



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



In the matter of:)	
)	
)	ISCR Case No. 06-19914
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

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

April 22, 2008

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I concluded that Applicant's eligibility for access to classified information must be granted.

Applicant prepared his Security Clearance Application (SF 86), on January 6, 2005 and executed it on March 10, 2005. On November 5, 2007, 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 November 24, 2007. He answered the SOR in writing and requested a hearing before an administrative judge. DOHA received the request on January 3, 2008. Department Counsel was prepared to proceed on January 22, 2008, and I received the case assignment on January 30, 2008. DOHA issued a notice of hearing on February 12, 2008, and I convened the hearing as scheduled on March 6, 2008. The government offered five exhibits, (GE) 1 through 5, which were received and admitted into evidence without objection. Applicant and one witness testified. He submitted two exhibits, (AE) A and B, which were received and admitted into evidence without objection. DOHA received the transcript of the hearing (Tr.) on March 18, 2008. I held the record open until March 20, 2008, for Applicant to submit additional matters. On March 18, 2008, he submitted seven exhibits, AE C through I, which were received and admitted without objection. The record closed on March 20, 2008.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a-1.d of the SOR. He denied the intentional falsification as alleged in ¶¶ 2.a and 2.b of the SOR.¹

Applicant is 41 years old. He works for a Department of Defense contractor as a production manager in the shop and a team leader in the field. Applicant is a welder by trade and has worked for his current employer for five years, initially working as a welder.²

Applicant married eight years ago. He and his wife do not have children. They separated seven months ago. His wife has two daughters, who are his step-daughters and are ages 17 and 19. His 17-year-old son from another relationship lives with him.³

As a teenager, Applicant spent time with friends, whom he describes as the “wrong crowd”. In 1985, at age 20, the police arrested and charged Applicant with grand larceny, possession of drug paraphernalia, and possession of marijuana. The court suspended his initial sentence of five years and placed him on 12 months probation. While on probation, the police again arrested and charged him with possession of marijuana with intent to distribute, a felony, in May 1987. The prosecutor reduced the charge to simple possession of marijuana, a misdemeanor, and the court sentenced him to 120 days in jail. Because of his second arrest, the court revoked his probation and reinstated his five year jail sentence, suspending four years. Applicant entered prison on November 4, 1987. The prison released him on February 22, 1989, and nine

¹Applicant’s undated response to the SOR, received on January 3, 2008.

²GE 1 (Applicant’s security clearance application, dated January 6, 2005 and executed on March 10, 2005) at 1-2; Tr. 20-21.

³GE 1, *supra* note 1, at 2-4; Tr. 22-23.

months later, the Corrections Department discharged him from parole. Applicant has not been arrested for similar criminal conduct since his release from prison.⁴

In October 1997, he and his girlfriend, now estranged wife, argued, as they often did. They argued heatedly on some occasions and this was one occasion. He eventually pushed her and she called the police, who charged him with assault and battery. The court sentenced him to 30 days in jail, which was suspended, and fined him.⁵

In 2004, Applicant and his wife got into yet another argument, which got out of control. When he came home from work, his wife started arguing with him and got into his face. He told her to move back, but she didn't. The arguing continued and eventually, he shoved her, causing her to fall and hit her arm. The police arrested and charged him with assault and battery. The court convicted him of assault, sentenced him to 60 days in jail, suspended, and fined him. No drugs or alcohol were involved in this incident. Applicant and his wife continued to argue and, as he states, regularly "butt heads" on a variety of issues. Because of their continuous arguing, Applicant now seeks a divorce as he does not want to lose his freedom.⁶

Applicant prepared his security clearance application (SF 86) on January 6, 2005. He answered "yes" to each of the following questions:⁷

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.) 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. The question asks for the date, nature of offense, action, authority or court, city and state, and county.

In response to this question, Applicant listed his 1985 arrest and original sentence by the court. He did not list his subsequent time in prison. When the police arrested him in 1987 for a marijuana offense, the court sentenced him to 12 months and

⁴GE 2 (United States Department of Justice, Federal Bureau of Investigation, criminal records, dated October 13, 2005) at 3; GE 3 (Letter, from State Department of Corrections, dated August 24, 2007) at 1; GE 5 (Interrogatories and answers, dated September 10, 2007) at 3-4; Tr. at 24-29.

⁵GE 2, *supra* note 4, at 4; Tr. 29-30.

⁶GE 2, *supra* note 4, at 4; GE 4 (Interrogatories and answers, dated September 10, 2007) at 3; Tr 31-32.

⁷GE 1, *supra* note 2, at 5-6.

two days in prison for his 1985 conviction as a result of his violation of probation. Since he prefers not to remember the details of his past criminal conduct, he obtained a copy of his arrest record from the local police department before completing the questions on his SF-86. This report listed the charges and his sentence, but not his prison time, which he does not deny he served. In his answer to Question 24, he did list his arrest for marijuana in 1987 and indicated that he spent 4 months in jail. He also spent time in a detention home as a teenager.⁸

Question 26. Your Police Record - Other Offenses

In the last seven years, have you ever been arrested for charged with or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.) 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. The question also asks for the date, nature of offense, action, authority or court, city and state, and county.

Applicant listed his 1997 arrest for assault and battery, but did not list his more recent arrest for the same charges in 2004. He has no explanation for this failure, except that maybe it slipped his mind. He denies that he intentionally failed to list this information.⁹

Applicant’s second-line supervisor, who is manager of Applicant’s department, testified on his behalf. His second-line supervisor describes Applicant as a good worker, and an honest and trustworthy employee. Applicant works well with others and with customers, both of whom respect him. Customers have provided written letters of commendation, noting Applicant’s reliability and performance. Applicant has always been trustworthy about the company’s jobs and processes. Applicant needs a clearance for general access, not to work on classified information or sensitive material, which is not available to him. His performance appraisals reflect his good performance.¹⁰

⁸*Id.* at 5; Tr. 33-34. I note that the criminal records report does not contain clear and correct information about Applicant’s criminal history. See GE 2, *supra* note 4.

⁹GE 1, *supra* note 2, at 6; Tr. 34-35.

¹⁰Tr. 39-47; AE A through C (Customer letters); AE D through AE I are his performance evaluations from 2003 until December 2007.

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 J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct, “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.”

Under AG ¶ 31, the following disqualifying condition could raise a security concern in this case:

- (a) a single serious crime or multiple lesser offenses.¹¹

The police arrested and charged Applicant in 1985 and 1987 for various types of criminal conduct, including with grand larceny and possession of marijuana, for which he served time in jail. The police also arrested him twice for assault and battery. The government has established that the above disqualifying condition applies.

Under AG ¶ 32, the following mitigating conditions may mitigate the government's security concerns:

- (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;
- (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.

After his release from jail in February 1989, the Applicant has not been arrested for any criminal conduct related to theft, burglary, drugs or alcohol. While in prison, he attended welding courses, which provided him a skill and subsequent employment. He long ago stopped associating with his past criminal friends. His employer praises his work ethic and skills, and considers him a valued employee. Applicant has mitigated allegations 1.a and 1.b by the passage of time and by a successful change in his conduct, work habits and friends. AG ¶¶ 32(a) and 32(d) applies.

¹¹At the hearing, the government withdrew allegation 1.e. because of the recent repeal of 10 U.S.C. 986. In light of the government's withdrawal, I need not discuss disqualifying condition AG ¶ 31(f). The remaining disqualifying condition are not applicable in this case.

Applicant's two later arrests arose out of a domestic situation. He and his estranged wife fought regularly over many issues. Sometimes, their arguments escalated out of control. On many occasions, he left the marital home. However, on two occasions, seven years apart, Applicant pushed his wife away from him. She fell and, at least once, hurt her arm. One these occasions, the last of which occurred more than 3 ½ years ago, she called the police, which lead to his arrest and conviction for misdemeanor assault. Applicant and his wife are now separated, largely because he does not want to be arrested another time for assault and battery because of their arguing. Given this change in his living situation, he is not confronted on a regular basis with his wife's anger. There is little likelihood that this conduct, of which he is not proud, will reoccur. His second-line supervisor knows that Applicant protects the jobs and processes of the company and trusts him to protect this information. Mitigating conditions AG ¶¶ 32(a) and 32(b) are applicable.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct as "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 following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

- (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation; and,
- (b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying:

- (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.

The government established that Applicant omitted material facts from his SF-86 when he answered "yes" to Questions 21 and 26 about his police record. This

information is material to the evaluation of Applicant's trustworthiness to hold a security clearance and to his honesty. For this guideline to apply, Applicant's omission must be deliberate. He denies, however, that he deliberately falsified his answer to these questions. When a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or 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 intent or state of mind at the time the omission occurred.¹² For DC ¶ 16 (a) to apply, the government must establish that Applicant's omission, concealment or falsification in his answer was deliberate.

Applicant credibly testified that he prefers not to continually remind himself about his bad conduct as a youth. Because he has pushed from his immediate memory many of the facts related to his early arrests, he obtained a copy of his police record from the local police department. He relied on this record information to answer Question 21 and Question 24. In his answer to Question 24, he indicated that he spent 4 months in jail, but listed only the suspended sentence given to him by the court in Question 21. His answers to both questions reflect that the information he provided was based on the police report he obtained. Thus, he did not deliberately and intentionally falsify his answer to Question 21. The government has not established allegation 2.a of the SOR.

Concerning Applicant's failure to list his arrest for assault and battery in August 2004 in his answer to Question 26, Applicant could not provide any reason for his failure to acknowledge this arrest. Because he listed the 1997 arrest, which occurred more than seven years earlier, his failure to list an arrest which happened seven months before he completed his SF-86 and was still in the court system was deliberate. The government has established its case in regards to allegation 2.b of the SOR.

AG ¶ 17 provides several conditions which may mitigate the government's security concerns regarding Applicant's falsification of his answer to Question 26. None of the mitigating conditions are applicable, except possibly AG ¶ 17(e):

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant acknowledged his 2004 arrest when he met with the investigator and at the hearing. In so doing, he has reduced his vulnerability to exploitation, manipulation or duress because of this arrest. He is not required to tell everyone about this arrest stemming from his marital problems. He is, however, required to make the government aware of any arrests within the time frame required by questions on the SF-86. Thus, I find that this mitigating condition may have some applicability.

¹²See 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)).

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 potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. When these problems first began, Applicant was a young man. (See AG ¶ 2(a)(4).) He chose friends, “the wrong crowd”, and followed their lead by using drugs and committing criminal acts, until he served time in prison. (See AG ¶¶ 2(a)(1), (2), and (5).) While in prison, he learned a trade. Since leaving prison, he has worked steadily and has chosen new friends. He no longer participates in the criminal activities of his youth. (See AG ¶¶ 2(a)(3), (6).)

Applicant's two arrests for assault and battery arose because of his often contentious relationship with his estranged wife. On these two occasions, their arguing escalated out of control and he shoved his wife, conduct he regrets. Because the arguing continues, he decided to divorce his wife. He no longer lives with her. He does not want to lose his freedom because of their relationship. (See AG ¶¶ 2(a)(3), (6) and (7).)

His early arrests occurred more than 20 years ago. During his time in prison, he reflected on his behavior and changed it after his release from prison. There is little likelihood this type of conduct will occur in the future. His first assault and battery arrest is over 10 years old. His second assault and battery arrest is more than 3 ½ years old. Recognizing that he and his estranged wife continued to argue and that their arguing could lead to further arrests if their emotions got out of control, Applicant decided to end his marriage to preserve his freedom. Since he has removed himself from this environment, he has significantly reduced the likelihood that he will be arrested for this conduct again. (See AG ¶ 2(a)(9).)

Applicant has an excellent work record. His supervisors, customers, and co-workers respect and trust him because he is reliable and a good performer. He learned from his prison experience. Since he cannot change the dynamics of his relationship with his estranged wife, he ended it. His decision not to reveal his 2004 arrest showed a lapse in judgment, which is contrary to his usual good judgment in the work place and in other parts of his life. Because he has acknowledged this arrest, his failure to reveal it initially cannot be used to coerce, pressure or exploit him, particular since he has other acknowledged criminal conduct.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his criminal 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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Paragraph 1, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant

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.

MARY E. HENRY
Administrative Judge