



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



In the matter of:)	
)	
)	ISCR Case No. 09-08302
)	
)	
Applicant for Security Clearance)	

Appearances

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

January 21, 2014

Decision

CEFOLA, Richard A., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) on July 23, 2009. On February 25, 2013, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J and E for Applicant. 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 after September 1, 2006.

Applicant acknowledged receipt of the SOR on March 12, 2013. He answered the SOR in writing on April 1, 2013, and requested an Administrative Determination by an administrative judge. Department Counsel issued a File of Relevant Material (FORM) on August 29, 2013. Applicant acknowledged receipt of the FORM on October 6, 2013, but failed to submit a response. Based upon a review of the pleadings and exhibits, eligibility for access to classified information is denied.

Procedural and Evidentiary Rulings

Motion to Amend SOR

Department Counsel moved to amend the SOR by amending Subparagraph 2.c. to read "Have you EVER been charged," vicing "Have you EVEN been charged." Department Counsel also moved to amend the SOR by amending Subparagraphs 2.d. and 2.e., alleging the date of Applicant's "Affidavit" to be "July 7, 2011," as opposed to being "July 7, 2010." These motions are granted.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in all the Subparagraphs of the SOR, with explanations.

Guideline J - Criminal Conduct

1.a.-1.h. Applicant admits that in May of 1994, he was charged with and convicted to two felonies, Assault with a Deadly Weapon and Shooting Into a Dwelling. As a result of this conviction, Applicant was sentenced to seven years at a youth detention center, to which he was confined for two years, and subsequently released on parole until 2003.

Applicant admits that in July of 2000, he was arrested and charged with five felonies: Assault with a Deadly Weapon, Battery with Serious Bodily Injury, Burglary, Conspiracy to Commit a Crime, and Felony Violation of Parole. The disposition of these charges can not be gleaned from the FORM, and Applicant avers that he "was not convicted."

Applicant admits that in April of 2002, he was charged with Inflicting Corporal Injury on Spouse/Cohabitant, a felony. The disposition of this charge can not be gleaned from the FORM, and Applicant again avers that he "was not convicted."

Applicant admits that in December of 2002, he was arrested for Driving with a Suspended License, a misdemeanor. The disposition of this charge can not be gleaned from the FORM, and Applicant avers that he "was not convicted."

Applicant admits that in April of 2003, he was arrested for Domestic Battery of Ex-Spouse/Date, a misdemeanor. (Item 9.) According to the Arrest Report, no further action was taken as a result of this arrest. (Item 9 at page 7.)

Applicant admits that in March of 2004, he was arrested for Driving with a Suspended License, a misdemeanor. (Item 8.) According to the Arrest Report, no further action was taken as a result of this arrest. (Item 8 at page 7.)

Applicant admits that in February of 2007, he was arrested for Obstructing/Resisting a Public Officer, a misdemeanor. (Item 7.) According to the Arrest Report, Applicant was transported to the county jail, but no further action is indicated. (Item 7 at page 4.)

Applicant admits that in July of 2009, he falsified his e-QIP, in violation of 18 U.S.C. Section 1001, a felony. He avers that he “didn’t understand the question.”

Guideline E - Personal Conduct

2.a. Applicant answered “NO” to Section 22a on his July 2009 e-QIP. (Item 4 at page 29.) This Section asks, in part, “Have you been issued a summons, citation or ticket to appear in court in a criminal proceeding against you . . . ?” Applicant avers that he “misunderstood [the] question.” In light of Applicant admitted extensive criminal conduct noted above, I find this to be a wilful falsification of material facts.

2.b. Applicant answered “NO” to Section 22b on his July 2009 e-QIP. (Item 4 at page 29.) This Section asks “Have you been arrested by any police officer, sheriff, marshal, or any other type of law enforcement officer?” Applicant again avers that he “misunderstood [the] question.” In light of Applicant extensive arrest record noted above, I find this to be a wilful falsification of material facts.

2.c. Applicant answered “NO” to Section 22c on his July 2009 e-QIP. (Item 4 at page 29.) This Section asks “Have you EVER been charged with any felony offenses?” Applicant avers that he “misunderstood [the] question.” Applicant was charged with felonies in 1994, in 2000, and in 2002 as noted above; and as such, I find this to be a wilful falsification of material facts.

2.d. Applicant admits that he falsified material facts in his July 7, 2011, Affidavit when he stated, “I was not uncooperative with the officers, and did not use profane language, as indicated in the incident report,” in reference to the February 2007 incident, noted above in Subparagraph 1.a. (Item 6 at page 7.)

2.e. Applicant again admits that he falsified material facts in his July 7, 2011, Affidavit when he stated, “I was in no way involved in the incident and was wrongly accused,” in reference to the July 2000 incident, noted above in Subparagraph 1.f. (Item 6 at page 6.)

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 AG ¶ 2(a) describing the adjudicative process. The administrative judge’s over-arching 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, 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 as to obtaining a favorable clearance 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 protect or 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.

Section 7 of Executive Order 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 J - Criminal Conduct

Paragraph 30 of the adjudicative guidelines sets out the security concern relating to 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.

The adjudicative guidelines set out certain conditions that could raise security concerns. Paragraph 31(a) provides that an “*a single serious crime or multiple lesser offenses*,” may raise security concerns. Paragraph 31(e) provides that a “*violation of parole or probation*,” may also raise security concerns. Applicant had a felony conviction in 1994, an alleged felony parole violation in 2000, four arrests from December of 2002 to February of 2007, and a felony willful falsification of his July 2009 e-QIP. I find no countervailing mitigating condition that is applicable here. Applicant has a long history of criminal conduct, and his felony willful falsification was less than five years ago.

Guideline E - Personal Conduct

The security concern for Personal Conduct is set out in AG Paragraph 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.

The guideline notes several conditions that could raise security concerns. Under Subparagraph 16(a), "*deliberate omissions, concealment, or falsification of relevant facts from any personnel security questionnaire . . . or similar form*" may raise security concerns. Here, Applicant was not candid about his past criminal conduct on his July 2009 e-QIP. Under Subparagraph 16(a), "*deliberately providing false or misleading information concerning relevant facts to an . . . investigator, security official . . . or other official government representative*" may also raise security concerns. Here, Applicant was not candid about his past criminal conduct on his July 2011 Affidavit. Again, I find no countervailing mitigating condition that is applicable here. Applicant's last willful falsification was less than three years ago.

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. Under AG Paragraph 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole-person concept. The Administrative Judge should also consider the nine adjudicative process factors listed at AG Paragraph 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.

I considered all of the evidence, including the potentially disqualifying and mitigating conditions surrounding this case. The record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For this reason, I conclude Applicant has not mitigated the security concerns arising from his Criminal Conduct and related Personal 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:

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant
Subparagraph 2.d:	Against Applicant
Subparagraph 2.e:	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 eligibility for a security clearance. Eligibility for access to classified information is denied.

Richard A. Cefola
Administrative Judge