

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant is 39 years old and a consultant for federal contractors. He has a history of criminal incidents that spans a 14-year period of time. When he completed his security clearance applications in December 2001 and April 2004, he failed to disclose a couple incidents. He failed to mitigate the security concerns raised by his criminal and personal conduct. Clearance is denied.

CASENO: 06-00520.h1

DATE: 06/30/2007

DATE: June 30, 2007

In re:)	
)	
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SSN: -----)	ISCR Case No. 06-00520
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
SHARI DAM**

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 39 years old and a consultant for federal contractors. He has a history of criminal incidents that spans a 14-year period of time. When he completed his security clearance

applications in December 2001 and April 2004, he failed to disclose a couple incidents. He failed to mitigate the security concerns raised by his criminal and personal conduct. Clearance is denied.

STATEMENT OF THE CASE

On December 1, 2001, Applicant submitted a Security Clearance Application (SF-86). On April 13, 2004, he submitted another SF-86. The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan. 2, 1992), as amended, DOHA issued a Statement of Reasons (SOR) on March 7, 2007, detailing the basis for its decision-security concerns raised under Guidelines J (Criminal Conduct) and E (Personal Conduct) of the Adjudicative Guidelines issued on December 29, 2005, and implemented by the Department of Defense effective September 1, 2006. The revised guidelines were provided to Applicant when the SOR was issued. Applicant answered the SOR in writing on March 31, 2007, and elected to have a hearing before an administrative judge. The case was assigned to me on April 13, 2007. DOHA issued a Notice of Hearing on May 15, 2007, setting the case for June 5, 2007.

At the hearing, Department Counsel introduced Government Exhibits (GX) 1–6 into evidence without objection. Applicant testified in his case. DOHA received the hearing transcript (Tr.) on June 14, 2007.

PROCEDURAL MATTERS

Prior to commencing the hearing, Department Counsel moved to amend the SOR and correct a typographical error in Paragraph 1.r. The motion was granted and number 1 was stricken from the paragraph and number 2 was inserted, such that the subparagraph now reads as follows:

As set forth in subparagraphs 2.c and 2.d below, you falsified your responses on two security clearance applications, in violation of 18 U.S.C. § 1001.

Department Counsel also moved to strike subparagraphs 1.h and 1.i from paragraph 2.d. The motion was granted.

FINDINGS OF FACT

Based on the entire record, including Applicant's admissions in his Answer to the SOR and at the hearing, I make the following additional findings of fact:

Applicant is 39 years old. He has been married to his second wife for about three years and has two children. He has one child from his first marriage that ended in 1999. He served on active duty in the U.S. Navy from July 1988 until October 1988. He went on active reserve duty from January

2000 until October 2000. He was a data processing technician (E-5) at the time of his honorable discharge. Since leaving the service, he has been working as a consultant for federal contractors. He has held a secret security clearance since May 1988. He is a full-time senior vice president at a local bank. (Tr. 23).

In December 2001, Applicant began completing a SF-86 while at a former employer's office. (Tr. 24). He did not fully complete it because he did not have all of the required information. Shortly after starting that application process, he located another position and the SF-86 was transferred to the new position and he obtained an interim clearance. However, unbeknownst to him the former employer submitted the application. (Tr. 25). In April 2004, he submitted an undated SF-86. (Tr. 25).

From 1990 to March 2004, Applicant admitted that he was arrested and charged with 14 criminal violations. They are as follows:

(1) In 1990, he was charged with Indecent Exposure after he and some friends pulled a prank, resulting in his arrest. The case was later dismissed. He was in his early twenties at the time. (Tr. 27-29).

(2) In June 1993, he was again charged with Indecent Exposure after he ran into the individual involved in the 1990 charge. He was found guilty and sent to counseling with the Navy. (Tr. 30).

(3) In April 1995, he was charged with Domestic Assault after getting involved in an argument with his former wife. The charge was dismissed. (Tr. 32).

(4) In August 1995, he was charged with Disturbing the Peace and Reckless Driving. He was found guilty of Disturbing the Peace and fined; the Reckless Driving charge was dismissed. (Tr. 32-34).

(5) In November 1995, he was charged with having a Concealed Weapon and Brandishing Firearm. He was moving out of his apartment when he became embroiled in an argument with his former wife's boyfriend. The police were called and they found his gun (for which he had a permit). The case was dismissed. (Tr. 35).

(6) In March 1996 he was charged with Assault after engaging in an argument with another girlfriend. It was dismissed. (Tr. 36).

(7) In April 1996, he was again charged with Assault and Annoying Phone Calls. The charges arose out of incidents involving that same girlfriend. The charges were later dismissed. (Tr. 36).

(8) In September 1996, he was charged with Article 91, Disrespect to a Chief Petty Officer, and Article 134, Communicating a Threat under the Uniform Code of Military Justice. He was reduced to an E-1 rank and forfeited \$580. (Tr. 39).

(9) In April 1999, he was charged with Reckless Driving. This case was continued to November 1999. In March 2000, he was found guilty of speeding and fined \$57. (Tr. 42; GX 4 at 6).¹

(10) In April 2001, he was charged with Stalking his former girlfriend. The case was dismissed. (Tr. 43).

(11) In April 2003, he was charged with Trespassing after he went to his girlfriend's house to pick up some of his things and got into an altercation with her. He was found guilty and incarcerated for 30 days (suspended) and fined \$50. (Tr. 44-45).

¹SOR ¶¶ 1.j, 1.k, and 1.l involve the same offense.

(12) In August 2003, he was charged with Annoying Phone Calls and Disorderly Conduct. The Annoying Phone Calls charge was dismissed and he was found guilty on the Disorderly Conduct charge. He was sentenced to four days in jail and placed on probation for six months. This incident arose after he again became embroiled with his girlfriend. (Tr. 47-48).

(13) In November 2003, he was charged with Violation of Probation that was later dismissed when the court discovered the clerk's office had made an error regarding an appeal Applicant filed. (Tr. 48-51; GX 4 at 11).

(14) In March 2004, he was charged with Reckless Driving. He was found guilty, fined and his license was placed in controlled status for two years, which required that he not receive any additional citations. He was subsequently removed from that status in 2006. (Tr. 51-52).

Applicant admitted that in July 2001 he was disciplined by a former employer for misappropriating time and allowing another individual to enter hours in violation of the company policy. He left the company in October 2001.

On the December 2001 SF-86, Applicant did not disclose the April 1995, August 1995, March 1996, April 1996 or April 1999 criminal charges in response to Question 26. Your Police Record - Other Offenses: (*In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in response to a, b, c, d, or e above? Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.*). He disclosed the Stalking incident and other adverse information under different questions. He denied that he intentionally falsified his answers to the questions. He asserted he could not fully complete it because he did not have the information when he sat down at the company's computer. He was told he could return and complete it later; however, he never returned because he obtained another position. He did not know the document would be submitted. (Tr. 55-56). He also mistakenly believed that because he had previously given a detailed summary of the 1990 incidents to an investigator, he need not be concerned about disclosing all of the information again.

In April 2004, Applicant executed another SF-86. In response to Question 26. Your Police Record - Other Offenses: (*In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in response to a, b, c, d, or e above? Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.*), he answered "yes.". He disclosed three offenses under that question, but did not disclose the reckless driving charge from April 1999 or the Violation of Probation Charge that was dismissed in 2004. He misinterpreted the question and did not believe its disclosure was required because it was a traffic violation for which he was fined \$57. (Tr. 59). He did not list the Violation of Probation Charge because he did not consider it to be a valid charge against him, having arisen as the result a clerical error in the court system, which was corrected by its dismissal. (Tr. 74). He disclosed other adverse information throughout the SF-86. He now clearly understands the government's requirement that each application be thoroughly completed as requested.

Applicant acknowledges that his criminal history brings his character into question. (Tr. 81). However, he believes he has matured over the years and is in a stable marriage and has a young infant. He has learned to exercise better judgment. (Tr. 84). He has a good job and the potential for developing a successful consulting business. He candidly admitted that he received a speeding ticket recently. He was driving 60-mph in a 45-mph speed zone on the interstate. (Tr. 71).

POLICIES

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has “the authority . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information.” *Id.* at 527. The President authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). Each security clearance decision “must be a fair and impartial common sense determination based upon consideration of all relevant and material information and the pertinent criteria and adjudication policy.” Directive ¶ 6.3. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

The revised Adjudicative Guidelines (AG) set forth potentially disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

Upon consideration of all facts in evidence and application of all appropriate adjudicative factors and pertinent legal standards, I conclude the following with respect to the allegations set forth in the SOR:

Guideline J: Criminal Conduct

Guideline ¶ 30 articulates the Government’s concern regarding criminal conduct stating, “[c]riminal 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.”

Based on the evidence, including Applicant’s admissions, the Government established a security concern under two Criminal Conduct Disqualifying Conditions: “a single serious crime or multiple lesser offenses,” and an “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.” Guidelines 31(a) and (c). Applicant was arrested and charged with criminal misconduct on 14 separate occasions from November 1990 to March 2004. Hence, he was convicted of multiple lesser offenses and admitted numerous allegations of criminal conduct.

After the Government raised a security concern, the burden shifted to Applicant to mitigate or rebut the allegations. There are five Criminal Conduct Mitigating Conditions under Guideline

32. I considered two of them. Guideline ¶ 32(a) provides mitigation when “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.” Applicant’s last criminal arrest and charge occurred in March 2004, after which he was fined and his driver’s license was placed in a controlled status for two years (to June 2006), about one year ago. Given his long history of criminal problems and his recent speeding ticket, sufficient time has not elapsed since the last charge and this Guideline is not applicable. Guideline ¶ 32(d) requires a showing that “there is clear 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 provided some evidence of mitigation under this Guideline. He exhibited remorse for his conduct and provided evidence of his good employment record. However, there is not clear evidence of successful rehabilitation, specifically in view of his recent speeding ticket in 2007 and its close proximity to his release from a controlled driving status within the past year.

The Government contends that the allegations contained in SOR ¶1.r pertaining to Applicant’s falsification of the December 2001 and April 2004 SF-86s constituted a felony under federal law. Based on a determination set forth under Guideline E that he did not deliberately omit information, *infra.*, I concluded he did not falsify his applications.

Guideline E: Personal Conduct

Guideline ¶ 15 articulates the Government’s personal conduct concern, stating that “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.”

The Government alleged in SOR ¶ 2.a that the criminal incidents listed in ¶¶ 1.a through 1.q raised a security concern under this Guideline. After reviewing all of the Personal Conduct Disqualifying Conditions, in particular Guideline 17(c)², I conclude it does not apply. Those allegations constitute the basis for a disqualification under Guideline J, as noted above, and therefore cannot be applied under this paragraph. None of the other disqualifying conditions apply. SOR ¶ 2.a is found in Applicant’s favor.

The Government raised a Personal Conduct Disqualifying Condition under Guideline ¶ 16(d), as to the allegation contained in SOR ¶ 2.b. The security concern is based on “credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack

²Guideline ¶ 17(c) reads: “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 person may not properly safeguard protected information.”

of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.” In July 2001, Applicant was disciplined by his former employer for conduct that involved dishonesty.

After the Government raised a security concern, the burden shifted to Applicant to mitigate or rebut these allegations. One of the Personal Conduct Mitigating Conditions could potentially be applicable in this instance. In order to trigger the application of Guideline ¶ 17(c), there must be evidence that “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.” The job termination was in July 2001, approximately six years ago, which constitutes the passage of a sufficient amount of time to warrant some mitigation under this condition.

The Government alleged in SOR ¶¶ 2.c and 2.d that Applicant falsified his SF-86 in December 2001 and April 2004, by failing to disclose specific criminal arrests and charges, thereby constituting a potential disqualification under Guideline ¶ 16(a) that reads “the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status determines security clearance eligibility or trustworthiness, or award fiduciary responsibilities.” Although Applicant admitted he did not disclose the information, he denied that he intentionally misled the government.

When a falsification allegation is controverted or denied, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant’s state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant’s state of mind at the time the omission occurred. ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

At the time Applicant completed the security clearance application in December 2001, he did not have all of the necessary information with him regarding his criminal history. He disclosed what he remembered throughout the SF-86 and intended on completing it later. He also knew that many of the criminal incidents were previously disclosed in an earlier interview. He was unaware that the incomplete form was submitted. He admits he was confused by a question in the April 2004 application, but disclosed many other adverse incidents in the SF-86. His explanation for not disclosing essentially three incidents is plausible. I find his presentation and demeanor while testifying on these issues lend credibility to his denial of any intention to falsify his SF-86s. Hence, the evidence does not establish deliberate falsification as alleged in ¶ 2.c and ¶ 2.d.

Whole Person Analysis

In addition to evaluating the disqualifying and mitigating conditions under each guideline, the adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at a balanced decision. The essence of scrutinizing all appropriate variables in a case is referred to as the “whole person” analysis. Directive ¶ E2.2. In evaluating the conduct of the applicant, an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual’s age and

maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other 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.

I considered the totality of the evidence in view of the “whole person” concept, including Applicant’s age, his past military service, his demeanor while testifying and candid disclosure about his criminal history, the cases that were dismissed, and remorse about his past. I took into account the fact that he has held a security clearance for a long period of time. I also considered his current professional successes and aspirations, and enthusiasm for his new family. However, the totality of the evidence in this record supports his disqualification from having access to classified information. He has been involved in 14 criminal incidents, several of them relating to interpersonal issues and others involving traffic problems, including a 2007 speeding ticket. He also had problems with one of his employers. All of these incidents clearly demonstrate a pattern of criminal and personal misconduct, which calls into question his judgment and willingness to comply with rules and regulations. Although he appears to appreciate the gravity of these problems and their effect on his career potential, he has not gained sufficient insight into his actions that continuously raise questions about his reliability and trustworthiness. Until he takes additional steps to insure that his life is not speckled with additional encounters with the law, and establishes a longer track record demonstrating that, I suspect similar events may recur in the future.

After weighing the disqualifying and mitigating conditions, all facts and circumstances, in the context of the whole person, I conclude he has failed to mitigate the security concerns raised by his criminal and personal conduct. The evidence leaves me with doubts as to his security eligibility and suitability. Accordingly, Guideline J and Guideline E are concluded against him.

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 as follows:

Paragraph 1: Guideline J (Criminal Conduct)	AGAINST APPLICANT
Subparagraphs 1.a–1.j:	Against Applicant
Subparagraphs 1.k-1.l:	For Applicant
Subparagraphs 1.m-1.q:	Against Applicant
Supbaragraph 1.r:	For Applicant
Paragraph 2: Guideline E (Personal Conduct)	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	Against Applicant
Subparagraphs 2.c - 2.d:	For Applicant

DECISION

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 a security clearance. Clearance is denied.

Shari Dam
Administrative Judge