



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



In the matter of:

Applicant for Security Clearance

)
)
)
)
)
)

ISCR Case No. 14-05467

Appearances

For Government: Andrew H. Henderson, Esquire, Department Counsel
For Applicant: Ryan C. Nerney, Esquire

August 24, 2016

Decision

MOGUL, Martin H., Administrative Judge:

On June 16, 2015, the Department of Defense (DoD) Office of Hearings 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 after September 1, 2006.

On July 20, 2015, Applicant replied to the SOR (RSOR) in writing, and he requested a hearing before an Administrative Judge. The case was assigned to this Administrative Judge on November 16, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on December 9, 2015, and I convened the hearing as scheduled on January 27, 2016. The Government offered Exhibits 1 through 5, which were received without objection. Applicant testified on his own behalf and submitted Exhibit A, which was also entered into evidence without objection. One additional witness testified on behalf of Applicant. DOHA received the transcript of the hearing (Tr) on February 4, 2016. I granted Applicant's request to keep the record open, and the record remained open until February 5, 2016, to allow Applicant to submit additional documents, but no documents were received. Based upon a review of the

pleadings, exhibits, and the testimony of Applicant and the additional witness, eligibility for access to classified information is denied.

Findings of Fact

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted documents, and the testimony of Applicant and his witness, and upon due consideration of that evidence, I make the following findings of fact:

Applicant is 35 years old. He is married, and he has three children. He received his high school graduate equivalency in 2010. Applicant is employed as an Onsite Supervisor by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Paragraph 1 (Guideline J - Criminal Conduct)

The SOR alleges that Applicant has engaged in criminal acts, which create doubt about his judgement, reliability, and trustworthiness. The SOR alleges that Applicant was involved in or committed 27 criminal acts or rules violations, which are listed in the SOR as 1.a. through 1.aa., and take place over a period from 1997 to 2012.

The allegations included: receiving tickets for violations such as Failure to Register Vehicle, Parking in a No Parking Zone, Driving Without Insurance, Driving With an Expired License Plate, and Driving Without a Properly Adjusted Seatbelt. Applicant was also arrested for several criminal violations, including, but not limited to: Possession of Marijuana and Drug Paraphernalia, Driving without a Proper Muffler, Operating a Moving Vehicle with a Suspended License, five instances of Failure to Appear, and Fugitive Arrest. He was fined for all of them. Applicant also was found Guilty for Pulling a Fire Alarm, and he was sentenced to two years supervised probation for Stealing, a Felony Classification C.

During his testimony, Applicant admitted most of the allegations; specifically 1.a through 1.e., 1.j. through 1.u., 1.w. through 1.x., and 1.aa. (Tr at 42-70.) Applicant could not recall 1.v., which was an allegation of an arrest for Failure to Appear in Court 1998, although Applicant did concede he failed on several occasions to appear in court when he was required to appear.

Applicant denied SOR allegation 1.f., which was an arrest in 2010 for possession of marijuana. He testified that his brother actually was arrested, but it was Applicant's vehicle so when Applicant's brother was arrested he used Applicant's name and social security number. Applicant claimed that he was not aware of this arrest until he was questioned by a Government investigator in 2013 in regard to this security clearance process. (Tr at 62-65.) Applicant could not explain how his brother could impersonate Applicant without having Applicant's driver's license, since that is usually something the police would check if they stop someone for marijuana possession. (Tr at 91-92.)

Applicant denied SOR allegation 1.z., which was an arrest in 1998 for Pulling a Fire alarm. He testified that another student at the school he was attending claimed he saw Applicant pull the fire alarm, and even though Applicant contended he did not pull the alarm, it was the account of the witness against Applicant. He testified that he went to court and he was advised it was easier to pay the fine than to contest the charges so he plead guilty, even though he did not commit the act. His mother paid a fine. (Tr at 44-46.) In Applicant's RSOR, he wrote, "in high school, a classmate bet me that I would not pull the fire alarm. Foolishly, I wanted to win the bet so I did pull the alarm. I regret the decision to this day. As a result, I was mandated and did complete over 300 hours of community service as punishment for my foolish act." At the hearing, Applicant was asked, but could not provide a reasonable explanation for why he provided one answer to this allegation on his RSOR, and why he gave a completely different answer during his testimony. (Tr at 88-91.)

Finally, during Applicant's testimony, he testified that he had a Bachelor's degree in Business. Upon further questioning, Applicant conceded that he had only attended approximately six months of business classes at a community college and he did not have a Bachelor's degree in Business. (Tr at 93-95.)

Paragraph 2 (Guideline E - Personal Conduct)

The SOR alleges in this paragraph that Applicant is ineligible for clearance because he exhibited conduct involving questionable judgement, lack of candor, dishonesty or unwillingness to comply with rules and regulations.

2.a. Applicant executed an Electronic Questionnaires for Investigations Processing (e-QIP) on August 15, 2013. The SOR alleges that Applicant falsified material facts on the e-QIP in response to the questions under "Section 22 - Police Record: In the past seven (7) years have you been issued a summons, citation, or ticket to appear in court in a criminal proceeding against you?" Also, "In the past seven (7) years have you been arrested by a police officer, sheriff, marshal or any type of law enforcement official?" Applicant answered "Yes," but he failed to disclose the information listed on the SOR as 1.f., 1.h., 1.i., and 1.k., above, which included arrests and convictions in 2010, and three in 2008.

Applicant testified that he used a background check that had been created for him, and a police officer, who is a family friend, ran an additional background check. Applicant claimed to have used these to try to help him remember and answer all the e-QIP questions correctly. Applicant claimed that if he did not properly include all of the information he should have it was because it was not listed on these background investigation reports, and he did not remember the events. He testified that he did not include the marijuana arrest listed as 1.f., because that was his brother's arrest of which he was not aware when he completed the e-QIP. (Tr at 70-73.)

2.b. The SOR alleges that Applicant falsified material facts on the e-QIP in response to the question under "Section 22 - Police Record "Have you EVER been charged with a felony offense?" (Emphasis in original.) Applicant answered , "No," and he failed to disclose the information listed on the SOR as 1.u., above, that he was arrested in 1998, charged and found guilty of Stealing, a Felony Classification C.

Applicant testified that he had always been under the impression that he had never been arrested or charged with a felony. (Tr at 73-75.)

2.c. The SOR alleges that Applicant falsified material facts on the e-QIP in response to the question under "Section 22 - Police Record, "Have you EVER been charged with an offense involving alcohol or drugs?" (Emphasis in original.) Applicant answered, "No," he had never been involved with a charge involving alcohol or drugs, when in fact he failed to disclose the information listed on the SOR as 1.f., and 1.o., above, which included arrests in 2010 and 2003 for possession of marijuana.

At the hearing, Applicant testified that he did not remember the 2003 marijuana arrest listed on the SOR as 1.o., and, as he had already testified, he claimed to not have been aware of the 2010 marijuana arrest that was allegedly committed by Applicant's brother, until he met with an investigator in 2013.

Mitigation

As reviewed above, one witness testified for Applicant. The witness has known Applicant since 1996, and for the last three years he has been Applicant's supervisor. He described Applicant as being an "outstanding" performer and a "very hard worker, reliable" and someone with whom he has "never had any problems." the witness was aware of the allegations against Applicant's in the SOR, including misrepresentations on his e-QIP, and he stated that these allegations do not change his opinion of Applicant. (Tr at 21-39.) Applicant also submitted two positive character letters, one from the witness who testified and one from an additional individual. (Exhibit A.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised 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 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 applicant or proven by Department Counsel. . . .” The Applicant has the ultimate burden of persuasion as to 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 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 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

Paragraph 1 (Guideline J - Criminal Conduct)

The Government alleged that Applicant engaged in 27 different acts of criminal conduct, from 1997 until at least 2012. Applicant did admit most of the SOR allegation during his testimony. However, he denied two significant allegations. While Applicant denied the pulling of the fire alarm during his testimony, he admitted it when he was answering the SOR. I find that Applicant’s story that his brother was the actual person who was arrested and charged with marijuana possession does not have the ring of truth. Applicant simply did not provide any reasonable explanation for how his brother could impersonate him with the police if he did not have Applicant’s driver’s license.

I find that ¶ 31(a), “a single serious crime or multiple lesser offenses,” applies in this case. ¶ 31(c), “allegations or admissions of criminal conduct, regardless of whether the person was formally charged,” is also applicable to this case. Because Applicant’s conduct was carried out over more than 15 years and as recently as 2012, and because Applicant has failed to honestly admit to all of the arrests, convictions and fines, I do not find any Mitigating Condition under ¶ 32 is applicable. Paragraph 1, Guideline J is found against Applicant.

Paragraph 2 (Guideline E - Personal Conduct)

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgement, 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 Government alleges in this paragraph that Applicant is ineligible for clearance because he engaged in conduct that exhibited questionable judgement, lack of candor, dishonesty, and unwillingness to comply with rules and regulations. The record is clear that Applicant did not furnish complete answers in his e-QIP. To make a determination as to his credibility regarding his allegation that he simply forgot to include some of his arrests, I have considered several factors. These include the fact that Applicant supplied a completely different version of his fire alarm incident on his RSOR than he did during his testimony. Applicant also provided a story about the drug arrest of his brother that simply does not ring true. Finally, I considered Applicant's initial testimony that he had a Bachelor's degree in business, which he later recanted because he had only attended six months of community college.

In reviewing the disqualifying conditions under Guideline E, I conclude that disqualifying condition ¶ 16(a) is applicable; there was "deliberate omission, concealment, or falsification of relevant facts from [a] personnel security questionnaire" by Applicant. I also find that Applicant's conduct supports Disqualifying Condition ¶16(d) "a whole-person assessment of questionable judgement, untrustworthiness, unreliability" under this guideline. I do not find any mitigating condition under ¶ 17 is applicable. I, therefore, resolve Guideline E against Applicant.

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. Based on all of the reasons cited above as to why the Disqualifying Conditions apply and the Mitigating Conditions do not apply, I find that the record evidence leaves me with significant questions and doubts as to Applicant's eligibility and suitability for a security clearance under the whole-person concept. For all these reasons, I conclude Applicant has not mitigated the 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
Subparagraph 1.a.-1.aa.:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a.-2.c.:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Martin H. Mogul
Administrative Judge