



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



In the matter of:)
)
) ISCR Case No. 15-04029
)
Applicant for Security Clearance)

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: *Pro se*

11/30/2017

Decision

RIVERA, Juan J., Administrative Judge:

Applicant falsified his 2012 security clearance application (SCA) and made misleading statements to a government investigator during an interview in December 2012. He is still vulnerable to exploitation, manipulation, and duress for the same information that led him to falsify his 2012 SCA and to provide misleading information. The personal conduct security concerns are not mitigated. Clearance denied.

Statement of the Case

Applicant submitted an SCA on November 5, 2012. After reviewing it and the information gathered during a background investigation, the Department of Defense (DOD) issued him a Statement of Reasons (SOR) alleging security concerns under Guideline E (personal conduct) on January 31, 2016. Applicant answered the SOR on February 29, 2016, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

DOHA assigned the case to me on August 12, 2016. DOHA issued a notice of hearing on December 12, 2016, setting the hearing for January 19, 2017. At the hearing, the Government offered three exhibits (GE 1 through 3), which were admitted

without objection. Applicant testified and submitted no exhibits. DOHA received the hearing transcript (Tr.) on January 26, 2017.

Findings of Fact

Applicant denied the two SOR allegations ¶¶ 1.a and 1.b. After a thorough review of the record evidence, and having considered Applicant's testimony and his demeanor while testifying, I make the following additional findings of fact:

Applicant is a 69-year-old employee of a federal contractor. He graduated from high school in 1966, completed a bachelor's degree in 1970, and did some work towards his master's degree, but did not finish it. He married in 1970 and has three grown children, ages 32, 30, and 27.

Applicant's work history indicates that he was the president and managing director of his own company between 1994 and 2006, when he sold it. He then worked part time as a consultant between March 2006 and August 2007. His current employer and clearance sponsor, a federal entity (a federally-funded research and development center), hired him for a full-time position in August 2007, and he was worked there since. He has possessed a top-secret clearance since January 2008, which is required for his position.

Applicant testified that during an unspecified period, he separated from his wife and started using the services of an online dating website. He claimed that, between 2010 and 2011, he corresponded twice (briefly) with a woman who contacted him on the dating website. They arranged to meet in person and have dinner together. She flew in from out of state and Applicant met her at the airport.

Applicant explained that when he met the woman he realized she had misrepresented herself in the website, and she also appeared to be high on drugs. He immediately ended the date and left the airport. After some driving, Applicant stopped at a rest stop to use the restroom. Apparently, the woman followed him in a taxi. When he returned to his car, she was inside of his car waiting for him. She demanded Applicant reimburse her for her travel expenses (about \$2,000). He refused. She then threatened to blackmail Applicant by disclosing to his wife that he was using an online dating service and their "relationship." They got into an argument, and she hit him several times. After she drew blood, he hit her back. Observers at the rest stop called the police, who arrested and charged them both with second-degree assault. Applicant was fingerprinted and released without bond.

Applicant testified that the woman obsessively continued to call him between March 2011 and June 2011. Initially, she wanted to know what he was going to testify about during the criminal proceedings, which were then pending. He averred he only took one of her phone calls and avoided any further contact. The woman also visited his work place (uninvited) when he was not there. His coworkers called to let him know

about a totally out-of-control and belligerent woman who was looking for him and refused to leave until police officers escorted her out of the premises

Applicant contacted his attorney after his arrest. The attorney had the charge dismissed, and the arrest was expunged from Applicant's criminal record. Applicant testified his attorney informed him the woman was mentally ill and had been institutionalized several times. The woman stopped calling Applicant around June 2011, after she was served a "cease-and-desist" letter from her state's attorney's office threatening prosecution if she continued to harass Applicant. Applicant stated he has had no further contact with her.

Applicant failed to disclose his 2011 arrest and second-degree assault charge on his November 2012 SCA. Section 22 (Police Record) of the 2012 SCA specifically required Applicant to disclose whether he had been arrested and charged within the preceding seven years, regardless of whether his record had been expunged or the charge dismissed.

Applicant explained that he falsified his 2012 SCA because his attorney advised him that legally he had no police or arrest record. He also claimed that before submitting his 2012 SCA, he discussed the matter with his direct supervisor who also advised him not to disclose the information. During his December 2012 interview with a government investigator, Applicant disclosed the arrest and the charge, apparently before confrontation. He testified that, notwithstanding his attorney and supervisor's advice, he was not comfortable with his response to the 2012 SCA question, and he wanted to disclose the arrest and charge.

Nevertheless, Applicant admitted that he was not candid and forthcoming during his December 2012 interview with the government investigator. He provided false and misleading information when he told the investigator that the evening of the incident he was travelling to a business conference, and that an "unknown woman" got into his car and demanded money. He failed to disclose several facts to the investigator: that he had met the woman in an online dating website; that he had online contact with her at least twice; that he arranged for her to travel by airplane to Applicant's state for a dinner date; that he cancelled their date after meeting her at the airport when he perceived she misrepresented herself; he refused to reimburse her for her travel expenses; and she threatened to blackmail him by disclosing their relationship to his wife.

In his SOR answer and at hearing, Applicant quibbled by saying that he did not lie when he said "an unknown woman" was in his car, because he had not personally met the woman before that night and he only chatted online with her twice and for short periods. He also claimed that he did not use the word "unknown" during the interview.

As of his hearing, Applicant had not informed his wife about his arrest and charge, or about the circumstances that led to it. He testified that he could not see how telling her would help their relationship at this time. However, he promised that, if

anyone ever attempted to blackmail or coerce him with that information, he would disclose the whole incident to his wife.

Applicant highlighted his exemplary work performance and his important work. His projects have won several awards, and he is well-liked by his employer. He would like to continue his contributions to the federal government, but needs his clearance to continue working in his position.

Policies

The SOR was issued under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

While the case was pending a decision, the Security Executive Agent implemented Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines* (AG), effective June 8, 2017, which replaced the 2006 AG. I decided this case under the current AGs implemented by SEAD 4.

Eligibility for access to classified information may be granted “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, § 2. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in SEAD 4, App. A ¶¶ 2(d) and 2(f). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . used to conduct investigations, . . . determine security clearance eligibility or trustworthiness. . . .¹;

¹ The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant’s intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant’s intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing. . . .

Applicant's November 2012 SCA (Section 22 (Police Record)) specifically asked him to disclose whether in the past seven years he had been arrested or charged with a crime. It required him to "report information regardless of whether the record in your case has been sealed, expunged, or otherwise stricken from the court record, or the charge was dismissed." Applicant deliberately failed to disclose his 2011 arrest and second-degree assault charge in his 2012 SCA.

Additionally, during his December 2012 interview, Applicant deliberately provided false and misleading information when he told the investigator that the evening of his arrest he was travelling to a business conference, and that an "unknown woman" got in his car and demanded money. He deliberately failed to disclose that he had met the woman on an online dating website; had online contact with her at least twice; arranged for her to travel by airplane to Applicant's state for a dinner date; cancelled their date after he perceived she misrepresented herself; and he refused to reimburse her for her travel expenses.

Moreover, Applicant deliberately failed to disclose that the woman threatened to blackmail him by disclosing to his wife that he was using an online dating service and that they had a "relationship." Applicant's false statement on his SCA, and his misleading statements in his interview satisfy the three above disqualifying conditions.

AG ¶ 16 describes conditions that could mitigate the personal conduct security concerns:

(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 advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. 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 contributed to 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.

AG ¶¶ 17(a) and (b) partially apply because Applicant disclosed his arrest and charge prior to a government investigator confronting him about his 2012 SCA omissions. However, the security concerns are not mitigated because, while he disclosed his omissions, he made false statements and provided misleading information about the circumstances of his arrest and charge to the investigator during the 2012 interview.

Applicant claimed that both his lawyer and his supervisor advised him that he did not need to disclose his arrest and charge in his 2012 SCA. He provided no corroborating evidence to support his claims. The language in Section 22 of the 2012 SCA is simple and straightforward. It required Applicant to report any arrest or charge within the preceding seven years **regardless** (emphasis added) of whether the record in his case had been sealed, expunged, or otherwise stricken from the court record, or the charge was dismissed. I do not believe his attorney or his supervisor (presumably with experience in the security clearance process), would have read the SCA language and advised Applicant not to disclose the required information.

AG ¶ 17(c) does not apply because making a false statement is a serious offense (felony), it did not occur under unusual circumstances, and it continues to cast doubt on Applicant's reliability, trustworthiness, and good judgment.

AG ¶¶ 17(d) and (e) do not apply because Applicant presented no evidence of counseling or that he has taken sufficient positive steps to reduce or eliminate his vulnerability to exploitation. I considered that Applicant claimed he told his supervisor about the SOR allegations. This disclosure could be considered as a step to reduce his vulnerability to exploitation. Notwithstanding, Applicant did not tell his wife about his use of the online dating site, that he arranged for a dinner date with a woman he met online, that he was arrested and charged with second-degree assault, that the woman attempted to blackmail him, that he was served with an SOR, and that his clearance

and job are in jeopardy. Applicant is still vulnerable to exploitation, manipulation, or duress.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. SEAD 4, App. A, ¶¶ 2(a), 2(d) and 2(f). I have incorporated my comments under Guideline E in my whole-person analysis. Some of these factors were addressed under that guideline, but some warrant additional comment.

Applicant is a 69-year-old employee of a federal contractor. He has worked for his employer since 2007, and has held a top-secret clearance since 2008, which he seeks to continue to be eligible for his position. Considering the record as a whole, Applicant's evidence is insufficient to mitigate the deliberate falsification of his 2012 SCA and his misleading statements to a government investigator in December 2012. Applicant is still vulnerable to exploitation, manipulation, and duress for the same information that led him to falsify his 2012 SCA and provide misleading information to an investigator in December 2012. The personal conduct security concerns are not mitigated.

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 |
| Subparagraphs 1.a and 1.b: | Against Applicant |

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national security interests of the United States to continue Applicant's eligibility for a security clearance. Clearance is denied.

JUAN J. RIVERA
Administrative Judge