



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



In the matter of:)
)
) ISCR Case No. 18-00173
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: *Pro se*

10/04/2018

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the personal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On March 5, 2018, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E, personal conduct. Applicant responded to the SOR on March 26, 2018, and elected to have the case decided on the written record in lieu of a hearing. On April 25, 2018, Department Counsel requested a hearing before an administrative judge.

The case was assigned to me on May 8, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 22, 2018, scheduling the hearing for July 12, 2018. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 7 were admitted in evidence without objection. Applicant testified, but he did not submit any documentary evidence. The record was held open for Applicant to submit additional information. He submitted documents that I have marked Applicant's Exhibits (AE) A through F and admitted without objection.

Findings of Fact

Applicant is a 34-year-old employee of a defense contractor. He has worked for his current employer since July 2017. He served in the U.S. military from 2006 until he discharged under other than honorable conditions in 2017. He attended college for a period without earning a degree. He married in 2006 and divorced in 2010. He married his second wife in 2011, and they divorced in 2017. He is the legal father of four children, but he is not the biological father of his oldest child.¹

Applicant was stationed overseas from about April 2011 until April 2014. He deployed for about five to six months in 2013. He transferred to the United States in 2014, but he deployed to the Middle East from about October 2014 to April 2015. In February 2016, military pay personnel notified military investigators that an audit was conducted, and Applicant was suspected of basic allowance for housing (BAH) and family separation allowance (FSA) fraud. While living overseas, Applicant claimed FSA and BAH on behalf of his children in the United States. His paperwork suggested he did not have the physical and legal custody necessary to claim the entitlements. The audit indicated that Applicant's paperwork may have been altered in order to justify the entitlements. The potential loss to the government was tabulated as \$47,882.²

Applicant's 2010 divorce order included a custody agreement. In April 2011, Applicant submitted to the military an amendment to the 2010 court order granting him full custody of his younger child with his first wife. The investigation revealed the amendment was not a legitimate court document, and had never been issued by the court. Applicant's ex-wife's signature was forged on the document, and the judge's signature was copied and pasted from the original document. The document allowed Applicant to collect BAH and FSA that he would not otherwise be entitled to. The additional BAH was to pay for his child's housing in the United States; and FSA is designed to offset the incidental expenses that arise when a family is separated.³

In November 2016, Applicant was charged with the following offenses under the Uniform Code of Military Justice (UCMJ):

- Article 107: False official statement in April 2013 when he signed with intent to deceive an official record, to wit: DD Form 1561, which he knew to be false in that his dependent children were in the legal custody of another person.
- Article 107: False official statement in April 2013 when he signed with intent to deceive an official record, to wit: DD Form 2367, which he knew to be false in that he was not entitled to overseas housing allowance for dependents residing in a U.S. zip code.

¹ Tr. at 64; GE 1, 2; AE D.

² Tr. at 15-21, 27; Applicant's response to SOR; GE 1-3.

³ Tr. at 51-56; Applicant's response to SOR; GE 3.

- Article 121; Larceny in that between April 2013 and April 2014, he stole more than \$500 from the U.S. Government in basic allowance for housing.
- Article 121; Larceny in that between April 2013 and April 2014, he stole more than \$500 from the U.S. Government in family separation allowance.⁴

The military did not charge Applicant with submitting the fraudulent court order. The Article 107 charges were for submitting false forms related to military pay entitlements. Applicant requested a discharge in lieu of trial. The request was approved, and he was discharged under other than honorable conditions in 2017. He paid about \$20,000 in restitution for his overpayment, and he has been paying the remainder since.⁵

Applicant's responses to military investigators in 2016 and during the security clearance adjudication process have been consistent. He asserted that he did not know that the 2011 court order was a fake. He stated that his first wife was having difficulties and asked him to take custody of their daughter. He told her that he would not do so unless a court approved it. He did not want to have custody of his daughter and still have to pay child support. He stated his first wife provided him the court order, which he assumed was legitimate. His first wife has questionable character, and he surmised that she had someone forge the document so that she would continue to receive child support.⁶

Applicant's daughter never moved to Applicant's overseas location or his location in the United States. He stated that he never intended to accept pay that he was not entitled to receive. He planned to have her live with him, but his deployments made that impossible. He documented that each month from August 2012 through January 2014, \$779 was paid directly by allotment from the DOD to a joint account he held with his first wife. The credit union statements show withdrawals in the United States while Applicant was living overseas, which indicates the withdrawals were made by his first wife.⁷

Applicant was interviewed for his background investigation in July 2017. He discussed the false court order. He stated that the military did not find him at fault for filing the incorrect documents, but he had to repay the amount that he should not have received. He stated that he received an honorable discharge in March 2017, and he chose not to reenlist. When confronted, he admitted that he received a discharge in lieu of trial by court-martial, but he did not believe that he received an other than honorable conditions discharge. He did not believe he would be eligible for the benefits he receives from the Department of Veterans Affairs if he was not discharged under honorable conditions. Applicant testified that he did not tell the investigator that he

⁴ GE 4.

⁵ Tr. at 28-31, 63; Applicant's response to SOR; GE 5.

⁶ Tr. at 15-24, 32-34, 42, 51-55, 72; Applicant's response to SOR; GE AE A, D.

⁷ Tr. at 17-21, 27, 42, 56, 71; Applicant's response to SOR; AE A, B, F.

received an honorable discharge; he told the investigator that he did not receive a dishonorable discharge.⁸

Applicant submitted documents and letters attesting to his excellent performance of duties in the military. He is praised for his trustworthiness, leadership, dedication, professionalism, work ethic, dependability, reliability, loyalty, and integrity. He is recommended for a security clearance.⁹

Policies

This case is adjudicated 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), which became effective on June 8, 2017.

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

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.

⁸ Tr. at 35; GE 2. The SOR did not allege that Applicant provided false information during the background interview, and the false information will not be used for disqualification purposes. It may be considered when assessing Applicant's credibility.

⁹ AE C.

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 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 for personal conduct is set out in AG ¶ 15, as follows:

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. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are 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 security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(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;

(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 submitted a falsified court document that allowed him to collect BAH and FSA that he would not otherwise be entitled to. He was charged with larceny and false official statement for submitting false forms related to pay entitlements. He requested a discharge in lieu of trial and was discharged under other than honorable conditions.

Applicant denies any knowledge that the court order was fake before he was notified by military authorities. He stated that he had no intent to receive pay to which he was not entitled, and that he was the unknowing victim of a dishonest ex-wife. Having considered all the evidence, including all of Applicant's statements; the more than \$47,000 Applicant obtained based upon the false court order; the fact that his daughter never came to live with him; and his acceptance of a discharge under other than honorable conditions in lieu of trial by court-martial, I find by substantial evidence¹⁰ that Applicant knew the court order was fake when he submitted it; he intentionally submitted false pay-entitlement documents; and he knowingly received pay to which he was not entitled. That conduct reflects questionable judgment and an unwillingness to comply with rules and regulations. It also created vulnerability to exploitation, manipulation, and duress. AG ¶ 16(e) is applicable. AG ¶ 16(c) is not perfectly applicable because Applicant's conduct could have been sufficient for an adverse determination under the criminal conduct guideline. However, the general concerns about questionable judgment and an unwillingness to comply with rules and regulations contained in AG ¶¶ 15 and 16(c) are established. Applicant's false official submissions establish AG ¶¶ 16(a) and 16(b).

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

¹⁰ Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." ISCR Case No. 10-09035 at 5 (App. Bd. Jun. 13, 2014) (citing Directive ¶¶ E3.1.14; E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994); ISCR Case No. 04-07187 at 5 (App. Bd. Nov. 17, 2006).

(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; and

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

Having determined that Applicant intentionally submitted false documents in order to defraud the U.S. Government, I have also determined that his testimony and claims of innocence were also false. It would be inconsistent to find his conduct mitigated.¹¹

¹¹ See ISCR Case 03-22819 at 4 (App. Bd. Mar. 20, 2006), in which the Appeal Board reversed the Administrative Judge's decision to grant an applicant's security clearance:

Once the Administrative Judge found that Applicant deliberately falsified a security clearance application in September 2002, the Judge could not render a favorable security clearance decision without articulating a rational basis for why it would be clearly consistent with the national interest to grant or continue a security clearance for Applicant despite the falsification. Here, the Judge gives reasons as to why he considers the falsification mitigated under a "whole person" analysis, namely that Applicant has matured, has held a position of responsibility, recognizes how important it is to be candid in relation to matters relating to her security clearance, and has changed her behavior so that there is little likelihood of recurrence. However, the Judge's conclusion runs contrary to the Judge's rejection of Applicant's explanations for the security clearance application falsification. At the hearing (after earlier admitting the falsification in her March 2003 written statement to a security investigator), Applicant testified that she had not intentionally falsified her application. Given the Judge's rejection of this explanation as not being credible, it follows that the Judge could not have concluded Applicant now recognizes the importance of candor and has changed her behavior.

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 Guideline E in my whole-person analysis. I also considered Applicant's favorable character evidence and military service, including his deployments.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not 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
Subparagraph 1.a:	Against Applicant

Conclusion

It is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge