



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



In the matter of:)
)
) ISCR Case No. 07-06396
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: Alicia Z. Aguirre, Esq.

April 15, 2011

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated personal conduct and criminal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On October 26, 2010, the Defense Office of Hearings and Appeals (DOHA) 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 (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the Department of Defense on September 1, 2006.

Applicant answered the SOR on November 15, 2010, and requested a hearing before an administrative judge. The case was assigned to me on February 7, 2011. DOHA issued a notice of hearing on March 2, 2011, and the hearing was convened as scheduled on March 24, 2011. The Government offered exhibits (GE) 1 through 13,

which were admitted without objection. Applicant testified, called a witness, and submitted exhibits (AE) A through E, which were admitted without objection. The record was held open until April 8, 2011, for Applicant to submit additional information. Applicant timely submitted a document that was marked AE F and admitted without objection. Department Counsel's memorandum forwarding Applicant's exhibit is marked Hearing Exhibit (HE) I. DOHA received the hearing transcript (Tr.) on April 1, 2011.

Findings of Fact

Applicant is a 41-year-old employee of a defense contractor. He has worked for his current employer, or a predecessor contractor, since 2006. He is applying for a security clearance. He served on active duty in the U.S. military from 1988 until he was discharged in 1990. He has a General Educational Development (GED) high school equivalency certificate. He was married from 1989 to 1995. He has been married to his current wife since 1997. He has five children, three from his first marriage, and two with his current wife.¹

Applicant was arrested in June 1992, after he and his stepbrother burglarized a business and stole about \$10,000. He was charged with the felony offenses of burglary and theft. He pleaded guilty to burglary pursuant to a plea bargain. The plea bargain required him to testify against his stepbrother on the burglary and theft charges, and on charges against the stepbrother for the sexual assault of a 15-year-old girl. Applicant received a deferred sentence and probation for six years, and he was ordered to pay costs and \$2,000 in restitution. The theft charge was dismissed. Applicant violated the terms of his probation on several occasions. The burglary charge was dismissed in 1999 after Applicant completed his probation.²

Applicant was separated from his first wife in September 1992. He went to her home and found her with a friend. His first wife and her friend reported to the police that Applicant became angry, pulled a pistol, pointed the pistol at them, pulled the slide back,³ and threatened to kill the friend. Applicant was later stopped in his car by the police. Applicant told the police that he did not have a pistol, but that he used a knife contained in a black leather sheath to simulate a pistol. There was no pistol found in his vehicle, but a knife in a black leather sheath was found in the glove compartment. Applicant was arrested for aggravated assault. He was never charged with the offense. Applicant testified that he did not have any weapon during the argument.⁴ I did not find his testimony credible. I find that he did threaten his wife and her friend with a weapon.

¹ Tr. at 22-25, 55-58; GE 1.

² Tr. at 29-31, 38, 59-61; Applicant's response to SOR; GE 3, 4, 10-13; AE B-E.

³ In a semiautomatic pistol, a round is chambered by pulling the slide back, making the weapon ready for firing.

⁴ Tr. at 61-65, 84-85; Applicant's response to SOR; GE 5, 11, 12; AE D.

In April 1993, Applicant was charged with the felony offense of sexual assault by accountability. The complaint alleged that Applicant physically removed a 15-year-old girl from a bedroom in which his stepbrother and another 15-year-old girl were engaged in, or about to engage in, sexual contact. Applicant then prevented the first girl from reentering the bedroom by blocking the doorway with his body. The charge against Applicant was dismissed pursuant to a plea bargain to testify against his stepbrother, as discussed above. Applicant admits that his stepbrother was dating a girl and she was in his bedroom. He denies knowing her age, and he denies removing another girl from the bedroom and preventing her reentry.⁵ His testimony was not credible.

In November 1993, Applicant sold stolen antlers for \$52. When questioned by the police, Applicant initially stated that he found the antlers. He then admitted that he stole the antlers, and that another man was involved. The police questioned the other man. The man admitted that he stole the antlers, and then he and Applicant sold them. Applicant and the other man were both charged with the misdemeanor offense of petit theft. Applicant pleaded guilty and was sentenced to 90 days in jail and court costs. At his hearing, Applicant admitted that he sold the antlers, but he denied stealing them. He stated the other man was his cousin, and his cousin stole the antlers. He stated that he had an idea that the antlers might be stolen when he sold them, but he was not certain.⁶

Applicant was arrested in January 1999 and charged with driving under the influence of alcohol (DUI), first offense, and operation of a vehicle by a person with alcohol concentration of .10 or more. He pleaded guilty to the second charge. He was sentenced to 30 days in jail, all suspended; a \$320 fine; he was ordered to attend alcohol classes; and his driver's license was suspended for six months. The DUI charge was dismissed.⁷

Applicant submitted a questionnaire for national security positions (SF 86) in September 2006. He listed his 1999 DUI under the question that asked about alcohol and drug offenses. He answered "No" to Question 23a of the SF 86, which asked "Have you ever been charged with, or convicted of any felony offense? (Include those under Uniform Code of Military Justice)." He stated that he misread the question and thought it only asked for felony convictions. He stated that he did not know that he was charged with felonies, and his burglary conviction was overturned.⁸ I do not find sufficient evidence for a determination that Applicant intentionally falsified the SF 86.

Applicant was interviewed about the 1992 burglary charge by an investigator from the Office of Personnel Management (OPM) in December 2006. He told the investigator that he had nothing to do with the burglary, and he was arrested as an

⁵ Tr. at 32-36, 61, 65-67, 79-82; Applicant's response to SOR; GE 6, 11-13; AE D.

⁶ Tr. at 31-32, 67-71; Applicant's response to SOR; GE 3, 7, 11.

⁷ Tr. at 45-48, 75; Applicant's response to SOR; GE 9.

⁸ Tr. at 25-29, 41-42, 82-83; Applicant's response to SOR; GE 1.

accomplice because his stepbrother used his truck and the stolen money was found in the truck.⁹ I find that Applicant intentionally provided false information about the burglary to the investigator.

Applicant provided a signed statement to an OPM investigator in March 2009. He wrote that he “knew nothing about the burglary and had nothing to do with it.” He wrote that he was not guilty of the burglary, but agreed to plead guilty in order to receive a deferred sentence. At his hearing, Applicant initially testified that the statement was truthful; he later admitted that it was false.¹⁰ I find that Applicant intentionally provided false information in the statement about his participation in the burglary.

In the same statement, Applicant discussed his knowledge of the charges against his stepbrother for the sexual assault of a 15-year-old girl. He wrote that he knew his stepbrother had a teenage girlfriend, but he “never saw him victimize her and did not know what they did behind closed doors.” He also wrote that he “never blocked anyone in any room in [stepbrother’s] residence.”¹¹ I do not find sufficient evidence for a determination that Applicant intentionally provided false information in the statement about the sexual assault of the 15-year-old girl.

Applicant provided another signed statement to an OPM investigator in May 2009. He wrote that when he testified against his stepbrother, he knew his stepbrother had a girlfriend, but he did not know how old she was. He also wrote that he “did not know that [he] was charged with sexual assault and had no involvement or knowledge of a sexual assault involving a minor or anyone else.”¹² There is insufficient evidence for a determination that Applicant intentionally provided false information in the statement about the sexual assault of the 15-year-old girl.

Applicant has received several awards from his employer for his excellent job performance. Applicant’s wife testified that he is trustworthy and a “hard-working good man.” She also wrote a letter attesting to his honesty and dependability. She wrote that he “has learned from his bad choices and shows remorse for what he had done in the past.” She believes he “has paid his debt to society and has become a good citizen.” There is no evidence that Applicant has been arrested, charged, or convicted of any offenses after 1999.¹³

⁹ Tr. at 76-79; Applicant’s response to SOR; GE 2.

¹⁰ Tr. at 36, 75-76; Applicant’s response to SOR; GE 11.

¹¹ Tr. at 36-44; Applicant’s response to SOR; GE 11.

¹² GE 12.

¹³ Tr. at 75, 87-94; AE A.

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(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.

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 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:

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 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; and

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

In 2006, and again in 2009, Applicant intentionally provided false information to OPM investigators about his participation in the 1992 burglary. AG ¶ 16(b) is applicable.

There is insufficient evidence for a determination that Applicant intentionally falsified his 2006 SF 86. AG ¶ 16(a) is not applicable. SOR ¶ 1.a is concluded for Applicant. There is also insufficient evidence for a determination that Applicant intentionally provided false information to OPM investigators about the sexual assault of a 15-year-old girl in 1993. SOR ¶¶ 1.c and 1.e are concluded for Applicant.

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

(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 improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. 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 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 intentionally provided false information to OPM investigators in 2006 and again in 2009. He was not completely candid during his testimony at the hearing. There are no applicable mitigating conditions.

Guideline J, Criminal Conduct

The security concern for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant'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. The following are potentially applicable:

(a) a single serious crime or multiple lesser offenses; and

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant was involved in a burglary and an aggravated assault in 1992, sexual assault by accountability and theft in 1993, and DUI in 1999. In 2006, and again in 2009, Applicant knowingly and willfully made materially false statements to OPM investigators, as discussed above. It is a criminal offense under 18 U.S.C. § 1001 to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the executive branch of the Government of the United States. Security clearances are within the jurisdiction of the executive branch of the Government of the United States.¹ A violation of 18 U.S.C. § 1001 is a serious offense as it may be punished by imprisonment for up to five years. The evidence is sufficient to raise the above disqualifying conditions.

¹See *Egan*, 484 U.S. at 527.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following are potentially applicable:

- (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 person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) evidence that the person did not commit the offense; and
- (d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Applicant has not been arrested, charged, or convicted of any offenses since 1999. He has a good job and a stable family life. Had Applicant been completely truthful throughout the security process, a number of mitigating conditions would be applicable. However, he willfully violated 18 U.S.C. § 1001 in 2006 and again in March 2009. He was not completely truthful at his hearing. No criminal conduct mitigating conditions are applicable.

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(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 Guidelines E and J in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

I considered Applicant's favorable character evidence and his service to this country in the U.S. military. For the most part, Applicant has his life in order following a turbulent period of criminal activity in the 1990s. However, he failed to provide truthful responses about his criminal activity during that period. It is fundamental to the security clearance process that applicants provide truthful and candid answers to all questions. Applicant chose not to.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant has not mitigated 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 E:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	For Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraphs 2.a-2.f:	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 eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge