



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



In the matter of:

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) ISCR Case No. 17-03978
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Applicant for Security Clearance

Appearances

For Government: Alison O'Connell, Esq., Department Counsel

For Applicant: Alan V. Edmunds, Esq.

11/30/2018

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant exercised questionable judgment by falsifying his June 21, 2017 electronic questionnaires for investigative processing (e-QIP) and by engaging in a series of acts that shows his unwillingness to comply with rules and regulations. His conduct raised security concerns under the guideline for personal conduct. Eligibility for access to classified information is denied.

Statement of the Case

On February 15, 2018, the Department of Defense (DoD) issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guidelines B, C, and E. 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 June 8, 2017.

Applicant answered the SOR on March 23, 2018, and requested a hearing before an administrative judge. (Answer.) The case was assigned to another administrative

judge and then reassigned to me on September 5, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on August 20, 2018, scheduling the hearing for September 7, 2018. The hearing was convened as scheduled. The Government offered Exhibits (GE) 1 through 5, which were admitted without objection, and Hearing Exhibit I. Applicant testified on his own behalf, and presented Applicant Exhibits (AE) A through K. DOHA received the transcript of the hearing (Tr.) on October 25, 2018.

Procedural Matters

Pursuant to Additional Procedural Guidance ¶¶ E3.1.10 and E3.1.17, of the Directive, Department Counsel moved to amend the SOR issued to Applicant to withdraw the allegations in SOR ¶¶ 2 and 3 under Guideline B and C. Applicant had no objection to the amendment and I granted the motion. (Tr. 9.)

Findings of Fact

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

Applicant is a 30-year-old employee of a defense contractor. He is employed as a driver for a ride-sharing service. He earned a bachelor's degree and is enrolled in a master's degree program. He has applied for a job with the defense contractor sponsoring his application for national security eligibility. (GE 1; AE A; AE B; AE I; Tr. 16-18.)

SOR ¶ 1.a alleges that Applicant had approximately 15 motor vehicle citations from 2004 to 2016. Those citations include multiple infractions for speeding; uninspected vehicle; and failing to comply with traffic signals. He attributed the large number of citations to his job as a driver, although many of his infractions occurred prior to that employment. He testified that clients pushed him to disobey the law sometimes. He admitted that he has received two additional traffic citations in 2018 for making an illegal left turn and for using his cell phone while driving. (GE 4; AE I; AE J; Tr. 18-20, 32-35.)

SOR ¶ 1.b alleges that Applicant used marijuana in 2015. He claimed he did not recall the date of his last marijuana use, but asserted he had not used it since 2015. He testified that he used marijuana fewer than six to eight times at parties. When questioned about his previous admission of marijuana "10 times" in the course of two months in 2015" disclosed to an investigative agent in July 2017, he claimed he only used it "five or so max." (GE 5; Tr. 36.) Applicant took drug urinalysis tests on March 18, 2018, and August 30, 2018, which was negative for all tested substances. He signed a statement of intent, pledging to abstain for further use of illegal substances. (GE 5; AE C; AE D; AE F; Tr. 21-24.)

SOR ¶ 1.c alleges that Applicant was arrested in April 2007 for Felony Embezzlement. The charge was later reduced to a misdemeanor, and he was found guilty. He was given a suspended sentence and required to pay restitution and perform community service. At that time, he was 18 years old and was working as a clerk for a retail store. He took store merchandise, scanned it, and issued himself a refund directly deposited to his bank account, as if he was returning previously purchased goods. He explained that at that time, he did not understand that his actions were illegal. He was terminated from his employment as a result of the embezzlement. (GE 2; GE 4; Tr. 25-29, 36-37.)

SOR ¶ 1.d alleges that Applicant was arrested and charged with Forging Public Records in April 2007. He admitted he forged a date on court records relating to the arrest in SOR ¶ 1.c. He provided the forged records to his high school to account for his absence. The charges were dismissed. (GE 3; Tr. 29-31, 37-40.)

SOR ¶ 1.e alleges that Applicant falsified his e-QIP when he denied drug use in the past seven years. In his Answer, Applicant admitted he falsified his e-QIP. He testified that he omitted his drug use on the e-QIP because he “wanted to know more about the question” and did not fully understand it. However, in his interview with an investigative agent, he claimed he did not list his marijuana use because he did not think experimental use had to be disclosed. (GE 1; GE 5; Answer; Tr. 32, 42-43.)

Applicant’s professor wrote a letter of support on Applicant’s behalf. The professor indicated Applicant is dedicated, responsible, and “an outstanding and motivated student.” (AE E.) A program director from his master’s program indicated Applicant is diligent and has done an excellent job. (AE G.)

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 AG ¶ 2 describing 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.” 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 avoided drawing 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 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 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 relating to the guideline for personal conduct is set out in AG ¶ 15:

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 16. The following are potentially applicable 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 eligibility or trustworthiness, or award fiduciary responsibilities; and

(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.

Applicant deliberately omitted his 2015 marijuana use on his 2017 e-QIP. The evidence is sufficient to raise AG ¶ 16(a) with respect to that omission.

Further, Applicant has an extended history of dishonesty, questionable judgment, and conduct that indicates an unwillingness to comply with rules and regulations. He incurred numerous traffic citations; used marijuana in violation of federal criminal laws; lied about that marijuana use on his e-QIP; embezzled from his employer; and forged court documents submitted to his school. These events occurred between 2004 and 2017, and reflect that he may not properly safeguard classified or sensitive information. The evidence is sufficient to raise AG ¶ 16(c).

AG ¶ 17 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 17, including:

(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;

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

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

None of the above conditions fully apply. While Applicant's embezzlement and forgery arrests occurred more than 12 years ago, they remain relevant, especially in light of his recent falsification to the Government. His behavior extends from 2004 through the present, as he gave inconsistent answers about his drug usage at hearing and during the investigation. His conduct shows that he continues to engage in inappropriate behavior. His additional 2018 traffic citations demonstrate that he has not yet learned to comply with traffic rules or is ambivalent about them. While he is credited for excellent work in his master's program and with two negative drug tests, he has not demonstrated sufficient rehabilitation to show similar behavior is unlikely to recur. He did not attempt to correct his falsification in a timely manner.

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 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(d) were addressed under those guidelines, but some warrant additional comment. Despite Applicant's success in higher education and favorable recommendations, his judgment remains questionable. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the personal conduct security concern.

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 E:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Jennifer Goldstein
Administrative Judge