



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



In the matter of:)
)
) ISCR Case No. 14-05943
)
Applicant for Security Clearance)

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: *Pro se*

04/18/2017

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the personal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On October 27, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E, personal conduct. 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 SOR on December 1, 2015, and elected to have the case decided on the written record in lieu of a hearing. The Government's written case was submitted on January 20, 2016. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant

received the FORM on February 10, 2016. He responded with documents that I have marked collectively as Applicant's Exhibit (AE) 1. The case was assigned to me on November 2, 2016. The Government exhibits included in the FORM and AE 1 are admitted in evidence without objection.

Findings of Fact

Applicant is a 56-year-old employee of a defense contractor. He has worked for his current employer since 2013. He has an associate's degree, which was awarded in 1993. He is married with three adult children.¹

Applicant was terminated from a job in September 2009 following an investigation into a complaint by a subordinate that Applicant made unwanted advances toward her. Applicant described a friendly relationship with the subordinate. He denied making any advances toward the subordinate.²

In about 2009, Applicant sought counseling from a psychologist or a psychiatrist. He was treated by the doctor for about a year for what Applicant described as depression, and he was prescribed an antidepressant.³ In 2010 or 2011, Applicant voluntarily admitted himself into a hospital at what he described as the hospital's psychiatric ward. He spent three days in the hospital.⁴

Applicant submitted a Questionnaire for National Security Positions (SF 86) in August 2013. Under Section 13A – Employment Activities, he reported the job that ended in September 2009. He intentionally provided false information when he wrote the reason for leaving the job as: "reduction in force." Applicant also intentionally provided false information when he answered "no" to the following question:

For this employment have any of the following happened to you in the last seven (7) years?

- Fired
- Quit after being told you would be fired
- Left by mutual agreement following charges or allegations of misconduct

¹ Items 3, 4; AE 1.

² Items 2-4.

³ Applicant stated the doctor was a psychologist, but a psychologist cannot prescribe medication. It is unclear whether the doctor was a psychiatrist who prescribed the medication or a psychologist, and the medication was prescribed by another doctor.

⁴ Items 2, 4.

- Left by mutual agreement following notice of unsatisfactory performance⁵

Section 13C – Employment Record of the SF 86 asked similar questions to the above, except it asked: “Have any of the following happened to you **in the last seven (7) years** *at employment activities that you have not previously listed?* (If ‘Yes’, you will be required to add an additional employment in Section 13A.” (italicized emphasis added) Since any issues that would have required a positive response occurred at previously listed employment, Applicant correctly answered “no” to this specific question.⁶

Applicant intentionally provided false information when he answered “no” to the following question under Section 21 – Psychological and Emotional Health:

In the last seven (7) years, have you consulted with a health care professional regarding an emotional or mental health condition or were you hospitalized for such a condition? Answer ‘No’ if the counseling was for any of the following reasons and was not court-ordered:

- strictly marital, family, grief not related to violence by you; or
- strictly related to adjustments from service in a military combat environment.

Please respond to this question with the following additional instruction: Victims of sexual assault who have consulted with a health care professional regarding an emotional or mental health condition during this period strictly in relation to the sexual assault are instructed to answer ‘No.’⁷

Applicant was interviewed for his background investigation in April 2014. He informed the investigator of his mental-health counseling. He stated that he inadvertently answered “no” to Section 21 of the SF 86. He stated that he was embarrassed to list his mental-health counseling, but the mental-health counseling could not be used to coerce, influence, or blackmail him. He did not correct the information on the SF 86 about why he left the job in September 2009. He told the investigator that he had never been counseled, there was no employee misconduct, and he left all employment under favorable circumstances.⁸

⁵ Items 2, 3. The SOR did not allege that Applicant falsified these questions. Any matter that was not alleged in the SOR will not be used for disqualification purposes. It may be used to assess Applicant’s credibility, in the application of mitigating conditions, and in the whole-person analysis.

⁶ Item 3.

⁷ Items 2-4.

⁸ Item 4.

Applicant was interviewed again in September 2014 to specifically ask him about the circumstances surrounding the job that ended in September 2009. He admitted that he was terminated from the job because of the allegations made by the subordinate. He also admitted that he was untruthful on the SF 86 and during his earlier interview. Applicant stated that he falsified the information because he did not want to be disqualified based solely on his mental health.⁹

In his response to the SOR, Applicant stated that he “falsified the information because [he] believed it would keep [him] from getting a job.” He further wrote:

Even with the statements by the DOD saying that it would not necessarily keep me from gaining a clearance, the circumstances regarding my dismissal from my employer and my subsequent voluntary hospitalization would, in my mind, keep me from gaining the job.

Applicant acknowledged that he made a mistake and that he would accept the consequences of his actions. He concluded:

I hope for a positive outcome, I wish to continue my work in support of the [U.S. military overseas]. I have taken and continue to take difficult yet necessary steps to improve myself because it is important to me to keep trying to improve. I am not perfect, I stumble and I ask consideration of this.

Applicant submitted numerous documents and letters attesting to his excellent job performance, dedication to his family, patriotism, community spirit, generosity, honesty, diligence, maturity, professionalism, work ethic, loyalty, strong moral character, and integrity.¹⁰

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

⁹ Item 4.

¹⁰ AE 1.

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 security concern for personal conduct is set out in AG ¶ 15, as follows:

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. The following disqualifying conditions are 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; 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.

SOR ¶ 1.a alleged that Applicant intentionally falsified Section 13C of the SF 86. However, any adverse information about his employment was required to be placed in Section 13A, not 13C. His answer to 13C was correct. SOR ¶ 1.a is concluded for Applicant.

Applicant intentionally provided false information on the SF 86 when he answered “no” to the psychological and emotional-health questions. AG ¶ 16(a) is applicable to SOR ¶ 1.b.

Applicant deliberately provided false information during his April 2014 background interview when he did not inform the investigator about why he left the job in September 2009 and he stated that he left all employment under favorable circumstances. AG ¶ 16(b) is applicable to SOR ¶ 1.c.

SOR ¶ 1.d alleged that Applicant was terminated in January 2009 following an investigation into a subordinate’s complaints of unwanted advances. The investigation was not placed in evidence. Applicant was terminated, but there is insufficient evidence to determine that he committed the alleged acts. SOR ¶ 1.d is concluded for Applicant.

SOR ¶ 1.e alleged that after his hospitalization in 2010 or 2011, Applicant failed to follow the recommendation “to seek aftercare with continuing medication and mental health counseling.” There is insufficient evidence to support this allegation. SOR ¶ 1.e is concluded for Applicant.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant intentionally provided false information on the SF 86. When he was interviewed for his background investigation in April 2014, he corrected the mental-health information, but he lied to the investigator about his job termination. He revealed that information in September 2014 only when specifically confronted with it. There are no applicable mitigating conditions.

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.

I considered Applicant's favorable character evidence. Applicant stated that he falsified the information on his SF 86 because he did not want to be disqualified based solely on his mental health. He is not disqualified for a security clearance because of his mental health. He is disqualified for lying on the SF 86 and during his background interview.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the personal 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 E:	Against Applicant
Subparagraph 1.a:	For Applicant
Subparagraphs 1.b-1.c:	Against Applicant
Subparagraphs 1.d-1.e:	For Applicant

Conclusion

In light of all of the circumstances 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.

Edward W. Loughran
Administrative Judge