



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



In the matter of: )  
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----- ) ISCR Case No. 06-24239  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Jennifer I. Goldstein, Esquire, Department Counsel

For Applicant: *Pro se*

February 4, 2008

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**DECISION**

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ROSS, Wilford H., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on October 26, 2004 (Government Exhibit 1). On May 7, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines E and J concerning the 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 President Bush on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant submitted an Answer to the SOR on July 5, 2007, and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on September 6, 2007. I received the case assignment on September 12, 2007. DOHA issued a notice of hearing on September 25, 2007, and I convened the hearing as scheduled on October 11, 2007. The Government offered Government Exhibits 1

through 5, which were received without objection. Applicant testified on his own behalf and submitted Applicant's Exhibits A and B, without objection. DOHA received the transcript of the hearing on October 22, 2007. The record closed on October 22, 2007. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

### **Findings of Fact**

The Applicant is 29 and married. He is employed by a defense contractor as a Security Guard and seeks to obtain a security clearance in connection with his employment.

#### **Guideline E - Personal Conduct**

#### **Guideline J - Criminal Conduct**

The Applicant was involved in a robbery in March 1999, when he was 20 years old. He drove the getaway car when his brother robbed a man. The Applicant credibly testified that he did not know his brother intended to rob anyone at the time. The Applicant was subsequently arrested and charged with one count of Robbery and one count of Assault and Battery. Subsequent to his arrest the Applicant spent six weeks in the county jail because he could not afford the bail. Because of the relatively minor extent of his involvement with the offense, he plead guilty to the lesser charge of Accessory to Robbery. He was sentenced to 80 hours of community service, which he completed. (Transcript at 20-24.)

In October 2004 the Applicant applied for a job with his present employer. As part of the application process, the Applicant was required to fill out a Company Employee Application (Government Exhibit 2) and a Defense Department Security Clearance Application (Government Exhibit 1).<sup>1</sup>

Government Exhibit 2 asks the following question at page 2, "Have you ever been convicted or plead guilty to a felony or misdemeanor?" The Applicant answered this question, "No." This answer was false.

Government Exhibit 1 asks the following as question 22.f., "In the last seven years, have you been arrested for, charged with, or convicted of any offense(s) not listed in response to [questions 22.] a, b, c, d or e above?" The Applicant answered, "No." This answer was also false.

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<sup>1</sup>Government Exhibit 1 is not signed by the Applicant. He did testify that the exhibit was a true copy of his questionnaire, that the answers were his, and that he knew when it was filled out that he was required to be true, complete and correct in his answers. (Transcript at 33-34.)

At the hearing, the Applicant explained his thinking concerning how he filled out the Company Employee Application as follows:

Well, prior to answering this question [on Government Exhibit 2], I had spoken to my employer . . . about my incident in . . . 1999. And due to the fact that it happened in 1999, he kind of led me to understand that it wasn't necessary for me to add it because it wasn't a felony on my behalf. It was a misdemeanor and I thought that because I did some jail time, it had been erased from my record. So, I didn't feel that it was necessary to put "yes" for the answer. (Transcript at 27-28.)

The Applicant further testified that his supervisor did not tell him to answer the question, "No." (Transcript at 28-29.) Finally, he stated that his supervisor also said "it wasn't important for me to put it down." (Transcript at 31.) This supervisor no longer works for the company. The Applicant provided no independent confirmation of his version of events.

The Applicant testified that he had basically the same motivation when he filled out Government Exhibit 1, the Security Clearance Application. (Transcript at 40-41.) The Government also submitted Government Exhibit 5. This is a Security Clearance Application signed by the Applicant January 11, 2006. This document appears to be a reprint of Government Exhibit 2, with some corrections by the Applicant. Question 26 of this Application also asks whether the Applicant has been arrested, charged or convicted of any offense not otherwise listed on the form within the last seven years. Once again the Applicant answered, "No." This was still a false answer to the question. His explanation was that he was in a hurry and just did what the receptionist in the office told him to do, which was sign the document. He just did not read it. (Transcript at 42-43.)

The Applicant stated that he regretted these falsifications. He further testified, in the future, he would be honest about what he had done in his past. (Transcript at 40.)

## **Mitigation**

The Applicant submitted documentary evidence showing that he is a highly respected person and employee. His current supervisor states, "I find [the Applicant] of good character and would trust him with confidential company information as well as classified information at the site that he currently works." (Applicant's Exhibit A.)

The Manager of Industrial Security for the contractor where the Applicant works (not his employing company) states, "Having known him for a period of three years, I have been very impressed with [the Applicant] and have appreciated his contributions to my department and our facility. I have never observed any conduct on the part of [the Applicant] that would give me a reason to suspect that he is anything but an honest individual and loyal American citizen." (Applicant's Exhibit B at 1.)

## Policies

Security clearance decisions are not made in a vacuum. 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. In addition, the Administrative Judge may also rely on his own common sense, as well as his knowledge of the law, human nature, and the ways of the world, in making a reasoned 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. Security clearance decisions include, by necessity, consideration of the possible risk that 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.

Finally, as emphasized by President Eisenhower in Section 7 of Executive Order 10865, "Any determination under this order . . . shall be a determination 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.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 16(a), the “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire,” is potentially disqualifying. Similarly under AG ¶ 16(b), “deliberately providing false or misleading information concerning relevant facts to an employer” may also raise security concerns. The Applicant falsified relevant information concerning his criminal record to his employer and twice to the Government. The evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

The guideline also includes examples of conditions that could mitigate security concerns arising from personal conduct involving falsifications. Under AG ¶ 17(a), the disqualifying condition may be mitigated where “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.” There is no evidence that the Applicant made such a correction to his record. This mitigating condition is not applicable to this case.

As stated above, the Applicant argues that he was misled by his then manager into making the falsifications. AG ¶ 17(b) states that the disqualifying conditions may be mitigated where “the refusal or failure to cooperate, omission or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully.” The Applicant admits that his former supervisor never told him to answer the question improperly. Based on my analysis of the available evidence, it appears that the Applicant made the decision to make false statements on his own. In addition, there is no evidence that the Applicant came forward to correct the falsifications at any time before he was interviewed by the Defense Security Service in 2006. (Government

Exhibit 3.) Under the particular circumstances of this case, I cannot find that this mitigating condition is applicable.

### **Guideline J - Criminal Conduct**

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 390:

Criminal activity creates doubts 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 Applicant was involved in a minor criminal incident in 1999. From all indications, he was not the prime mover in this incident, as was shown by his guilty plea to a misdemeanor and the award of community service as a sentence. AG ¶ 31(a) applies to this case, stating that a disqualifying condition is "a single serious crime of multiple lesser offenses."

However, several of the mitigating conditions also apply and justify a finding for the Applicant as to this Guideline. They are AG ¶ 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"; and AG ¶ 32(b), "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."

### **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. The Applicant is a hard-working, highly respected, professional person who has overcome his earlier criminal conviction. However, on at least three occasions, the Applicant gave false answers about his

criminal record to his employer and the Government. The fact that I find that Criminal Conduct to be mitigated is not relevant to a decision on the falsification. The Government had a right to know about the conviction and then make a decision about the Applicant's security worthiness.

Under AG ¶ 2(a)(3), the conduct occurred as recently as 2006. The Applicant continues to attempt to justify his falsifications by reference to his then supervisor. However, the ultimate decision was always his. I am not convinced that he has a proper understanding of how he got in these circumstances. Accordingly, I cannot find that there have been permanent behavioral changes under AG ¶ 2(a)(6). Accordingly, at the present time, I cannot find that there is little to no potential for pressure, coercion, exploitation, or duress (AG ¶2(a)8)), or that the likelihood of recurrence is close to nil (AG ¶2(a)9)).

Overall, the record evidence leaves me with questions and/or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude the Applicant has not mitigated the security concerns arising from his personal conduct.

On balance, it is concluded that the Applicant has not successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons. As stated above, Paragraph 2 is found for the Applicant.

### **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:	AGAINST THE APPLICANT
Subparagraph 1.a:	Against the Applicant
Subparagraph 1.b:	Against the Applicant
Paragraph 2, Guideline J:	FOR THE APPLICANT
Subparagraph 2.a:	For the Applicant

## **Conclusion**

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 eligibility for a security clearance. Eligibility for access to classified information is denied.

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WILFORD H. ROSS  
Administrative Judge