



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



In the matter of:

ISCR Case No. 16-01372

Applicant for Security Clearance

Appearances

For Government: Caroline Heintzelman, Esq., Department Counsel
For Applicant: *Pro se*

10/11/2018

Decision

WHITE, David M., Administrative Judge:

Applicant was charged with a gross misdemeanor firearm offense in 1995, and with felony child molestation and child rape in 2013. He deliberately omitted the firearms charge from two Electronic Questionnaires for Investigations Processing (e-QIP) that he executed in 2007 and 2015. Resulting security concerns were not mitigated. Based upon the testimony, pleadings and exhibits, national security eligibility is denied.

History of Case

On May 4, 2015, Applicant submitted an e-QIP for reinvestigation of his security clearance eligibility. On January 26, 2017, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline J (Criminal Conduct), and 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 effective within the DoD after September 1, 2006.

Applicant answered the SOR in writing on February 23, 2017 (Answer), and requested a hearing before an administrative judge. The Defense Office of Hearings and Appeals (DOHA) assigned the case to me on April 24, 2017. DOHA issued a Notice of Hearing on July 11, 2017, setting the hearing for July 27, 2017. On that date, Department Counsel offered Government Exhibits (GE) 1 through 7 into evidence, which were admitted without objection. Applicant testified, but offered no documents into evidence during the hearing. I granted Applicant's request to leave the record open until August 28, 2017, to permit submission of additional evidence. DOHA received the hearing transcript (Tr.) on August 4, 2017. Applicant submitted documentary exhibits on August 17, 2017, which were marked Applicant Exhibits (AE) A, B, and C, and admitted without objection.

The SOR in this case was issued under the adjudicative guidelines that came into effect within the DoD on September 1, 2006. Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines* (December 10, 2016), implemented new adjudicative guidelines that came into effect on June 8, 2017. All national security eligibility determinations issued on or after June 8, 2017, are to be decided using the new *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), as promulgated in Appendix A of SEAD 4. I considered the previous adjudicative guidelines, as well as the new AG, in adjudicating Applicant's national security eligibility. This decision is issued pursuant to, and cites, the new AG; but my decision would be the same under either set of guidelines.

Findings of Fact

Applicant is employed by a major Federal contractor, and is applying to continue the security clearance he has held since 2007 in connection with that work. (GE 1.) The SOR alleged that Applicant was charged with four felony offenses in 2013, a misdemeanor firearms offense in 1995, and two traffic offenses in 1977; and that he deliberately falsified material facts by answering, "No," in response to the questions on his 2015 and 2007 e-QIP forms that asked if he had ever been charged with a firearms offense. Applicant admitted the SOR allegations related to the felony and traffic offenses, and denied the remaining allegations, with some explanations. (Answer.) Applicant's admissions, including his statements to an OPM investigator during his March 17, 2016 interview (GE 6) and his hearing testimony, are incorporated in the findings below.

Applicant is 62 years old. He dropped out of high school, then earned a General Equivalency Diploma (GED) in March 1974. He has been married since 1989, and has three adult children. He served an active duty enlistment in the U.S. Navy from 1974 to 1978, and was honorably discharged in 1980 after serving two more years the inactive reserve. He has been continuously employed in technical data project management at the contractor since October 1996. (GE 1; GE 6; Tr. 6-7, 53-54.)

Applicant was stopped and arrested for resisting an officer, attempting to elude, reckless driving, and not having a valid license or registration, when he failed to pull over promptly after running through a yellow light in his "hotrod car" on March 22, 1977. He was on active duty in the Navy at the time. Applicant was issued citations, but all charges were eventually dismissed by the court on April 13, 1977. (Answer; GE 2; Tr. 54-58.)

On September 14, 1995, Applicant and his sister-in-law were moving his personal property into the motel owned by her, and where he and his wife resided during his first year in the region where they still live. A group of juveniles began throwing what he called, "horse apples,"¹ at them from the top of a hill across the street. Applicant shouted at the group to stop what they were doing, and says that he was concerned that his sister-in-law might be injured if one of the thrown objects hit her. Applicant said that it was the end of a long and frustrating day, and when the juveniles continued throwing things he took out his pistol and shot it into the air. A woman who lived across the street called the police and reported that someone was shooting bullets into her house. The police responded, confiscated Applicant's pistol, and took him to the police station where he was booked and issued a citation for illegal discharge of a firearm. He said in his Answer that he pled no contest to this charge and received six months of probation. Court documents indicate that he eventually appeared in court on November 8, 1996, where he pled not guilty and charges were dismissed with \$150 in court costs assessed. (Answer; GE 2; GE 3; Tr. 58-68.)

During mid-October 2012, Applicant's 12-year-old former neighbor told her twin sister and several of their friends that Applicant had sexually molested her "multiple times," while he was babysitting them during 2007 or 2008. The sister told their parents, who reported the matter to the county sheriff. The twins were in second grade at the time of the incidents and were friends with Applicant's youngest daughter, who was about three years older. Applicant admitted that he would take the twins, and sometimes his daughter, down into his basement to watch movies while his wife worked upstairs. He and one twin, occasionally joined by the other girls, would sit on a couch with a blanket over them to watch the movies. The twin claimed not to be ticklish, and he would frequently tickle her all over, which often turned into a wrestling match, according to his late 2012 statements to the county sheriff's detective investigating the case. He said that he never intentionally put his hand down her pants or digitally penetrated her, as she described him doing during some of these sessions. Other than denying that he molested the girl, he declined to discuss these incidents in detail during his March 2016 OPM interview and during his hearing and referred to his prior explanations in the records of the criminal proceeding. (GE 4; GE 6; Tr. 72-78.)

After the investigation was completed in April 2013, Applicant was charged with two counts of rape of a child and two counts of child molestation in the first degree. These are Class A felonies. After multiple continuances, his trial resulted in a mistrial on

¹ From his description of, "a large, green, hard spiky, some sort of fruit that grows on trees," the objects being thrown were probably thorn apples that grow on jimsonweed.

February 3, 2015, because the jury could not reach a unanimous verdict. The prosecutor decided not to retry the case, and the charges were dismissed without prejudice² on March 18, 2015. (GE 1; GE 5; Answer; AE C; Tr. 82-84.)

Applicant completed e-QIP questionnaires on March 27, 2007, and May 4, 2015, by certifying that his statements on them were true, complete, and correct to the best of his knowledge and belief, and were made in good faith. He further acknowledged his understanding of the potential adverse consequences of knowing and willful false statements. On the 2015 e-QIP, he also certified that he had carefully read the foregoing instructions to complete the form. Pertinent instructions include to report information regardless of whether the record in the case has been sealed, expunged, or otherwise stricken from the record, or the charge was dismissed. In Section 22 of his 2015 e-QIP he was asked, among other things, "Have you **EVER** been charged with an offense involving firearms or explosives?" He answered, "No." However, he responded, "Yes," and described his recently dismissed rape of a child charges in response to an earlier question asking about any arrests, charges, summonses, or convictions by a court during the past seven years.³ In Section 23.b of his 2007 e-QIP he was asked, "Have you ever been charged with or convicted of a firearms or explosives offense?" He also answered the question, "No." Applicant did not otherwise disclose his 1995 charge and 1996 trial for illegal discharge of a firearm. (GE 1; GE 7.)

When asked about firearms offenses during his March 2016 OPM interview, Applicant initially answered, "No," again, then said there were none except for the illegal discharge of a firearm offense in 1995. He went on to describe that incident and the subsequent police and court proceedings in some detail to the interviewer. He said that he had not listed the charge on his 2015 e-QIP because it was self-defense and the charge was dropped. In his Answer, Applicant denied that he was arrested by the police during this incident, or convicted of the firearms offense, for which he was taken to the police station, booked, and issued a citation. During his hearing and post-hearing submissions, he continued to debate the definition of, "arrest," and asserted that he had not been formally arrested or read his rights, so he had not intended to misrepresent or falsify his e-QIP answers. Throughout the process, however, he has acknowledged that he was formally charged with illegal discharge of a firearm, and appeared in court to answer that charge. The drafter of the SOR used the language, "arrested . . . and charged," and, "deliberately failed to disclose that you were arrested for a firearm." However, the questions at issue were quoted in the SOR and neither contained the word, "arrest." When he answered the e-QIP questions, "No," he denied having been charged with, not having been arrested for, a firearms offense. (GE 1; GE 6; GE 7; AE A; Tr. 64-71.)

² This means that no final determination was reached and the charges could be retried at the prosecutor's discretion.

³ Applicant also insisted that he was not technically 'arrested' on these 2013 charges. (GE 6; Tr. 80.)

Applicant submitted letters from five coworkers, including his manager, and from seven friends and family members. They discussed their opinions and observations of his good character, reliability, integrity, and dedication. All of these people have known Applicant for many years and hold him in high regard. None of them commented on the specific allegations in the SOR. (AE B.)

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's national security eligibility.

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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14 requires the Government to present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 says that an "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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."

A person applying for national security eligibility seeks to enter 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 national security eligibility. 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 or sensitive information.

Finally, as emphasized in Section 7 of Executive Order 10865, “[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Guideline J: Criminal Conduct

The security concern relating to the guideline for criminal conduct is set out in AG ¶ 30:

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 contains five disqualifying conditions that could raise security concerns and may be disqualifying. Two of those conditions were established, as discussed below:

- (a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and
- (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.

Applicant's criminal charges in 1977, 1995, and 2013 involved driving offenses, illegal discharge of a firearm, and child rape/molestation incidents. The traffic, misdemeanor, and felony charges were dismissed by the courts in each case, but the underlying conduct casts continuing doubt on Applicant's judgment, reliability, and trustworthiness. Legitimate security concerns under this guideline were raised by this evidence.

The guideline in AG ¶ 32 contains four conditions that could mitigate criminal conduct security concerns:

- (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;

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

(c) no reliable evidence to support that the individual committed the offense; 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 conduct that led to these criminal charges spanned the past 40 years, was intermittent, and arose in unrelated settings. Each incident involved circumstances that are unlikely to recur, but they all demonstrate poor judgment and immaturity. He continues to deny the wrongfulness of his conduct on each occasion, and failed to sufficiently demonstrate remorse or other evidence of rehabilitation, accountability, trustworthiness, or good judgment. Significant mitigation of the criminal conduct concerns was not established.

Guideline E: Personal Conduct

AG ¶ 15 expresses the security concerns 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 the national security investigative or adjudicative processes.

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

(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 national security clearance eligibility or trustworthiness, or award fiduciary responsibilities; 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 falsely answered, “No,” in response to the questions on his 2007 and 2015 e-QIP security questionnaires that asked if he had ever been charged with a firearms offense. He acknowledges that he was charged in 1995 with illegal discharge of a firearm. He has alternatively attempted to justify his false answers by saying that he fired his pistol in self-defense, by saying the charge was later dropped, and by questioning whether his interaction with law enforcement officers at the scene and the police station technically constituted an arrest. The e-QIP questions did not mention the word, “arrest,” and made no exception based on subsequent dismissal by the court. This evidence establishes that Applicant intentionally concealed and omitted information concerning this firearms charge, and raises substantial security concerns under AG ¶ 16(a).

On multiple occasions, Applicant engaged in conduct with a neighbor girl who was in second grade that led, several years later when she finally reported it, to multiple felony charges for child rape and molestation. Although a hung jury did not convict him of these charges, and they were subsequently dismissed, the underlying conduct and his concealment of it, while holding a security clearance, clearly jeopardizes his personal, professional, and community standing. Security concerns under AG ¶ 16(e) were accordingly established.

AG ¶ 17 includes four conditions that could mitigate security concerns arising from Applicant’s potentially disqualifying personal conduct:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (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 did not provide, and the record does not otherwise contain, evidence that would support mitigation under any of the foregoing conditions. Applicant did not acknowledge his 1995 firearms charge until he was confronted during the 2016 OPM interview, and more recently attempted to justify his false answers on two e-QIP forms by quibbling about the definition of an arrest. His ongoing reluctance to discuss or answer questions concerning the child rape and molestation charges demonstrates his continuing vulnerability to manipulation or duress based on the underlying conduct.

Neither falsely denying the firearms charge on two e-QIP forms nor molestation of a young girl are minor offenses. His questionable actions on multiple occasions, and his subsequent attempts to deny or conceal them, generate continuing doubt about his judgment and trustworthiness. He neither acknowledged these issues nor demonstrated positive steps to reduce the likelihood of recurrent inappropriate behavior.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's national security eligibility 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.

According to AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the applicable guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant is sufficiently experienced to be accountable for his voluntary decisions and actions that led to the criminal charges and falsifications involved in this case. His sporadic episodes of bad judgment span 40 years, and he continues to deny or minimize the wrongfulness involved. A number of coworkers, friends, and family members expressed their general views of his good character, but there is insufficient evidence of rehabilitation or a track record of compliance with security-related and other legal obligations. The potential for pressure, exploitation, or duress remains significant.

Overall, the evidence creates substantial doubt as to Applicant's trustworthiness, judgment, and suitability for a security clearance. He failed to meet his burden to mitigate the security concerns arising under the guidelines for criminal conduct and personal conduct.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of the Directive, are:

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 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 the interests of national security to grant Applicant eligibility for a security clearance. National security eligibility for access to classified information is denied.

DAVID M. WHITE
Administrative Judge