, and the charge was later dismissed.¹⁴

Applicant completed and signed his security clearance application (SCA) on March 18, 2009. Section 22 required that he disclose whether he had ever been charged with any offenses related to alcohol or drugs. It also asked if he was issued a summons, citation, or ticket to appear in court in a criminal proceeding. He responded “no” to both questions. Applicant stated he did not believe he had to disclose the marijuana offense on his SCA because it was dismissed and he was cited and not arrested. He stated he was confused by the question. He did not think the offense was on his record because the offense was dismissed or expunged and no longer on his criminal record. He stated he raced through the SCA and if he had read the directions more carefully he would have reported it. Applicant also testified that he did not read any of the directions under Section 22 that required him to disclose his police record even if a charge was sealed or expunged. Applicant’s testimony was not convincing or credible.¹⁵

Section 15 of the SCA asked Applicant if he had ever served in the military. He answered “yes.” It also asked: “Have you ever received a discharge that was not honorable?” Applicant answered “no.” Applicant listed his type of discharge as “honorable.” He did not choose the correct option of “general under honorable conditions.” Applicant explained that he rushed through completing his SCA and “missed it” and “overlooked” the question about the type of discharge. He said he merely made a mistake and he was not trying to lie. He stated he was “totally misinformed” and he had a “lack of intelligence.” I find Applicant’s testimony was unbelievable and he deliberately falsified his SCA.¹⁶

In Applicant’s sworn statement to the OPM investigator on November 24, 2009, he stated:

In 12/1999 I was discharged from the U.S. Army with a general discharge under honorable conditions, I had attempted to obtain a medical discharge and was offered the general discharge instead. There were no UCMJ violations.¹⁷

When asked at his hearing why he stated he had no UCMJ violations he stated:

¹⁴ Tr. 41-42, 110; GE 3, 11.

¹⁵ Tr. 43-44, 111-128; GE 1, 3.

¹⁶ Tr. 97-99, 128-140; GE 1, 3.

¹⁷ GE 3.

I had kind of—I crossed over that question, but I confirmed with my security rep, and said that for Military, just go by the DD-214, and being they said in lieu of trial by court-martial, and I got out on a general under honorable conditions, I put the answer I thought was best. I wasn't 100 percent sure on the answer. But I put the answer—I just went off the DD-214.¹⁸

Applicant's testimony was not credible. I find he deliberately provided false and misleading information in his sworn affidavit. Applicant's DD Form 214 listed his discharge as general under honorable conditions. He listed he was honorably discharged. He did not list what was on his DD-214.

Applicant stated he has changed his life and no longer associates with those with questionable backgrounds. He has worked hard at pursuing his education and being involved in the community.

I considered all of the documents Applicant provided. I reviewed his performance evaluations from 2009 and 2010. He is considered a "successful contributor." He was described as a competent performer and a valued team player, who meets the objectives and expectations of the position.¹⁹ I considered his talent management biography and college transcripts.²⁰ Character letters describe Applicant as easy going and generous. He has been an active volunteer at a behavior health center. A friend considered him his role model. He is held in high regard because of his volunteer service to at-risk youth. He is organized and treats people with respect. He was also described as efficient, extremely competent and has excellent communication skills, both written and verbal. A soldier who served with Applicant described him as a man of utmost integrity and humility.²¹

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 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching

¹⁸ Tr. 47-48.

¹⁹ AE B.

²⁰ AE A.

²¹ Tr. 44-47; AE C.

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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and 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 Executive Order 10865 provides that 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

AG ¶ 15 expresses the security concern for 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. I find the following 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 government representative; 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 activities which, if known, may affect the person's personal, professional, or community standing.

Applicant was involved in a car accident and fled the scene. He was charged with larceny under the UCMJ and was discharged from the Army in lieu of trial by general court-martial. He received a "general discharge under honorable conditions." He misled and provided false information to the OPM investigator when he stated there were no UCMJ charges against him. He intentionally falsified his SCA application when he listed that he received an "honorable" discharge, when in fact he received a "general discharge under honorable conditions." He was aware of the distinction. He intentionally falsified his SCA when he failed to disclose his marijuana offense. Applicant also pled guilty and was convicted of breaking and entering. Applicant's history of criminal activity and his misrepresentations show a pattern of questionable personal conduct, which creates a vulnerability to exploitation, manipulation, or duress, and could affect his personal, professional, or community standing. I find the above disqualifying conditions apply to Applicant's personal conduct.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered the following mitigating conditions under AG ¶ 17:

- (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 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 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;

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

(g) association with person involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

There is no evidence that Applicant made prompt, good-faith efforts to correct his omissions, concealments, and falsifications. Applicant claimed he made the statement that "there were no UCMJ violations" because he was told by his security representative to disclose only what was listed on his DD Form 214. There is no corroborating evidence to support his statement. Even if Applicant believed he was only required to list what was on his DD Form 214, he failed to correctly list the type of discharge he received. He listed that he received an "honorable" discharge, which was not true. I do not find his omissions, concealments, and falsifications were caused or contributed to by improper or inadequate advice. Applicant did not correct his omissions before he was confronted by the OPM investigator. Instead, he continued to provide misleading information to the investigator. The omissions, concealments, and falsifications are serious because Applicant was attempting to mislead the Government about the larceny charges that were pending at a general court-martial when he was in the Army. He was attempting to mislead the Government when he stated he had no UCMJ charges. He was attempting to mislead the Government by failing to disclose he was cited for marijuana possession. He intentionally misled the Government when he listed on his SCA that he received an "honorable" discharge, when in fact he was discharged from the Army in lieu of a trial by court-martial and received a "general discharge under honorable conditions." His testimony at his hearing was inconsistent, evasive, and not credible. I find AG ¶¶ 17 (a) and 17(b) do not apply.

Applicant's past conduct while in the military and after his discharge is a cause of concern. Each incident he has been involved in he has attributed to someone else. He denies involvement in a car accident, despite statements to the contrary. He indicated in his statement to the OPM investigator that he had no UCMJ offenses. His statements

made to CID that he did not know he did not have authorization to use someone else's credit card are not believable. He pled guilty to breaking and entering, but blamed the crime on his roommate. He picked up the wrong coat that had marijuana in it. He did not read the directions when he answered the question inquiring into past drug-related offenses. He was "totally misinformed" and had a "lack of intelligence" when he listed he received an "honorable discharge" instead of a "general discharge under honorable conditions." Applicant has a pattern of being untruthful. His offenses are not minor and his false testimony regarding that conduct is a matter of grave concern. I find that his actions did not happen under unique circumstances, but rather as a result of his deliberate actions. I find Applicant's course of conduct casts doubt on his current reliability, trustworthiness, and judgment. Applicant has not acknowledged his behavior or taken positive steps to convince me that the inappropriate behavior is unlikely to recur or that he has taken actions to reduce or eliminate vulnerability to exploitation, manipulation, or duress. I find AG §§ 17(c), 17(d), and 17(e) do not apply. There is some evidence that Applicant no longer associates with persons involved in criminal activity. I find AG § 17(g) has limited application. I find the facts do not support application of AG §§ 17(f).

Guideline J, Criminal Conduct

AG § 30 sets out the security concern for criminal conduct:

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.

I have considered the disqualifying conditions under Criminal Conduct AG § 31 and the following are potentially applicable:

- (a) a single serious crime or multiple lesser offense; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant was involved in serious criminal activity while in the Army, resulting in larceny charges and his discharge in lieu of a trial by general court-martial. After his discharge, he pled guilty to breaking and entering. He was cited in 2005 for marijuana possession. The above disqualifying conditions apply.

I have also considered all of the mitigating conditions for criminal conduct under AG § 32 and the following are potentially applicable:

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

(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 was involved in serious criminal activity while in the Army. He pled guilty to breaking and entering in 2000. He was cited in 2005 for possession of marijuana. It has been over five years since Applicant's last criminal activity. There is evidence that Applicant has furthered his education, works in the community, and seems to do well at his job, which reflects positively that there is evidence of successful rehabilitation. I find AG ¶ 32 (d) applies. Applicant failed to provide honest information on his SCA, to the OPM investigator, and at his hearing. His conduct continues to be a security concern and casts doubt on his reliability, trustworthiness, and judgment. I find AG ¶¶ 32(a) does not 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 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines E and J in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment. Applicant was discharged in lieu of a trial by general court-martial due to larceny charges. He pled guilty to breaking and entering in 2000. He was arrested for possession of marijuana in 2005. Applicant has earned an associate's, bachelor's, and master's degrees. He is involved in his community and has done well at his job. However, the concern is that Applicant repeatedly provided false or misleading information to the Government. He failed to be honest about the type of discharge he received from the Army on his SCA. His testimony was not believable. He misled the

OPM investigator by providing false and misleading statements and he failed to disclose that he was cited for possession of marijuana. His explanations were not credible. Applicant has taken important steps in rehabilitating his life, but his attempts to hide his past and his failure to be honest throughout the security clearance process, including his hearing, diminish any persuasive weight that those facts may normally be given. Overall, the record evidence leaves me with serious questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the guidelines for Personal Conduct and Criminal Conduct.

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:

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| Paragraph 1, Guideline E: | AGAINST APPLICANT |
| Subparagraphs 1.a: | Against Applicant |
| Subparagraph 1.b: | Withdrawn |
| Subparagraphs 1.c-1.j: | Against Applicant |
| Paragraph 2, Guideline J: | AGAINST APPLICANT |
| Subparagraph 2.a: | Against 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 a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge