



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



In the matter of:)	
)	
)	ISCR Case No. 23-01685
)	
Applicant for Security Clearance)	

Appearances

For Government: Tara Karoian, Esq., Department Counsel
For Applicant: *Pro se*

07/25/2024

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline J, criminal conduct, Guideline D, sexual behavior, and Guideline E, personal conduct. Eligibility for access to classified information is denied.

Statement of the Case

On December 27, 2023, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J, criminal conduct, Guideline D, sexual behavior, and 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 June 8, 2017.

Applicant answered the SOR on January 17, 2024, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the Government’s file of relevant material (FORM), and Applicant received it on April 12,

2024. He was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of receipt of the FORM. The Government's evidence is identified as Items 2 through 7 (Item 1 is the SOR). Applicant did not submit a response to the FORM or object to the Government's documents. The case was assigned to me on July 17, 2024. The Government's documents are admitted into evidence.

Findings of Fact

Applicant admitted all the SOR allegations. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 58 years old. He earned an associate's degree in 1988, a bachelor's degree in 1988, and a master's degree in 1991. He married in 1996 and divorced in 1998. He remarried in 1998 and divorced in 1999. He has an adult daughter.

In July 2022, Applicant completed a security clearance application (SCA). Section 22-Police Record of the SCA advised him to report information regardless of whether the case was sealed, expunged, or otherwise stricken from the court record, or the charge was dismissed. This section asked to report incidents that happened in the past seven years, which Applicant answered "no" to the specific inquiries. The SCA then states **Police Record (EVER)** and for each inquiry under this section the word "EVER" is in bold and capitalized. It requires reporting if Applicant had ever been charged with any felony offense; convicted of any offense involving domestic violence or a crime of violence, such as battery or assault against his child, dependent, cohabitant, spouse or legally recognized civil union/domestic partner, former spouse or legally recognized civil union/domestic partner or someone with whom you share a child in common. Applicant responded "no."

In May 2023, Applicant was interviewed by a government investigator. He was asked by the investigator to verify the accuracy of his responses on his SCA as to his police record. He verified the accuracy of his response in the SCA. He was then confronted with each criminal offense that was reported on his FBI record and other police reports. For each offense noted below, he repeated the same response to the government investigator that he had no knowledge of the criminal issues.

In Applicant's SOR answer, he admitted all of the allegations, including his deliberate failure to disclose his criminal record in his SCA and during his interview with the government investigator. He provided the following statement in his SOR answer.

I am writing to explain I never lied about my background history[.] I was asked do I remember it[.] I said no it was 30 years ago[.] [A]lso I have been working 8 y[ears] for [employer]. When I was filling out the paperwork it said the last 10 [years] of your life to report on the paperwork[.] [W]hy take a job

from somebody that had no problems away. It is unfair to say a person lied when asking about 30 year history. (Item 2)

Applicant deliberately failed to disclose the felony criminal arrests and charges as alleged in SOR ¶¶ 1.c and 1.e in his SCA and during his interview with a government investigator. When asked about his felony arrests and the other arrests as alleged in SOR ¶¶ 1.a, 1.b, 1.d, 1.f and 1.g, he denied any knowledge of each of them to the government investigator, including those for which he served jail time. I find he deliberately omitted and concealed his past criminal conduct to the government investigator. The SOR allegations are supported by the FBI rap sheet, police reports and Applicant's subsequent admissions in his SOR answer. (Items 2-7)

The SOR allegations of Applicant's criminal conduct are as follows:

In December 1990, Applicant was arrested and charged with simple assault. This charge was dismissed. (SOR ¶ 1.g; Item 5)

In July 1993, Applicant was arrested and charged with family violence-probable cause assault/battery/aggravated assault/reckless endangering and interfering with a peace officer. He was convicted of interfering with a peace officer. (SOR ¶ 1.f; Item 5)

In July 1994, Applicant was arrested and charged with sexual assault 1st degree, a felony. He was convicted of the lesser charges of misdemeanor sexual assault 4th degree and false imprisonment. He was sentenced to 12 months' probation. The police report states that Applicant kissed and inappropriately touched a woman without her consent. (SOR ¶ 1.e; Items 5, 7)

In August 2004, Applicant was arrested and charged with criminal damage to property less than \$500. There is no evidence this charge was prosecuted. (SOR ¶ 1.d; Item 5)

In August 2005, Applicant was arrested and charged with criminal threat, a felony, criminal damage to property less than \$500, and battery. He was convicted of misdemeanor criminal damage to property and battery and sentenced to six months in jail and 12 months' probation. (SOR ¶ 1.c; Items 6, 7)

In May 2006, Applicant was arrested and charged with vehicle liability insurance requirement, driving while license cancelled/suspended/revoked, seat belt failure to wear, and traffic control signals infraction. He was convicted of driving on a suspended license and vehicle liability insurance requirement and sentenced to jail for 30 days. The other charges were traffic infractions. (SOR ¶ 1.b; Item 5)

In January 2012, Applicant was arrested and charged with driving on a suspended license and operating an uninsured motor vehicle. It appears these charges were not prosecuted. (SOR ¶ 1.a; Item 5)

Applicant did not provide a response to the FORM. Other than the passage of time, he did not provide mitigating evidence regarding the criminal conduct, sexual behavior or personal conduct.

Policies

When evaluating an applicant's suitability for national security eligibility, 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 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 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states 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 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 that an applicant may deliberately or inadvertently fail to 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 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. 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. 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

(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.

Applicant had two felony arrests and charges that he did not disclose on his SCA (SOR ¶¶ 1.c and 1.e). When asked, Applicant affirmed to the government investigator the accuracy of his SCA and that he had no criminal conduct to disclose. When he was asked about each specific criminal offense alleged in the SOR, he said he had no knowledge of each one. Although some of the criminal offenses are for minor violations and date back many years, I do not find it credible that Applicant had no knowledge of being arrested and charged with sexual assault 1st degree in 1994 and convicted of sexual assault 4th degree and false imprisonment. I do not find it credible that he had no knowledge of being arrested and charged with felony criminal threat and being convicted of a misdemeanor and sentenced to 6 months in jail and 12 months' probation. Applicant stated in his SOR answer “the paperwork” said he was only required to disclose criminal activity from the past ten years. There is no reference to 10 years in the SCA, and it clearly states in bold and capitalized that he was to report if he **EVER** had been arrested, charged, or convicted of a felony. When he was specifically asked about each of his past felony arrests, he told the investigator he had no knowledge. When he was asked about his other criminal

arrests, he told the investigator he had no knowledge. Perhaps for the non-felony arrests he could attribute it to being a long time ago, but he was not being asked to independently recall each offense, but rather he was confronted with each by the investigator, and he still chose to state he had no knowledge of any past criminal conduct. I do not believe he had no knowledge that he was involved in any past criminal conduct. Applicant deliberately failed to disclose his felony arrests on his SCA and he deliberately falsified and attempted to conceal his criminal conduct from the government investigator when he said he had no knowledge of any of his criminal offenses. I find the above disqualifying conditions apply.

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; and
- (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.

There is insufficient evidence to conclude that Applicant made a prompt, good-faith effort to correct his omissions and concealment. To the contrary, after he failed to disclose his felony arrests in his SCA, he claimed to have no knowledge of any past criminal conduct when confronted with each of his past criminal offenses by the government investigator. The evidence does not support the application of AG ¶ 17(a).

Being truthful and honest is the cornerstone of the security clearance process. It is the simplest part of the process. The government relies on those who are trusted with the nation's secrets to always be honest, even when disclosure could potentially threaten one's career. Applicant deliberately chose to be untruthful. AG ¶ 17(c) does not apply because deliberately failing to disclose information on an SCA and swearing to its accuracy is not a minor offense. Deliberately concealing information from a government investigator is not minor. I find Applicant's omissions and concealments are serious and cast doubt on his reliability, trustworthiness, and good judgment.

Guideline J: Criminal Conduct

The security concern 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. I have considered all of the disqualifying conditions under AG ¶ 31, and the following are potentially applicable:

- (a) a pattern of minor offenses, any one of which on its own would be unlikely to affect national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and
- (b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

Applicant has multiple criminal arrests from 1990 through 2012. They are for simple assault, family violence assault/battery/aggravated, assault/reckless endangerment, interfering with a police officer, and criminal damage to property less than \$500. He also was arrested for various motor vehicle related offenses, which include driving on a suspended license, operating uninsured motor vehicle, and vehicle liability insurance requirement. I do not deem the minor traffic infractions as criminal conduct and have not considered them in my analysis.

In addition, Applicant was arrested and charged in 2005 with criminal threat, a felony, along with criminal damage less than \$500 and battery. He was convicted of misdemeanor criminal damage to property and battery. He was sentenced to six months in jail and 12 months' probation. In 1994, he was arrested and charged with sexual assault 1st degree, a felony. He was convicted of the lesser charge of misdemeanor sexual assault 4th degree and false imprisonment. He was sentenced to 12 months' probation. The above disqualifying conditions apply to Applicant's criminal conduct.

The guideline also includes conditions that could mitigate security concerns arising from criminal conduct. The following mitigating conditions under AG ¶ 32 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; and
- (d) there is evidence of successful rehabilitation; including, but not limited to, passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

I have considered that Applicant's last criminal arrest was in 2012. He was 46 years old the last time he was arrested. I have considered that his 2012 arrest for driving

on a suspended license was not prosecuted; his 2004 arrest and charge for criminal damage to property was not prosecuted; and his 1990 arrest for simple assault was dismissed. I find for Applicant for SOR ¶¶ 1.a, 1.d and 1.g.

Applicant's criminal conduct is a concern because it does not just involve minor motor vehicles offenses and property damage. In 1994, he was arrested and charged with a felony for sexual assault 1st degree. He was found guilty of misdemeanor sexual assault 4th degree and false imprisonment. He was sentenced to 12 months' probation. He was also charged in 2005 with criminal threat, a felony, and was convicted of misdemeanor criminal damage to property and battery. He was sentenced to jail for 6 months and probation for 12 months. These are serious criminal offenses. Applicant offered no evidence of mitigation other than passage of time. As noted above, he did not disclose any of his past criminal conduct on his SCA and told the government investigator that he had no knowledge of each of the criminal offenses that are alleged. He eventually admitted all of the criminal offenses in his answer to the SOR, but he does not offer any mitigating evidence other than the passage of time. There is insufficient evidence to conclude his repeated criminal conduct happened under unusual circumstances and does not cast doubt on his current reliability, trustworthiness, and good judgment. I find AG ¶¶ 32(a) and 32(d) do not apply.

Guideline D: Sexual Behavior

The security concern for sexual behavior is set out in AG ¶ 12:

Sexual behavior that involves a criminal offense; reflects a lack of judgment or discretion; or may subject the individual to undue influence of coercion, exploitation, or duress. These issues, together or individually, may raise questions about an individual's judgment, reliability, trustworthiness, and ability to protect classified or sensitive information. Sexual behavior includes conduct occurring in person or via audio, visual, electronic, or written transmission. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of sexual orientation of the individual.

The guideline notes several conditions that could raise security concerns. The following disqualifying conditions under AG ¶ 13 are potentially applicable:

(a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted.

In 1994, Applicant was arrested and charged with sexual assault 1st degree and found guilty of misdemeanor sexual assault 4th degree and false imprisonment. The evidence supports he kissed and inappropriately touched a woman without her consent. The above disqualifying condition applies.

The guideline also includes conditions that could mitigate security concerns arising from sexual behavior. The following mitigating conditions under AG ¶ 14 are potentially applicable:

(b) the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or judgment; and

(e) the individual has successfully completed an appropriate program of treatment, or is currently enrolled in one, has demonstrated ongoing and consistent compliance with the treatment plan, and/or has received a favorable prognosis from a qualified mental health professional indicating the behavior is readily controllable with treatment.

Applicant did not provide any mitigating evidence except perhaps the passage of time. His sexual behavior was cross-alleged under the criminal conduct guideline and some of that analysis is applicable under this guideline. Although it has been many years since he was convicted of this offense, it involves serious misconduct, and he failed to provide evidence that it happened under unique circumstances, and it is unlikely to recur. He did not provide evidence that he participated in a treatment program. His conduct casts doubt on his reliability, trustworthiness, and good judgment. There is insufficient evidence to apply the mitigating conditions.

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(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

Guidelines J, E and D in my whole-person analysis. Applicant has not met his burden of persuasion. The record evidence leaves me with serious questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant failed to mitigate the security concerns arising under Guideline J, criminal conduct, Guideline E, personal conduct, and Guideline D, sexual behavior.

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
Subparagraph 1.a:	For Applicant
Subparagraphs 1.b-1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraphs 1.e-1.f:	Against Applicant
Subparagraph 1.g:	For Applicant
Paragraph 2, Guideline D:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraphs 3.a-3.b:	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 security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge