



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



In the matter of:)
)
) ISCR Case No. 17-01495
)
Applicant for Security Clearance)

Appearances

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

03/06/2018

Decision

BENSON, Pamela C., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline E, personal conduct. Applicant's eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on January 29, 2015. On May 30, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) 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) effective within the DOD on September 1, 2006. On June 8, 2017, new AGs were implemented and are effective for decisions issued after that date.¹

¹ I considered the previous Adjudicative Guidelines, effective September 1, 2006, as well as the new Adjudicative Guidelines, effective June 8, 2017. My decision would be the same if the case was considered under the previous Adjudicative Guidelines.

Applicant's initial Answer to the SOR, on June 13, 2017, was incomplete. He submitted a complete Answer on July 11, 2017. He requested a hearing before an administrative judge. The case was assigned to me on October 9, 2017. On November 17, 2017, DOHA issued a Notice of Hearing, setting the hearing for December 5, 2017. The hearing convened as scheduled. Department Counsel offered Government Exhibits (GE) 1 through 8, which were admitted without objection. Applicant testified, but offered no documents into evidence. The record closed on the date of the hearing. DOHA received the hearing transcript on December 12, 2017.

Findings of Fact

Applicant admitted SOR ¶¶ 1.a through 1.m. After a thorough and careful review of the pleadings, testimony and exhibits submitted, I make the following findings of fact:

Applicant is 56 years old. He has been married since 2004. He was previously married from 1989 to 1990. He has 23-year-old twins. He has been employed as a truck driver for a federal contractor since January 2015. (Tr. 33-34; GE 1)

Applicant was arrested in January 1995 and charged with two felony counts of abuse, neglect and endangerment of a child. (SOR ¶ 1.a) His children were removed from the home. He admitted he was arrested for these charges, but he was only convicted of a gross misdemeanor and required to complete parenting classes and 18 months of probation. His six-month-old twins were hospitalized. (Tr. 31, 36, 38-41, 61-64)

Applicant was also arrested in April 2004 (¶ 1.c) and charged with felony battery with a deadly weapon and malicious destruction of property. Applicant was involved in a physical altercation with another driver, who was stopped at a red light. According to the police report, Applicant struck both the other vehicle, and the other driver, with a tire iron. Applicant initially lied to the detectives and denied any involvement. He testified that he was required to turn himself into the police station. He was angered by what he perceived to be reckless driving by the other driver. He admitted that he punched the other driver with his fists, but he denied damaging the other vehicle or using a tire iron during the confrontation. He was found guilty of a lesser felony, required to pay restitution and complete three years of probation. (Tr. 44-48, 65-67; GE 3, GE 5, GE 6)

Applicant was arrested in November 2011 for driving under the influence. (¶ 1.g) He admitted that he tested positive for amphetamines after the arrest. However, he denied knowingly ingesting them. He possessed a DOD security clearance at the time of his arrest. He believes he tested positive for amphetamines due to secondhand smoke. He admitted he must have unknowingly come in contact with amphetamines. He initially claimed that he had last used amphetamines more than 20 years ago. However,

he later testified that he never used amphetamines in his life. (Tr. 11-12, 51-52, 56-57, 69; GE 3, GE 5)

Applicant has a history of employment terminations. He was terminated for cause in March 2004, April 2006, June 2008, July 2009 and January 2015. (§§ 1.b, 1.d-1.f, and 1.h) The SOR also alleged that he intentionally failed to disclose all of these employment terminations on his January 2015 SCA, as required. (§§ 1.i-1.m) In his Answer, Applicant admitted his intent to falsify by failing to disclose this adverse information. He listed that he wanted to make a good impression by leaving the negative information off of the application. He testified that he deliberately withholds adverse information about his employment history whenever he fills out any type of application, either employment or security clearance application. It was not until his background interview, approximately seven months later, that Applicant disclosed his job terminations to the DOD authorized investigator. Applicant listed in his Answer that in his background interview it should be noted that he was 100 percent honest and that he can be trusted. (Tr. 31, 69-71; GE 1, GE 3)

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 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, these guidelines are applied 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 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 not drawn inferences grounded on mere speculation or conjecture.

Directive § E3.1.14 requires the Government to present evidence to establish controverted facts alleged in the SOR. Under Directive § E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and 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 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

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern for 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 information 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 find the following 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 national security eligibility or trustworthiness, or award fiduciary responsibilities; and

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, 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. This includes, but is not limited to, consideration of:

(2) any disruptive, violent, or other inappropriate behavior; and

(3) a pattern of dishonesty or rule violations.

Applicant has been terminated numerous times between 2004 and 2015. He has several felony arrests. AG ¶¶ 16(d) (2) and (3) apply. He deliberately failed to disclose any of his employment terminations on his 2015 SCA. AG ¶ 16(a) applies.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered the following mitigating conditions under AG ¶ 17:

(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; and

(d) the individual 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.

Applicant acknowledged that he deliberately failed to disclose his employment terminations on his 2015 SCA because he was ashamed of his work history and he wanted to make a good impression. This is not a mitigating circumstance. There is no indication that he made prompt, good-faith efforts to correct the falsified information on the security application, despite that he signed and certified that all of his listed information was accurate and true. Applicant did not disclose his employment terminations until his background interview approximately seven months after he completed the SCA. AG ¶ 17(a) does not apply.

Applicant admitted that he deliberately failed to disclose his job terminations not only his most recent SCA, but on his prior one as well. Falsifications on his 2010 SCA are not alleged in the SOR, but I can consider them in weighing mitigation and likelihood of recurrence. He believes that by revealing the truth when asked about it later somehow shows that he is reliable and trustworthy after all. I do not find that to be the case. Applicant did not establish that his deliberate omissions are unlikely to recur. They continue to cast doubt on his judgment, trustworthiness and reliability. AG ¶ 17(c) does not apply. There is insufficient evidence to raise AG ¶ 17(d).

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(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. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Overall, Applicant's work track record, criminal history and his repeated falsifications raise continuing questions about his judgment, reliability, and trustworthiness. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to 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
Subparagraphs 1.a-1.m:	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 a security clearance. Applicant's eligibility for access to classified information is denied.

Pamela C. Benson
Administrative Judge