



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



In the matter of:)	
)	
XXXXXXXXXX, XXXXX)	ISCR Case No. 05-04059
SSN: XXX-XX-XXXX)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Nichole L. Noel, Esq., Department Counsel
For Applicant: Applicant's spouse

July 14, 2008

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has mitigated security concerns pertaining to Personal and Criminal Conduct. Clearance is granted.

Applicant submitted his Security Clearance Application (SF-86), on January 16, 2004. On February 7, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines E (Personal Conduct) and J (Criminal Conduct). 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 February 14, 2008. He answered the SOR in writing on February 26, 2008, and elected to have his case decided on the written record in lieu of a hearing. On March 11, 2008, the Government exercised its

right under the Directive's Additional Procedural Guidance to request a hearing. Department Counsel was prepared to proceed on April 7, 2008, and I received the case assignment on April 10, 2008. DOHA issued a notice of hearing on April 16, 2008, scheduling the case to be heard on May 7, 2008. The hearing was convened as scheduled.

The Government offered Government Exhibits (GE) 1 through 3, which were received without objection. GE 1 through 3 were identified by the Government's List of Exhibits, Exhibit (Ex.) I. Applicant testified on his own behalf. He offered Applicant Exhibits (AE) A and B, which were received without objection. I held the record open until May 16, 2008 to afford Applicant the opportunity to submit additional material. Applicant timely submitted AE C through R, which were forwarded by Department Counsel Memorandum dated May 19, 2008 (Ex. II), and received without objection. DOHA received the transcript of the hearing (Tr.) on May 15, 2008.

PROCEDURAL RULINGS

Request to Amend the SOR

Department Counsel moved to amend the SOR by changing the date in SOR ¶¶ 1.a. and 1.b. of "October 1999" to "October 1990." Without objection from the Applicant, I granted Department Counsel's motion. Tr. 10-12.

Findings of Fact

In his Answer to the SOR, Applicant denied all of the allegations. After a thorough review of the record, I make the following findings of fact.

Applicant is a 37-year-old telecommunications foreman, who has been employed by a defense contractor since November 1999. He is a first-time applicant for a security clearance. GE 1, Tr. 49-50.

Applicant dropped out of high school in the 9th grade, and was awarded his GED "in either 1994 or 1995." He has been married since February 1995. He and his wife have two children, a nine-year-old son, and a six-year-old daughter. GE 1, Tr. 31-32.

When Applicant completed his SF-86, and executed it on January 16, 2004, and re-affirmed it on August 11, 2004, he provided incomplete information in response to Question:

21. Your Police Record – Felony Offenses Have you ever been *charged with or convicted of* any felony offense? (Include those under the Uniform Code of Military Justice.)(emphasis added). For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the record. The single exception to this

requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607.

Applicant answered “Yes” and listed an October 1999 (1990) arrest¹ for theft over \$300/uttering. He failed to list that he was charged in June 1993 of Assault, Intent to Injure with a Deadly Weapon, Maiming-Malicious Injury, and Reckless Endangerment. He was convicted of the offense of Assault only. GE 3. SOR ¶¶ 1.a. and 1.b. His explanation for an incorrect answer was:

Whenever I fill out an application whether it be for a job or – I always get, have you ever been convicted of. I had misread the question as been charged with. You know I just misread it and just misunderstood the question. And I just didn’t put the other one down because it was a simple – what I was always told was that it was assault, a simple assault is that I was always told. And that’s why I never put that down because I didn’t know it was a felony or not and to this day I still don’t know if it is. Tr. 40.

Applicant further stated and reemphasized he now understands the question included “*charged with*” and “*convicted of*” a felony (emphasis added). Knowing what he knows today, he would have answered the question differently. Tr. 41-43.

Applicant’s wife testified that she helped her husband complete his SF-86 and consulted with her father, who is a retired police lieutenant from a major U.S. city. She stated her father advised her that her husband’s assault charge was a misdemeanor. She further stated, “It was not our intent to lie on the application. Certainly we knew that they were going to do a background check and so we included that we thought was the felony and again I just misread and didn’t realize that it was also any type of charges, felony charge.” Tr. 19.

Applicant’s father-in-law testified on his behalf. As indicated *supra*, his father-in-law is a retired police lieutenant from a major U.S. city. He stated, “when my daughter called me and asked me about the question, the conviction for a felony I instructed my daughter that his conviction in [major U.S. city] was not a felony conviction.” Tr. 59. He further stated in response to a question whether he recalled which of the original charges, if any, were felonies, he said, “I believe it was assault with the intent to maim. I believe that’s what it was. I know it was a felony assault charge. The conviction was a common law misdemeanor assault.” Tr. 61. Applicant provided a table of applicable state law pertaining to assault. The table indicated that assault, 2nd degree, was a misdemeanor under applicable state law. AE B.

At the time Applicant was convicted of assault, he was 22 years old. He served “[c]lose to a year” in prison. He completed all court-ordered probation, which included making restitution to the victim. In the 15 years since he was released from prison, he

¹ Applicant erroneously listed an October 1990 arrest as an October 1999 arrest. See **Motion to Amend SOR** *supra*.

has not been involved in any sort of trouble, and has been a model citizen. He is involved in his children's baseball and football programs, golfs, and works on home projects. Tr. 48-50, 54.

Applicant submitted seven reference letters. Extracts of those letters follow. His mother-in-law stated, "I don't think my husband and I could have found a better spouse for our daughter." AE C. His brother-in-law stated, "I have no reservations about [Applicant's] character and trust him with my greatest possessions on this earth, my children." AE D. His Outside Plant Manager stated, "[Applicant] has been a foreman on several of my jobs and has always shown his dedication and reliability." AE E. His company President stated, "[Applicant] is an asset to our company, and I respect his strong work ethic, dedication to our company, and reliability over the years." AE F.

Another company Director stated, "[Applicant] is a very loyal employee who has great work ethics and is extremely dedicated to the company and his job." AE G. His company Vice President stated, "[Applicant] is an excellent worker with outstanding ethics and overall skills. . . . I would give him the highest of recommendations." AE H. His Human Resources Manager stated, "[Applicant] is very hard working, committed to the job and our people, honest and very trustworthy." AE I. Applicant also submitted work performance evaluations covering the period of 2001 to 2007. The evaluations document Applicant's sustained solid performance punctuated with above average performance. AE J – R.

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(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. 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 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 provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 indicates two conditions that could raise a security concern and may be disqualifying in this case, including:

(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

(e) personal conduct, or concealment of information about one's conduct, that creates 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, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Posing potential security concerns are Applicant's documented omissions of his felony charge in 1990 from his SF-86 completed in January 2004. His omissions are attributable to his misunderstanding of the question asked. I note Applicant's formal education ended before he completed the 9th grade. Applicant sought his wife's assistance in completing the SF-86, and it is clear from testimony submitted that they misunderstood the question. Their misunderstanding was further corroborated by Applicant's father-in-law. He correctly answered the assault conviction was a misdemeanor, but added when asked that the assault with intent to maim charge was a felony. I found Applicant and his witnesses to be credible and were acting in good faith. While Applicant could reasonably have been expected to be more diligent when answering Question 21, his judgment lapses and confusion are not enough to impute knowing and willful falsification under Guideline E.

Applicant's explanation of his omissions is persuasive enough to avert inferences of knowing and willful omission. There being no misconduct substantiated, there is no need to discuss Personal Conduct Mitigating Conditions.

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.

For reasons discussed *supra*, Applicant's conduct did not rise to a level of knowing and willful falsification and accordingly did not violate 18 U.S.C. § 1001, as alleged. Accordingly, further discussion of Criminal Conduct Disqualifying or Mitigating Conditions under Guideline ¶¶ 31 and 32 is not warranted.

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) 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 facts of the case and nine adjudicative process factors listed at AG ¶ 2(a) *supra*. Falsifications are a core security concern. Inasmuch as Applicant’s behavior was not deliberate or willful, no misconduct was established precluding the applicability of further discussion under the Whole Person Concept.

To conclude, Applicant presented sufficient evidence to explain, extenuate, or mitigate the security concerns raised. Applicant met his ultimate burden of persuasion to obtain a favorable clearance decision. I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my “careful consideration of the whole person factors”² and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. For the reasons stated, I conclude he is eligible for access to classified information.

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:	FOR APPLICANT
Subparagraph 1.a. – b.:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 1.a.:	For Applicant

²See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

ROBERT J. TUIDER
Administrative Judge