



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



In the matter of:)
)
) ISCR Case No. 15-04961
)
Applicant for Security Clearance)

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: Gregory F. Greiner, Esq.

07/19/2018

Decision

GARCIA, Candace Le'i, Administrative Judge:

Applicant mitigated the personal conduct and criminal conduct security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On February 28, 2016, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E (personal conduct) and J (criminal conduct). The action was taken 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* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG).¹

Applicant responded to the SOR on March 18, 2016, and requested a hearing before an administrative judge. The case was assigned to me on November 9, 2017. It

¹ I decided this case using the AG implemented by DOD on June 8, 2017. However, I also considered this case under the previous AG implemented on September 1, 2006, and my conclusions are the same using either set of AG.

was terminated on December 18, 2017, due to a lack of jurisdiction as Applicant was separated from employment. The case was reopened on January 29, 2018, when Applicant was sponsored by his current defense contractor. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on January 31, 2018, scheduling the hearing for February 13, 2018. Applicant waived the 15-day notice requirement under ¶ E3.1.8 of the Directive. I convened the hearing as scheduled.

I appended to the record as Hearing Exhibits (HE) I and II the Government's and Applicant's exhibit lists. I admitted Government Exhibits (GE) 1 through 3 in evidence without objection. Applicant testified, called four witnesses, and submitted Applicant's Exhibits (AE) A through K, which I admitted in evidence without objection. DOHA received the hearing transcript (Tr.) on February 21, 2018.

Findings of Fact

Applicant admitted in part and denied in part SOR ¶ 1.a, admitted SOR ¶ 1.b, and denied SOR ¶ 2.a. His admissions are incorporated in my findings of fact.

Applicant graduated from high school in 1997. He is 41 years old, married, and he has three minor children. He served honorably in the U.S. military from 1998 to 2003, during which time he was deployed to Afghanistan and Iraq. He achieved the rank of sergeant. In October 2006, he joined the Active Guard Reserve (AGR) and was promoted to a staff sergeant. He received a Bad Conduct Discharge (BCD) from the AGR in April 2010, due to his conduct as discussed below. After a period of unemployment, he worked for two defense contractors since around late 2009. As of the date of the hearing, he was offered employment by a third defense contractor contingent on obtaining a security clearance. He was also in the process of completing his thesis for his bachelor's degree in aeronautical science. He was first granted a security clearance while he served in the U.S. military.²

Soon after becoming a staff sergeant, Applicant learned from other non-commissioned officers (NCOs) in his unit that he could receive a housing allowance if he provided a home address on his travel voucher that was 20 miles outside the boundaries of the military base. Since the residence in which he and his wife lived did not qualify for the allowance, he listed the address in which his parents-in-law resided. He also postured that he and his wife were going through a divorce. Once monthly, he also submitted a voucher containing false receipts from an address at an inn, given to him by another member, so that he could receive additional reimbursements. Though he felt that his actions were wrong, he knowingly engaged in such conduct for six to seven months. He testified that the practice was prevalent throughout his unit, and it gave him a sense of belonging with the other NCOs in his unit. He also knew he could get away with it. He attributed his actions to being immature and naïve, though he was 29 to 30 at the time.³

² Tr. at 50, 53, 65-68, 81-83, 86-88, 100, 114; GE 1, 2, 3; AE A, D, H, J, K.

³ Tr. at 50-64, 69-71, 74-75, 79-80, 88-89, 98-105, 113-116; GE 1, 2, 3; AE A.

During this period, Applicant was experiencing financial difficulties. His wife was unemployed. Their twin children were just born. They had two mortgages on their home that they purchased in 2003, to include an adjustable rate mortgage that they obtained without fully understanding what it was. They had two cars they could not afford. While he sought assistance through the AGR, he testified that he received help with groceries but no such help was available to supplement his housing costs. Though the money he fraudulently received enabled him to resolve some of his financial problems, he continued to exercise poor financial judgment. For instance, he purchased a boat in 2008 that his parents-in-law had to help him pay.⁴

When Applicant was approached by the U.S. Government in May 2008 about his fraudulent conduct, he invoked his right to remain silent. He wanted to warn others first. He recalled subsequently disclosing his actions in a letter to his Officer in Charge (OIC) at an unrecalled date, after learning that individuals in other units were in trouble for similar conduct. He also felt guilty for his actions. He disputed that he only disclosed his actions to his OIC because another member had already done so, and he acknowledged that he did not know the extent of that individual's involvement. Upon disclosing his conduct to his OIC, his pay and allowances were immediately forfeited. He thought that he would be required to repay the money he received, and he also believed he would be discharged from the AGR. He did not think he would be prosecuted. He was told, however, that he would be court-martialed because he was a staff sergeant.⁵

In March 2009, he pled guilty before a special court-martial to one specification of violation of the Uniform Code of Military Justice (UCMJ) Article 107, False Official Statement, and one specification of violation of the UCMJ Article 121, Larceny. As a result, he was sentenced to be reduced to a private, confinement for 10 months, forfeiture in pay of \$933 monthly for 10 months for a total of \$9,330, and a BCD. In so pleading, he acknowledged that he knowingly falsified his home address and stole \$58,579 from the U.S. Government, consisting of per diem, basic housing allowance, family separation allowance, and lodging reimbursements, from November 2006 to May 2008. He believed he falsified his travel vouchers for six to seven months rather than one and a half years. He also believed the amount he defrauded the U.S. Government was closer to \$30,000 than \$58,579. He was advised by his defense attorney that if he fought the charges, he could face felony-level charges and punishment, and things would likely not work in his favor. He chose to take responsibility by pleading guilty to the specifications as charged.⁶

While Applicant was in confinement, he lost his home. His wife and children had to move in with his in-laws. His pay was forfeited for 10 months. After serving eight months, he was released on good behavior. He owed the U.S. Government \$17,035. He worked odd jobs before obtaining an out-of-state job with a defense contractor in

⁴ Tr. at 50-64, 71-74, 77, 85, 95-98, 112-113; GE 1, 2; AE A, F.

⁵ Tr. at 69-71, 74-75, 79-80, 89-95, 104-112, 115; GE 2, 3; AE A.

⁶ Tr. at 50-64, 77-81, 89-91, 104-112; GE 1, 2, 3; AE A, H.

late 2009, requiring a family relocation. With the interception of his tax refunds and a repayment plan over the course of two to three years, he repaid the outstanding \$17,035 balance as of July 2015.⁷

Applicant testified that his life was turned upside down because of his egregious mistake, and he learned many lessons as a result. Among them are that shortcuts are not the way to do things in life and honesty is paramount. He is embarrassed by it all. He testified that if he were to find himself in a similar situation, he would decline to participate and ask to be transferred. He would find another way to belong. He would consult with others for advice. He has not since been involved in any criminal activity. He desires to hold a leadership role within the U.S. Government, he has attended school to help him achieve his goal, and he does not intend to engage in any conduct that would jeopardize it.⁸

As of the hearing, Applicant's finances had improved significantly. He did not have any delinquent debts or other financial problems, and he has money in a savings account. He and his wife are diligent about not overspending. They sold their boat. They short sold their prior home in 2012, and they are current on the mortgage for the home they purchased in 2015. He testified that they repaid his parents-in-law. If he were to find himself in financial straits again, he would seek financial counseling.⁹

His 2014 and 2015 performance evaluations with a defense contractor reflect overall performance ratings of "exceeded expectations." He participates in his children's school board. He is involved in his one child's junior ROTC program. He is also involved in his community.¹⁰

Applicant's wife of 18 years testified that this experience was the lowest point of their family's lives. She reiterated that the practice seemed prevalent throughout his unit, but acknowledged that they have both since taken responsibility for their serious error in judgment. They promised each other that they would never put their family through such turmoil again. She has handled the family's financial affairs since Applicant was sentenced to confinement. She believed that Applicant repaid the U.S. Government a total of \$28,000, which included his forfeited pay and the amount he paid after he was released from confinement, and that he did not have an outstanding balance.¹¹

Applicant's first witness had daily contact with Applicant when he served as his supervisor from mid-2013 to 2016. Since then, he continues to remain in contact with Applicant. The witness served honorably in the U.S. military, was discharged in 1993,

⁷ Tr. at 50-64, 74-77, 79, 81, 114-115, 117; GE 1, 2; AE A, E, H, K.

⁸ Tr. at 74-77, 79, 81, 83-86, 99-104, 114-115, 118; AE A.

⁹ Tr. at 63-64, 71-74, 77, 81-82, 84-85, 97-98, 116-117; GE 2; AE A, F, I.

¹⁰ Tr. at 83, 116-117; AE G.

¹¹ Tr. at 48-64; GE 1.

and has held a security clearance for over 20 years. He testified that Applicant told him about his fraudulent conduct and its repercussions. He indicated that he saw similar behavior throughout his military career. He attributed such conduct to Applicant's youth, foolishness, and an error in judgment. He stated that he has a very high opinion of Applicant, as he has proven to be an honorable and trustworthy individual who is loyal to the United States.¹²

Applicant's second witness has been a friend since their service in the U.S. military. The witness served honorably in the U.S. military for 10 years, has worked for 16 years for various defense contractors, and has held a security clearance since 2010. He testified that he was disappointed with Applicant's actions, but believed Applicant paid the price for them. He described Applicant as trustworthy.¹³

Applicant's third witness was also a veteran of the U.S. military and has held a security clearance for 16 years. He was Applicant's coworker from 2009 to 2017. He has since maintained frequent social contact with Applicant. He learned about Applicant's actions in around 2014, prior to the issuance of the SOR. He described Applicant as a phenomenal asset to the U.S. Government and an individual with high integrity. Other character references attested to Applicant's exceptional work ethic and his unquestionable judgment and reliability.¹⁴

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(a), 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 national security eligibility will be resolved in favor of the national security."

¹² Tr. at 19-30.

¹³ Tr. at 30-40.

¹⁴ Tr. at 40-48; AE B, C.

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 Exec. Or. 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* Exec. Or. 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to 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 ¶ 31 describes conditions that could raise a security concern and may be disqualifying. I considered the following relevant:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted; and

(e) discharge or dismissal from the Armed Forces for reasons less than “Honorable.”

Applicant pled guilty before a special court-martial in 2009 to violations of Articles 107 and 121 of the UCMJ. He understood that by doing so, he took responsibility for the charges that he knowingly falsified his home address and stole \$58,579 from the U.S. Government from November 2006 to May 2008. He received a BCD as a result. AG ¶¶ 31(b) and 31(e) apply.

I have considered all of the mitigating conditions under AG ¶ 32 and considered the following relevant:

(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 the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant's knowing falsification of his home address and theft of \$58,579 from the U.S. Government from November 2006 to May 2008 raise serious concerns about his integrity. His resultant 2009 criminal conviction and BCD are significant blemishes on his record. He took responsibility by pleading guilty to the charges, serving the court's sentence, and repaying the U.S. Government. His conduct happened 10 years ago. He was sincere, credible, and remorseful at hearing. These facts and the record as a whole leave me without any lingering doubts about his current reliability, trustworthiness, and good judgment. AG ¶ 32(a) applies.

There is evidence of successful rehabilitation. Applicant served the court's sentence and he repaid the U.S. Government. In the years since his conduct and resulting conviction, he has become a model employee. He received favorable ratings from his employers and is held in high regard. He is involved in his community. He has no other involvement with criminal activity. AG ¶ 32(d) applies.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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. I considered the following relevant:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness,

unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information; 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 displayed untrustworthiness, questionable judgment, and unreliability when he engaged in the fraudulent conduct as discussed above. He was embarrassed by his actions and the negative repercussions. AG ¶¶ 16(c) and 16(e) apply.

I have considered all of the mitigating conditions under AG ¶ 17 and considered the following relevant:

(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.

For the same reasons as set forth above in my Guideline J analysis, AG ¶¶ 17(c), 17(d), and 17(e) apply.

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(d):

(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 Guidelines E and J in my whole-person analysis.

I have considered Applicant's record in its totality, to include his exceptional performance for U.S. defense contractors since he was released from confinement in late 2009. Applicant credibly testified at hearing that he has taken responsibility for his fraudulent conduct and resulting conviction. He was candid, sincere, and remorseful.

Overall, the record evidence leaves me without questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant 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:	FOR APPLICANT
Subparagraphs 1.a – 1.b:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

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's eligibility for a security clearance. Eligibility for access to classified information is granted.

Candace Le'i Garcia
Administrative Judge