



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



In the matter of:)
)
) ISCR Case No. 12-08724
)
Applicant for Security Clearance)

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

11/29/2016

Decision

CERVI, GREGG A., Administrative Judge:

Applicant refuted the personal conduct security concerns. Eligibility for access to classified information is granted.

Statement of the Case

Applicant completed a Questionnaire for National Security Positions (SF 86)¹ on March 9, 2012. On July 10, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E, personal conduct.² On September 30, 2015, the SOR was amended by Department Counsel to amend and clarify SOR ¶¶ 1.a, 1.b, and 1.e.

¹ Also known as a Security Clearance Application (SCA).

² The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

Applicant responded to the original SOR on August 10, 2015, and requested a hearing before an administrative judge. He responded to the amended SOR on October 22, 2015. He denied all of the SOR allegations. The case was assigned to me on July 9, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on August 15, 2016, scheduling the hearing for September 13, 2016. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 4 were admitted into evidence; however, Applicant objected to the accuracy of GE 2. The exhibit will be addressed in my findings of fact. Applicant's Exhibits (AE) A through G were admitted without objection. DOHA received the hearing transcript (Tr.) on September 21, 2016.

Findings of Fact

Applicant is 60 years old, and has been employed as a systems engineer for a defense contractor since 1999. He is applying to continue his security clearance. He completed high school in 1976, and completed some college work. He honorably served in the U.S. Navy from 1976 to 1999, retiring as a Senior Chief Petty Officer (E-8). He served in the first Gulf War and has deployed aboard ships numerous times while on active duty and as a civilian technical representative. He married in 2005 and has three adult children from a previous marriage. His first security clearance was granted in 1984, and it was continued at various levels for years to follow.³

The SOR alleges under Guideline E, that Applicant falsified his 2001 and 2012 SCAs by not disclosing a 1977 arrest and court-martial for possession of marijuana and medication without a prescription, and a 1984 arrest for driving under the influence of alcohol. Additionally, the SOR alleges Applicant did not report his use of marijuana from 1976 to 1978 while holding a security clearance, in his 2001 and 2012 SCAs. Finally, the SOR alleges Applicant failed to truthfully describe his past drug involvement during an Office of Personnel Management (OPM) interview in 2012. Applicant denied all of the SOR allegations, and provided explanations in his answer to the SOR and during his testimony.

Applicant enlisted in the U.S. Navy in 1976 at the age of 20. In 1977, he was apprehended on base after a command authorized search was conducted. They discovered Applicant possessed "nine bags" of marijuana, and green colored pills without a prescription (tested as a non-controlled muscle relaxant and acetaminophen obtainable by prescription). Applicant admitted buying the marijuana off base and trading for the muscle relaxant. He claimed that the marijuana was for his own use, but that he would supply to friends "at his cost," and the pills were intended for a girlfriend. According to his testimony, he was convicted at a special court-martial for possession of illegal drugs. There was no official document presented showing the actual charges, type of court-martial, conviction, sentence, or results of appeal. According to Applicant, his conviction was later overturned on appeal.

Applicant's electronic security clearance applications (SCAs) from 2001 and 2012 make no reference to these events. When interviewed by an OPM investigator in

³ AE E.

2012, the summary of the interview indicated that Applicant admitted he was arrested for having a “dime”⁴ bag of marijuana but no prescription drugs were involved; he was found guilty in military court, and was sentenced to reduction in rate and confinement to the base for six months where he washed buses. The verdict was eventually overturned on appeal.⁵ He gave a similar recitation in his answer to the SOR.

In 1984, Applicant was driving erratically when he was stopped by base police, who determined he was intoxicated, and arrested him. He was administered a breathalyzer test and accused of drunk driving. He testified that he appeared before his executive officer (XO) to answer questions. The XO decided not to forward the charge for disciplinary action and the incident was dismissed.⁶ Beside the arrest report, the Government did not submit documentary evidence of any action taken after the arrest. In testimony, Applicant claimed he did not think he was “arrested” since he was taken to the security office, placed into a holding room with an open door, and told to “sleep it off.” Also, he was not charged or disciplined as the case never went past the XO investigation level.

In or about 2001, Applicant testified that he submitted a handwritten SCA. He did not recognize the unsigned, unverified computer-generated SCA submitted by the Government in GE 2. He testified that, to the best of his memory, GE 2 did not reflect what he would have submitted in writing, where he believes he listed his past drug and alcohol related offenses.

In 2012, he again completed an SCA to update his security clearance, and failed to list either incident. He claimed that he did not intentionally omit the information, rather he was confused by the questions in the SCA because the incidents were so old, were military versus civilian matters, and the fact that the court-martial was overturned and the DUI was dismissed. He also asserted that he did not have a security clearance when the drug and alcohol incidents occurred. Applicant believes he freely discussed the two incidents in question to the best of his recollection when interviewed by OPM, although he indicated the facts became clearer once he received documents in discovery from the Government after the SOR was issued.

Applicant submitted character letters from various colleagues, including his vice president of engineering, project manager, and government agency branch manager. The letters generally attest to his high character, trustworthiness, adherence to rules and regulations, work ethic, personal ethics, and devotion to duty.

⁴ In testimony, he described a dime bag as a quantity that could be purchased for \$10. He then split the marijuana into smaller bags to take on a trip.

⁵ His military rate (rank) of E-4 was reinstated, and he was selected for promotion to E-5 a few months later after passing a promotion exam. He eventually retired at the senior enlisted rate of E-8.

⁶ He described this process as a “board of inquiry” and an executive officer investigation (XOI), where he was asked questions and the executive officer (XO) was to decide to either dismiss the charge or recommend going forward with disciplinary action. The XO decided to dismiss the charge.

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 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 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."

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 concern under this guideline is set out in 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.

The relevant disqualifying condition under AG ¶ 16 is:

(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; and

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

When a falsification allegation is controverted, as in this case, the government has the burden of proving it. An omission, standing alone, does not prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time of the omission.⁷

I conclude the disqualifying conditions in AG ¶16(a) and (b) have not been raised. Applicant successfully rebutted the allegations related to the 2001 SCA and his involvement with drugs while holding a security clearance (SOR ¶¶1.a, 1.b, 1.d). There is insufficient evidence of intentional falsification of his 2001 SCA as Applicant rebutted the accuracy of GE 2, testified that he completed an SCA by hand, and believes he noted his court-martial and DUI incident on the handwritten form that was not transferred to the computer generated SCA. Additionally, there is insufficient evidence to show that Applicant held a security clearance while he used marijuana or at the time of the two incidents at issue here. In fact, Applicant submitted evidence that directly contradicts SOR ¶¶ 1.b and 1.d.

The facts related to his alcohol and drug incidents were omitted from his 2012 SCA. Applicant believed that since the court-martial was more than seven years old,

⁷ See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

was not a civilian trial, and the conviction was overturned on appeal, that it did not have to be reported. Likewise, he used the same logic about the need to report the DUI incident, since it too was an on-base incident with military police, not civilian police, and resulted in no disciplinary action. He was wrong in both instances, but he did not intentionally falsify the SCA. Applicant freely discussed the two incidents to the best of his recollection when interviewed by OPM, although indicated in testimony that his memory was later clarified after he received the Government's documents in the discovery process. Overall, I find that Applicant did not deliberately falsify his SCAs or information provided to the OPM investigator.

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. 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 Guideline E in my whole-person analysis.

It is significant to note that Applicant's drug possession court-martial occurred nearly 40 years ago and his conviction was overturned. His alcohol related incident occurred 32 years ago, and was dismissed by the command without disciplinary action. Despite these incidents, he continued his military career on active duty, was promoted, and eventually honorably retired as a senior enlisted member. He moved directly into a job as a government contractor, where he has remained with a security clearance since about 2001, without incident. In addition, he freely discussed these incidents to the best of his ability given the length of time since they occurred without the benefit of reviewing factual documents prior to the interview. He is considered by his colleagues to be a person with high character, trustworthy, devoted, ethical, and adheres to rules and regulations.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant refuted the personal conduct security concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR and amended SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

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| Paragraph 1, Guideline E: | For Applicant |
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| Subparagraphs 1.a – 1.e: | For Applicant |
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Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

GREGG A. CERVI
Administrative Judge