KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant is 27 years old and works for a defense contractor. In 2002, at age 22, he pled guilty to possession of a fake ID. The matter was subsequently expunged. Consequently, he did not note it in his May 2005 security clearance application. When asked to up-date his work experience on his application in January 2006, he did not up-date facts to denote dropped charged arising from an October 2005 domestic dispute. By explaining the facts regarding his plea and the sequence of events surrounding his security clearance applications, Applicant has mitigated criminal conduct and personal conduct security concerns. Clearance is granted.

CASENO: 06-22184.h1

DATE: 06/21/2007

DATE: June 21, 2007

In re:	
--------------------	ISCR Case No. 06-22184
SSN: ------------	
Applicant for Security Clearance	

DECISION OF ADMINISTRATIVE JUDGE
ARTHUR E. MARSHALL, JR.

APPEARANCES

FOR GOVERNMENT
Fahryn Hoffman, Esq., Department Counsel

FOR APPLICANT
Pro Se

SYNOPSIS

______Applicant is 27 years old and works for a defense contractor. In 2002, at age 22, he pled guilty to possession of a fake ID. The matter was subsequently expunged. Consequently, he did not note it in his May 2005 security clearance application. When asked to up-date his work experience on his application in January 2006, he did not up-date facts to denote dropped charged arising from an October 2005 domestic dispute. By explaining the facts regarding his plea and the sequence of events surrounding his security clearance applications, Applicant has mitigated criminal conduct and personal conduct security concerns. Clearance is granted.

STATEMENT OF THE CASE

On May 19, 2005, Applicant applied for a security clearance and submitted a Security Clearance Application (SF 86). On December 28, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. The SOR detailed reasons why, under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of the revised Adjudicative Guidelines (AG) issued on December 29, 2005, and implemented by the Department of Defense, effective September 1, 2006, DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to continue a security clearance for Applicant. It also recommended the matter be referred to an administrative judge to determine whether his clearance should be revoked.

In a letter, dated January 9, 2007, Applicant responded to the SOR.[1] He admitted the allegations raised under Guideline J, denied the sole allegation raised under Guideline E, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel prepared the Government's written case on April 24, 2007. A complete copy of the file of relevant material (FORM)[2] was received by Applicant and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30-days of his receipt of the FORM. Applicant submitted additional information, dated May 28, 2007, that was accepted as part of the FORM without objection by Department Counsel. The case was assigned to me on June 6, 2007.

FINDINGS OF FACT

Applicant's admissions to the sub-allegations set forth in the SOR are incorporated herein. After a complete and thorough review of the evidence in the record, I make the following additional findings of fact:

[1] Applicant's original submission was notarized on January 16, 2007. It was returned so he could express his preference for a live hearing or hearing on the record. An amended letter, notarized on February 5, 2007, indicated Applicant wished to proceed on the written record.

[2] The FORM included five items to support the Government's contentions.

Applicant is 27 years old and works for a federal defense contractor. He has been employed by his current employer since January 2005. During the course of this employment, Applicant has worked as data technician. He married in December 2002. Applicant completed a one-year course of post-secondary study at a technological institute in 2004. He is 5'6" and weighs 140 pounds.[3] Few supplemental facts are included in the FORM or submitted by Applicant. Instead, Applicant directly addressed the three main allegations raised in the SOR.

In approximately September 2002, Applicant was arrested and charged with possessing a fake ID. He pled guilty and was fined $100. The judge told him that upon payment of the fine, the matter would be expunged.[4] The fine was paid.[5] There are no facts in the record indicating how this incident arose or the facts surrounding the arrest. Department counsel argues, however, that there "is nothing in the record to indicate that the [arrest] happened under unusual circumstances suggesting that the behavior is unlikely to recur."[6] Department Counsel also states that "Applicant's arrest for possessing fake identification happened . . . when he was 22 years old, of the age of majority and of drinking age . . . ."

In May 2005, Applicant completed a SF-86 security clearance application. On that form, he answered "no" 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 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 court 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 did not list the 2002 incident because his non-drug-related plea had been expunged upon payment of the $100 fine, therefore he assumed it the expungement order fell under an exception to the reporting requirement.

On October 8, 2005, Applicant and his wife had an argument or domestic dispute. Applicant was charged with 1) simple assault/battery and 2) refusal/relinquish of phones.[7] Both charges were dropped.[8] These charges are included in national files maintained by the Federal Bureau of Investigation, Criminal Justice Information Services Division.[9] Those same files note that "an

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[3] Item 4 (Applicant's security application (SF-86), dated May 19, 2005) at 1.

[4] Response to the SOR, dated January 9, 2007.

[5] It is notable that the incident is not mentioned in Item 5 (The U.S. Dept. of Justice, Federal Bureau of Investi gation (FBI), Criminal Justice Information Services Division, FBI Identification Record, dated March 1, 2006).

[6] FORM at 4.

[7] There is no indication in the FORM defining this second charge.

[8] Although the charges were ultimately dropped, Department Counsel states: ". . . the Applicant's criminal conduct is aggravated by the fact that . . . he did voluntarily commit the *crimes* and falsification . . ." (Emphasis added). FORM at 4.

[9] *See* Item 5, *supra*, note 4.

individual should be presumed not guilty of any charge/arrest for which there is no final disposition stated on the record or otherwise determined."[10]

In January 2006, Applicant's SF-86 was returned to him. He was specifically directed to provide additional information regarding his work history. He did so, then initialed and signed the application again. It did not occur to him to review or up-date other sections of the application package. Had he known of such a requirement, he would have provided information regarding the dropped 2005 domestic charges.[11] The omission was not a deliberate act on his behalf, only a misunderstanding as to the instructions. In a subsequent interview with investigators, he fully disclosed the incident.

In its FORM, the Government introduces Applicant's SF-86 as Item 4. The first page is electronically stamped as having been signed on May 19, 2005. The first page starts with the first question, then the next three pages continue through question 30. Page 5 begins with a repeat of question of 30, continues to the final question (question 43), and is signed at the bottom with the date of January 30, 2006. The following page, signed and dated May 19, 2005, includes questions 10 through 16 and 43 and answers consistent with the previously stated questions 10 through 16 and 43. Another four pages follow which consist of usual addenda and releases. No explanation is given as to why the SF-86 is thus comprised. Department Counsel depicts the Item as "Security clearance application (SF86), dated May 19, 2005, and signed both May 19, 2005, and January 30, 2006 (10 pages)."[12]

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

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[10] *Id.* at 2.

[11] Response to the SOR, *supra*, note 3.

[12] FORM at 2.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.[13] The government has the burden of proving controverted facts.[14] The burden of proof is something less than a preponderance of evidence.[15] Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.[16] Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[17]

No one has a right to a security clearance[18] and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."[19] Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.[20] The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.[21] It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon consideration of the evidence, I find the following two adjudicative guidelines most pertinent to the evaluation of the facts in this case:

Guideline J – Criminal Conduct. *The Concern*: 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.

Guideline E - Personal Conduct. *The Concern*: 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.

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[13] ISCR Case No. 96-0277 at 2 (App Bd Jul. 11, 1997).

[14] ISCR Case No. 97-0016 at 3 (App Bd Dec 31, 1997), Directive, Enclosure 3, ¶ E3.1.14.

[15] *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

[16] ISCR Case No. 94-1075 at 3-4 (App Bd Aug.. 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.

[17] ISCR Case No. 93-1390 at 7-8 (App Bd Jan. 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.

[18] *Egan*, 484 U.S. at 531.

[19] *Id*.

[20] *Id*.; Directive, Enclosure 2, ¶ E2.2.2.

[21] Executive Order 10865 § 7.

Conditions pertaining to these recently amended adjudicative guidelines that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, are set forth and discussed in the conclusions below.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all legal precepts, factors, and conditions, I find the following with respect to the allegations set forth in the SOR:

Criminal Conduct:

With respect to Guideline J (Criminal Conduct), the Government has established its case. Applicant admits that he was arrested for incidents occurring in 2002 and 2005, and that he pled guilty to the 2002 charge. Such incidents and admissions are sufficient to raise security concerns, invoke Criminal Conduct Disqualifying Conditions (CC DC) 1, ¶34(a) (*a single serious crime or multiple lesser offenses*), and CC DC 3, ¶34(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted*), and initiate inquiry.

At issue are two criminal incidents. First, Applicant pled guilty to possession of a fake ID at age 22. The incident occurred nearly five years ago, shortly after reaching his majority. He is now 27 years of age. In the intervening years, he has married, matured, and joined the work force. There have been no other similar or related incidents in the intervening years, and there is little reason to believe it should happen again.

Department Counsel argues that there is nothing in the record to indicate that the arrest happened under such unusual circumstances that the behavior is unlikely to recur, and she notes that the Applicant had reached his majority at the time. The fact that a 22-year-old would be in actual need or possession of a fake ID, however, is, in itself, unusual. Applicant is relatively slight in physical size and was then barely over 21-years of age, a combination that may well given rise to the ill-advised, but not uncommon, practice of carrying a fake ID. In the absence of some additional facts linking this infraction to some adult criminal activity raising heightened concerns, such as driving without a license or resisting arrest, there is nothing to suggest that the more mature Applicant of today would ever again find himself in this position.[22] Consequently, Criminal Conduct Mitigating Condition (CC MC) 1, ¶32(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*) applies.

The SOR also cites to a 2005 allegation regarding a domestic dispute. Here, the police intervened and, erring on the side of caution, charged Applicant on two counts. Those charges were quickly dropped. Although allegations concerning a domestic disturbance can help raise a disqualifying condition and invoke inquiry, they do not establish that any "criminal behavior happened," that the person was coerced into "committing the act" or offense alleged, or that any

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[22] Because the Government failed to provide any documentary evidence substantiating this charge and plea, and because Applicant limited his commentary to the disposition of the matter, little more can be said about the incident.

criminal activity occurred as a *fait accompli.*[23] Moreover, while such allegations may raise an inference of criminal activity, it is not the sort of activity, if proven, that would construct a nexus with a conviction for possessing a fake ID. While the burden rests on the Applicant to demonstrate evidence sufficient to overcome the Government's proffer regarding this incident, presented as it is with no elaboration of the facts, no police report, and no explanation as to what exactly one of the charges means, the fact that the charges were dropped is highly mitigative in itself.

Personal Conduct

The SOR alleges that Applicant deliberately falsified material facts regarding his criminal record on his SF-86. Specifically, the Government points to Applicant's negative answer to Question 26 despite his 2002 and 2005 arrests and his 2002 guilty plea. Consequently, Personal Conduct Disqualifying Condition (PC DC), ¶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*) applies.

In 2002, when Applicant pled guilty to possessing a fake ID, the judge told him that the matter would be expunged from his record upon payment of the fine. Applicant paid the fine and the matter ceased to be on his record.[24] When Applicant completed his in May 2005 SF-86, that matter had been expunged.[25] Question 26 stressed the need to report any offense not previously covered on the form, including those which had been sealed or stricken from the record. Not seeing the word "expunged" among those descriptors, he assumed the expunged, minor, 2002 incident was not to be reported. When reading the final sentence - "The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act . . .for which the court issued an expungement . . . " - he assumed the question meant to exclude any expungement *except* those related to the Federal Controlled Substances Act. Given the cumbersome wording of the question and Appellant's limited education and youth, his explanation is not implausible. Importantly, in the absence of some evidence or suggestion he acted with deliberate falsity, none of the available Personal Conduct Disqualifying Conditions (PC DC) apply to this omission.

When, in January 2006, Applicant was asked to up-date his work history portion of his SF-86, he did as directed. He did not up-date any other questions or otherwise review the SF-86 in its entirety because he was not told to do so. In the absence of some indication he meant to mislead, conceal, or falsify his answers, a negative answer to question 26 does not automatically raise a PC DC. Indeed, based on the evidence, it is hard to tell whether Applicant even had the opportunity to up-date question 26 had he though to do so. The SF-86 curiously contains only one sheet of questions with a January 2006 date; the remainder are either dated May 19, 2005, or blend compatibly with them. Moreover, the January 2006 page is limited in scope to posing questions 30 through 46 and does not include any inquiry regarding question 26. It is thus impossible to tell whether Applicant had the

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[23] Also, as noted in item 5, "an individual should be presumed not guilty of any charge/arrest for which there isno final disposition stated on the record or otherwise determined."

[24] *Compare* Item 5, *supra*, note 4.

[25] The other incident cited in the SOR occurred in October 2005.

opportunity to change or up-date question 26 on his own initiative. Again, with no indication Applicant deliberately tried to omit, conceal, or falsify, no PC DC can be raised.[26]

I have considered both the record evidence and Applicant in light of the "whole person" concept. Applicant is a maturing young man who admitted the allegations concerning his arrests and guilty plea and denied, with a reasonable explanation, an allegation he falsified his SF-86. Although his guilty plea was the result of an adult's actions, it occurred shortly after he reached his majority and concerned a minor offense from about five years ago. No elaboration was given with regard to charges related to a domestic incident between Applicant and his wife, so the only fact related to that alleged incident is that the charges were dropped. The former incident was expunged, and Applicant was told it would be removed from his record. The latter occurred after Applicant drafted his SF-86 and the FORM fails to provide evidence Applicant had the opportunity to change his answer to question 26 had he wished to do so.

Based on these facts, security concerns were understandably raised. With concise narrative by Applicant and a review of the FORM, those security concerns have been mitigated. In the absence of lingering security concerns, it is clearly consistent with the national interest to grant a security clearance.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.2.5 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

Paragraph 2, Guideline E: FOR APPLICANT

Subparagraph 1.a: For Applicant

DECISION

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

Arthur E. Marshall, Jr.

[26] In finding that no disqualifying condition is raised under Guideline E, paragraph c under Guideline J is found in favor of Applicant.

Administrative Judge