



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-01265
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel F. Crowley, Esquire, Department Counsel
For Applicant: *Pro Se*

May 21, 2008

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on January 6, 2005. On January 14, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J and E for Applicant. The action was taken under Executive Order 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on January 22, 2008. He requested a hearing before an administrative judge. I received the case assignment on March 5, 2008. DOHA issued a notice of hearing on April 8, 2008, and I convened the hearing as scheduled on Tuesday May 6, 2008. The Government offered Exhibits (GE) 1-4, which were received without objection. Applicant testified in his own behalf and did not submit any exhibits at the hearing. At Applicant's request, I left the record open until May 16,

2008 for submission of documents. Applicant timely filed exhibits (AE) A and B. Department counsel had no objection to their admission into the record. DOHA received the transcript of the hearing (Tr) on May 15, 2008. Based upon a review of the case file, eligibility for access to classified information is denied.

Findings of Fact

In his Answer to the SOR, dated January 22, 2008, Applicant admitted the factual allegations in ¶¶ 1.a-1.c of the SOR. He also admitted the factual allegations in ¶¶ 2.a and 2.b of the SOR, but he denied that it was an intentional falsification.¹ He provided additional information to support his request for eligibility for a security clearance.

Applicant is a 56-year-old employee of a defense contractor. He graduated from high school in 1970. He attended college courses from 1971 until 1974. He also attended correspondence school until 1977. He completed a program and received a certificate as a machinist. He was married and divorced three times. He has worked for his current employer since July 2004 (GE 1).

Applicant traveled extensively for his work throughout the years. He worked for various companies but was steadily employed. He relates that his travels contributed to his marriage difficulties. Applicant has three biological children and six by marriage (Tr. 16).

In 2000, Applicant was going through a divorce. His one son was involved in a gang. Applicant's former wife (mother of his son) called him one evening to tell him that their son was involved in an altercation. She reported to him that gun shots had been fired at the house and she feared for her son and his life (Tr. 19). Applicant quickly left his home and sped to the house. He had been drinking at home prior to the time of the call. He was stopped for speeding. Applicant recalls that there was an altercation between the police officer and himself. As a result, in November 2000, Applicant was charged with Driving Under the Influence (DUI). He was found guilty (GE 2). He was fined approximately \$1,100 and placed on probation for six months. He completed 50 hours of community service (Tr. 33).

When Applicant started working for his current employer, he told them about the 2000 DUI incident. He also listed the incident on his 2005 security clearance application.

In 2002, Applicant was leaving his ex-wife's home where he had been making some repairs. He stopped at a convenience store and bought two 24-ounce beers. He drank one beer and opened the other (Tr. 23). He was stopped by the police after he drove away. The officer had been sitting near the convenience store and saw Applicant leave. Applicant relates that this area is desolate and is considered a "speed trap." He was charged with DUI. The court found him guilty on November 9, 2002. He served

¹Applicant attached an addendum to his answer to the SOR in which he specifically addressed the allegation in 2.b.

four days in jail and was fined \$2,100 (GE 2). He entered a program of deferred adjudication. He did not pay the entire amount of the fine but he was released. On July 4, 2004, Applicant made a payment of \$267 on the fine. In 2004, he reported that he would pay the balance within three months. As of the hearing date, Applicant still owed approximately \$750 on the fine.

On Applicant's January 6, 2005 security clearance application (SF 86), Applicant answered "yes" to a question about his police record. He listed a 1989 felony offense (possession of a firearm) and noted the record was sealed (GE 1). He also listed his DUI from 2000 and noted the records were sealed. He did not list his 2002 alcohol incident (GE 1).

Applicant related the events of 2000 and 2002 during his security interview with investigators in 2006. He told them that the 2002 incident was a trumped up charge. He also related that the state court informed him that this 2002 incident would not be listed on his record. He told the investigators that he did not list the 2002 incident on his 2005 SF 86 due to an oversight (GE 4).

In his 2007 interrogatories, Applicant revealed that the fine (\$777) was not paid because he believed this was "hush" money to "seal the record" so that it would not be known to anyone. He intended to pay the rest of the fine but had some financial difficulties due to his divorces and illness in his family (GE 3). He again stated that he would pay the rest as soon as possible.

At the hearing, Applicant was adamant that he was not guilty of the 2002 charge. He then stated at the hearing: "so yes [I] falsified my information but it was under the intent — or not really, where it's when they tell you — they said well look, you— these things are sealed." Applicant further explained that he did not think it was outright lying because he had been through the parish courts and they said do not worry about it. Applicant also made clear that on the application he knew it said "well tell everything that happened." (Tr 25).

When questioned, Applicant revealed that he has filled out a number of security applications since starting his current employment (Tr. 26). He has worked on sensitive material and he states that he has never harmed anyone. He has not done anything on his job that would be considered untrustworthy.

On cross-examination, Applicant admitted that he was angry about the amount of fine for the 2002 alcohol incident. He blamed the criminal justice system and felt that race was an issue in the case. He stated that he would send them a payment whenever he gets some money (Tr 34). However, he still believes he was "robbed" due to the large amount of the fine.

Applicant admitted that he was under the impression that as long as he paid the fine under the deferred adjudication program, his records would be sealed. However, he stopped making the payments.

When Applicant responded to the SOR, he stated that when he initially completed the security clearance questionnaire he misunderstood the instructions to the question (Addendum to Applicant's answer to SOR 2008). He continued that "[I] failed to read and understand that these charges should be reported even if the record was sealed." This does not make sense in light of the fact that in answer to other questions concerning his police record, Applicant listed the offense and then put records "sealed." (Tr 38). He further argued that he just did not accept the fact that he did something wrong in 2002 (Tr.39). I find that Applicant falsified his security application in 2005 by intentionally omitting the 2002 DUI.

Applicant explained that he had not paid more on the outstanding fine due to some other financial problems. He had a knee injury and was receiving a reduced rate of income on workers' compensation in 2007. He also is paying for a daughter in college and some other family members who have needs (Tr 47).

Applicant paid the remaining balance of \$750 on his 2002 DUI in two payments of \$375 by money order. He submitted evidence of two payments to the adjudication program after the hearing and before the record closed (AE A-B).

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2, 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 avoided drawing inferences grounded on mere speculation or conjecture.

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 applicant or proven by Department Counsel. . . .” The Applicant has the ultimate burden of persuasion as to obtaining 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 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 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 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.

The guideline notes several conditions that could raise security concerns. Under AG & 31(a), an A single serious crime or multiple lesser offenses[@] may be potentially disqualifying. Similarly under AG & 31(c), A an allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted[@] may raise security concerns. As noted above, Applicant admits he committed a crime in 2000. He was charged and convicted of DUI in 2002. He also falsified his January 6, 2005 security clearance application, in violation of 18 U.S.C. Section 1001. These facts are sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Under AG ¶ 32(a), the disqualifying condition may be mitigated where 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 current reliability, trustworthiness, or good judgment.[@] Applicant-s DUI was in 2002. However, he had not paid the remainder of the

fine as late as the hearing date even though he was on notice that this was an issue for the security clearance. The falsification is more recent (2005). It shows poor judgment given his record. This potentially mitigating condition does not apply.

Under AG & 30(d), it may be mitigating where 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.” As noted above, Applicant just paid his outstanding fine from 2002. This is almost six years later. In fact, he does not acknowledge the 2002 incident as his fault. This does not support rehabilitation. He provided no additional information to consider for mitigation. I find this potentially mitigating condition is not a factor for consideration in this case.

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 information. Of special interest is any failure to cooperate with the security clearance process.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 16 (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” is a potential disqualifying condition.

Applicant did not disclose his 2002 alcohol incident in his 2005 security clearance application. Although he at first stated that he misunderstood the question, due to the fact that it was to be sealed, he listed other offenses that were sealed. Thus, his explanation is not credible. He deliberately omitted the information on the 2002 incident. He did not believe that he was guilty but he knew he was charged and convicted. He intentionally omitted the information.

Similarly, AG ¶ 16(e) “personal conduct, or concealment of information about one’s conduct that creates a vulnerability to exploitation, manipulation or duress, such as (1) engaging in activities which, if known, may affect the person’s personal, professional, or community standing” is applicable in this case.

Applicant refused to acknowledge the 2002 incident. He also refused to pay the remaining fine. At the hearing, he was adamant that he believed he was robbed and that he would pay sometime when he could. This outstanding balance was from 2002,

almost six years ago. Moreover, the record was to be sealed if he paid the required fee. He had not done so until after the hearing in May 2008.

Paragraph 17 lists conditions that could mitigate security concerns. Specifically, ¶ 17(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 judgement” does not apply in this case. Moreover, ¶17(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” does not apply. Applicant was unwilling to pay the fine for the 2002 DUI because he disagreed with the conviction. He has not had any other DUI incidents since 2002. However, his refusal to pay the fine until after the hearing is not appropriate behavior. He did not perform or comply with the rules and regulations and the agreement in his 2002 deferred adjudication program until faced with the issue of a security clearance.

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 the 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 common sense 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. Applicant is a hard-working man who has provided for his family. He received two DUIs. He completed his probation and community service for the alcohol incident in 2000. However, with respect to the one in 2002, he disagreed with the conviction and refused to complete the program fine until after his hearing. He still does not believe that he was guilty. He was a mature man at the time. His disregard for the rules does not show trustworthiness. His 2005 falsification is recent. Although he first stated that he misunderstood the question, when Applicant explained the matter at the hearing, his explanation was not credible. He listed other incidents that had been sealed. Thus, his argument that it was sealed is not persuasive. Applicant did not comport with the agreement in the 2002 deferred adjudication. He has a good employment record but that alone is not sufficient to grant a

security clearance and mitigate the concerns under the criminal conduct and personal conduct guidelines.

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 has not mitigated the security concerns arising from his criminal conduct and personal conduct.

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 J:	AGAINST APPLICANT
Subparagraphs 1.a-c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-b:	Against Applicant

Conclusion

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

NOREEN A. LYNCH
Administrative Judge