



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



In the matter of:)
)
) ISCR Case No. 14-01759
)
)
Applicant for Security Clearance)

Appearances

For Government: Tara R. Karoian, Esq., Department Counsel
For Applicant: *Pro se*

08/19/2016

Decision

CREAN, Thomas M., Administrative Judge:

Based on a review of the case file and pleadings, Applicant failed to mitigate personal conduct and criminal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On October 23, 2013, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for a position with a defense contractor. (Item 3) Applicant was interviewed as part of a background investigation by The Office of Personnel Management (OPM) on January 14, 2014. (Item 5) After reviewing the results of the background investigation, the Department of Defense (DOD) could not make the affirmative findings required to issue a security clearance. On June 13, 2014, DOD issued a Statement of Reasons (SOR) to Applicant detailing security concerns for personal conduct and criminal conduct. These actions were 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 in the DOD on September 1, 2006.

Applicant answered the SOR on July 2, 2014. He admitted the two allegations of criminal conduct (SOR 1.a, and 1.b). As to personal conduct, he admitted the misconduct allegation (SOR 2.a), but denied the falsification allegation. (SOR 2.b) He provided a detailed explanation for his responses with supporting exhibits. He elected to have the matter decided on the written record. (Item 2) Department Counsel submitted the Government's written case on September 22, 2015. Applicant received a complete file of relevant material (FORM) on January 25, 2016, and was provided the opportunity to file objections and to submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant timely replied to the FORM on March 14, 2016. (Item 6) He provided detailed information on the alleged criminal and personal conduct security concerns with 20 exhibits. I was assigned the case on June 9, 2016.

Procedural Issues

Applicant was advised in the FORM that the summary of the Personal Subject Interview (PSI) with an OPM agent (Item 5) was not authenticated and could not be considered over his objection. He was further advised that he could make any corrections, additions, or deletions to the summary to make it clear and accurate, and he could object to the admission of the summary as not authenticated by a Government witness. He was additionally advised that if no objection was raised to the summary, the Administrative Judge could determine that he waived any objection to the admissibility of the PSI. Applicant objected to the admission of the PSI when he responded to the FORM. (Item 6, Response to FORM, dated March 14, 2016, at 2) I will not consider the information in the PSI in my decision.

Findings of Fact

After a review of the case file and pleadings, I make the following findings of fact.

Applicant is a 39-year-old strength and fitness coach who has been coaching soldiers on their fitness for a defense contractor since October 2013. He received a bachelor's degree in May 1999 and a master's degree in May 2004. He worked with college athletes from approximately 2003 until May 2012 as a strength and fitness coach at various colleges. He has never married.

The criminal conduct security concerns allege that Applicant was charged with driving under the influence in June 2011. He pled no contest to the charge and was found guilty of reckless operation of a vehicle, a misdemeanor. He was sentenced to pay a fine of \$250, pay court costs, serve a suspended jail term of 30 days, and probation for one year. The fines and costs have been paid, and the suspended sentence and probation completed. (SOR 1.a)

Applicant was also charged with and convicted of telecommunications harassment on May 22, 2012. He pled guilty and was sentenced to pay a \$100 fine and 730 days of probation. The fine has been paid and probation sentence completed. Applicant petitioned the court for the records to be sealed. The records in the case were sealed on October 8, 2015. (SOR 1.b)

Applicant admitted that in May 2013 he was terminated from his employment as a college athletic coach for violating the school's policy on staff relationships with students. Applicant admitted the relevant facts of the allegation but noted that he resigned from the school rather than being terminated.

He denied that he deliberately falsified his e-QIP by failed to list his conviction for telecommunications harassment. He states that after listing the reckless operations of a motor vehicle conviction in the e-QIP, he inadvertently clicked the "no" response as to further criminal convictions believing the question pertained to the reckless operation conviction.

In his response to the SOR (Item 2), Applicant provided a detailed explanation of the facts surrounding each of his criminal charges. As to the driving while intoxicated offense, he reported drinking four beers in a four or five hour period before driving home. He was stopped by a police officer after making an abrupt lane change. He declined to take a field breathalyzer test. He states that he has not consumed any alcohol since this June 2011 offense because it opened his eyes to the dangers of drinking and driving. He has not consumed alcohol in five years and he has no interest in drinking alcohol. (Item 2, Response to SOR, dated July 2, 2014 at 1-2; Item 6, Response to FORM, dated March 14, 2016, at 2-3)

Applicant was in a romantic relationship with Miss R, from November 2008 until December 2010. In June 2011 after being charged with driving while intoxicated, Miss R decided she no longer wanted a relationship with or to talk to Applicant. In January 2012, Applicant tried to contact Miss R to restart their relationship. He was hired by another college and moved in to a new state in April 2012. He called Miss R to tell her he had moved. The next month Miss R filed a Telecommunications Harassment charge against Applicant. Since his conviction of this offense, he has not tried to contact or speak to Miss R. (Item 2, Response to SOR, dated July 2, 2014 at 2-4; Item 6, Response to FORM, dated March 14, 2016 at 3-4)

In September 2012, Applicant was the head strength and conditioning coach at a college. Applicant worked with one of the college athletes, Miss W. They also started to meet for lunch on campus so Applicant could discuss problems with Miss W. By May 2013, Applicant and Miss W realized they had deeper feelings for each other and they agreed to begin a personal relationship. The relationship was reported to Applicant's supervisor. The supervisor determined that Applicant's relationship with Miss W violated the school's policy on amorous relationships. The supervisor asked Applicant to resign or be terminated. Applicant resigned from his position. Applicant and Miss W are still in a committed relationship. (Item 6, Response to FORM, dated March 14, 2016 at 4-5)

Applicant denied that he deliberately falsified his e-QIP (Item 30) by failing to list in response to question 22 his arrest and conviction for harassing communications. Applicant stated that after listing his driving while intoxicated offense, the computer program moved to the next section of the e-QIP concerning illegal use of drug. He did not realize there were more questions concerning other criminal conduct. He inadvertently missed the part of the e-QIP asking for other criminal convictions.

Applicant included with his response to the SOR and his response to the FORM, letters of recommendation and certificates of commendation. In the response to the SOR, there is a letter from his attorney for the driving while intoxicated offense. The attorney reports that because of Applicant's lack of criminal history and his cooperation and respectful behavior when stopped by the police, his plea agreement for a reduced charge was accepted. During the time the attorney worked with him, Applicant was honest and trustworthy. He believes the incident was isolated conduct. (Letter, dated June 24, 2014)

Applicant included letters from his former supervisor at his present company. The supervisor knew Applicant for several years prior to Applicant's working with the company. Applicant demonstrated loyalty, integrity, honesty, and good decision making. Applicant was always respectful of rules and regulations concerning protection of privacy and classified information. (Letter, dated June 30, 2014; Exhibits C and S, Response to FORM)

Applicant also presented a letter from one of his former military clients. The client attests to Applicant's ability as a strength and fitness coach. Applicant worked with the soldier to rapidly bring him to top physical condition. He notes that Applicant has the ability to communicate with soldiers at all levels from junior enlisted to senior officers. Applicant motivates, ensures correct action, and provides professional advice. (Response to FORM, Exhibit R)

Applicant provided a letter of commendation from a school director of athletics that employed Applicant as a strength and conditioning coach. Applicant is dedicated to his profession. He developed a system to provide strength and conditioning programs for over 20 teams at the school. Applicant showed expertise, diligence, and motivation. The athletic director highly recommends Applicant as strength and conditioning coach. (Response to FORM, Exhibit T)

Applicant presented certificates of completion of various courses in physical conditioning and first aid. He also presented completion certificates for various strength and conditioning continuing education classes. (Response to FORM, Exhibits F to Q)

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 must be considered 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 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 applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion for obtaining 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 protect or protect classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Analysis

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 (AG ¶ 30). In June 2011, Applicant was arrested and charged with driving while intoxicated but convicted in accordance with his plea of the misdemeanor offense of reckless operation of a vehicle. In May, 2012, he was charged with and convicted of the misdemeanor offense of communications

harassment. This information raises Criminal Conduct 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). Applicant's criminal actions raise questions about his judgment, reliability, and trustworthiness and calls into question his ability and willingness to comply with laws, rules, and regulations.

I considered the following Mitigating Conditions under 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 and does not cast doubt on individual's reliability, trustworthiness, or good judgment

(b) the person was pressured or coerced into committing the act and those pressures are no longer presented in the person's life;

(c) evidence that he person did not commit the offense; 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.

The mitigating conditions do not apply. Applicant committed a criminal driving offense in 2011 and a harassing communications offense in 2012. There is no question that Applicant committed the criminal conduct since he admitted and pled guilty to the conduct resulting in convictions of the offenses or a lesser offense. The inappropriate conduct is recent happening four to five years ago. Since Applicant admitted the conduct, the circumstances were not unusual and can likely recur. There was no pressure to commit the offenses. He voluntarily drank alcohol and then drove his vehicle. He initiated the telephone calls resulting in the harassing communications offense. After these two offenses, Applicant was terminated from his employment for misconduct in May 2013.

Applicant had three incidents of security concern in three years. It has only been three years since the last incident. Applicant claims he is remorseful for the conduct and will no longer engage in criminal conduct. However, three years of no criminal or improper conduct is not enough time to determine that there has been successful rehabilitation. For the reasons stated above, the allegations of criminal conduct cast doubt on Applicant's reliability, trustworthiness, and good judgment, and his ability to comply with rules and regulations.

Personal Conduct

A security concern is raised because conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. Personal conduct is always a security concern because it asks the central question whether the person's past conduct justifies confidence the person can be entrusted to properly safeguard classified information. (AG ¶ 15)

In May 2013, Applicant, as a college staff member, had a romantic relationship with one of his student clients in violation of the college's policies. He was terminated by the college for the violation of policy. (SOR 2.a) These actions are security concerns and raise the following Personal Conduct Disqualifying Conditions under AG ¶ 16:

(c) credible adverse information in several adjudicative areas that is not sufficient for an adverse determination under any other single guideline, but which, considered as a whole, supports a whole-person assessment of questionable judgement, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulation, or other characteristics indicating that the person may not properly safeguard protected information); and

(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 judgement, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(3) a pattern of dishonesty or rules violation.

A personal conduct security concern was also alleged because Applicant allegedly deliberately failed to list the May 2012 harassing communications offense on his October 2013 e-QIP. Applicant claims the omission was inadvertent. Applicant listed the driving while intoxicated offense and his job termination on the e-QIP. (SOR 2.b) The failure to list this material fact raises Personal Conduct Disqualifying Condition AG ¶ 16(a) (Deliberate omission, concealment, or falsification of relevant facts from any personal 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).

I considered the following mitigating conditions under AG ¶ 17 for all of the disqualifying conditions under personal conduct:

(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 by 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 circumstance 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 untrustworthiness, unreliable or other inappropriate behavior, and such behavior is unlikely to recur; and

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

There are two types of personal conduct security concerns raised by Applicant's conduct: conduct that shows questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations; and second the failure to provide full, complete, and candid answers during the security clearance process. Applicant presented sufficient information to mitigate the failure to provide full and complete information allegation but not the unwillingness to comply with rules and regulations allegation.

Applicant admits that as a college staff member he had a romantic relationship with a student in violation of the college policy. Even though Applicant was aware of the college fraternization policy, he willingly entered into a relationship with a student. The college terminated his employment because of the relationship and the violation of policy. Applicant's relationship with the student is another example of his continued dishonesty and failure to follow rules and regulations. His pattern of failing to follow rules and regulations is recent and significant. Applicant was involved in two criminal conduct incidents and a failure to follow rules and regulations incident in three years. Other than his own statement that he has reformed and will follow rules and regulations in the future, Applicant has not presented sufficient information to indicate that this pattern of conduct is not likely to recur. He has failed to mitigate personal conduct security concerns relating to following rules and regulations.

Applicant denied intentional falsification for failing to list his conviction for harassing communications on his security clearance application. Applicant listed two other incidents of derogatory information on his e-QIP including a more serious criminal offense. While there is a security concern for a deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government when applying for a security clearance, not every omission, concealment, or inaccurate statement is a falsification. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully with intent to deceive. Since Applicant listed two of the three incidents of derogatory information on the e-QIP, there is no reason for him to deliberately not include the third incident which was a misdemeanor. I find that Applicant did not deliberately fail to provide correct and accurate information on the security clearance application.

Whole-Person Analysis

Under the whole-person concept, the administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the circumstances. An 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 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 considered the testimony and letters of recommendations from friends and supervisors and their evaluation of Applicant's honesty, reliability, trustworthiness, and good judgment.

Applicant exhibited a pattern of dishonesty and violation of rules and regulations. He was convicted of reckless operation of a vehicle in 2011, harassing communications in 2012, and violation of his employer's policy on personal relationships with students in 2013. Applicant's pattern of dishonesty and rules violation indicates that he has questionable judgment, is untrustworthy, lacks reliability, and is unwilling to comply with rules and regulations. Applicant's actions indicate he will not properly handle, manage, and safeguard classified information. My finding that Applicant did not deliberately fail to provide accurate and complete information on his security clearance application does

not change my holding that the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the personal conduct and criminal conduct security concerns.

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
Subparagraphs 1.a - 1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b;	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.

THOMAS M. CREAN
Administrative Judge