



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



In the matter of:)
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SSN: -----) ISCR Case No. 06-25287
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Applicant for Security Clearance)

Appearances

For Government: D. Michael Lyles, Esquire, Department Counsel
For Applicant: Gary L. Rigney, Esquire

May 22, 2008

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on November 19, 2007. The SOR is equivalent to an administrative complaint and it details the factual basis for the action. The issues in this case fall under Guideline J for criminal conduct and Guideline E for personal conduct (falsification of a security-clearance application). For the reasons discussed below, this case is decided against Applicant.

In addition to the Executive Order and Directive, this case is brought under the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines) approved by the President on December 29, 2005.

¹ Executive Order 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended, and DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive).

The Revised Guidelines were then modified by the Defense Department, effective September 1, 2006. They supersede or replace the guidelines published in Enclosure 2 to the Directive. They apply to all adjudications and other determinations where an SOR has been issued on September 1, 2006, or thereafter.² The Directive is pending revision or amendment. The Revised Guidelines apply here because the SOR is dated after the effective date.

Applicant's Answer to the SOR was received on December 26, 2007, and he requested a hearing. The case was assigned to me on March 7, 2008. The hearing took place as scheduled on April 16, 2008. The transcript (Tr.) was received on April 24, 2008.

Findings of Fact

Under Guideline J, the SOR alleges nine incidents of criminal conduct. Under Guideline E, the SOR alleges Applicant falsified material facts on a security-clearance application because he failed to disclose three incidents of criminal conduct when answering Question 23f. In his Answer, Applicant admits the Guideline J allegations except for the matter alleged in SOR ¶ 1.i. He denies the falsification allegation. Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 39-year-old employee of a defense contractor. He has a high-school education graduating in 1988. He has worked in the defense industry since May 2005. His current position is known as a quality receiving inspector. He is seeking to obtain an industrial security clearance for the first time.

Applicant married in 2005, but he and his wife are now in divorce proceedings, which involves a custody dispute for a child born in 2006. He is the father of two children with two mothers, the first child born out of wedlock in 2003. He pays child support for each and is current (Tr. 66). In addition to his full-time job, Applicant has his own small business doing lawn care on a part-time basis.

Applicant has a history of criminal conduct, which he does not dispute (Exhibits 2 and 3). The best evidence of his history is a RAP sheet from a city police department (Exhibit 2). His record of criminal conduct is described as follows:

1. May 1992—arrested and charged with disturbing the peace and resisting arrest; guilty of disturbing the peace while the other charge was *nolle prossed*.³

² See Memorandum from the Under Secretary of Defense for Intelligence, dated August 30, 2006, Subject: Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005).

³ The term *nolle pros* is a verb form of *nolle prosequi*, which “denotes either (1) the legal notice of abandonment of suit, or (2) a docket entry showing that the plaintiff or the prosecution has relinquished the action.” Bryan A. Garner, *A Dictionary of Modern Legal Usage* 591 (2nd ed., Oxford University Press 1995).

2. July 1992—arrested and charged with harassment and third-degree criminal mischief; guilty of harassment while the other charge was *nolle prossed*.
3. January 1995—arrested and charged with harassment; found not guilty.
4. July 1996—arrested, charged, and convicted of third-degree larceny of property.
5. February 2001—arrested, charged, and convicted of domestic violence-third harassment.
6. September 2001—arrested and charged with harassment; the charge was *nolle prossed*.
7. January 2004—arrested and charged with violation of protection or restraining order; the charge was *nolle prossed*.
8. May 2004—arrested and charged with first-degree criminal trespass; the charge was *nolle prossed*.
9. He was identified or described by the city police department in the RAP sheet as a domestic violence offender.

To sum up, Applicant has been arrested eight times and convicted four times.

Five of the incidents involved his relationship with a woman (Tr. 63–65). His wife has not made any allegations of domestic abuse against him (Tr. 65–66). He is not now on probation, parole, or otherwise subject to a court’s supervision or order. He is not proud of his history of criminal conduct and attributes it to not living the right type of life and associating with the wrong people (Tr. 29–30). He believes that he has matured and changed, and his focus is now on his children (Tr. 30).

Applicant completed a security-clearance application in September 2005 (Exhibit 1). Concerning his police record, Question 23f asked him to answer the following question: “In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in response to” Questions 23a–23e. He responded affirmatively and disclosed a single incident—an August 2000 (date estimated) misdemeanor conviction for harassment. In fact, his disclosure related to the fifth incident listed above that took place in February 2001. He did not disclose the sixth, seventh, or eighth incidents listed above, all of which concluded when the charges against him were *nolle prossed*. Applicant had no paperwork available to him when he completed the security-clearance application and relied on his memory (Tr. 61).

Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. To start, no one has a right to a security clearance.⁴ As noted by the Supreme Court in 1988 in the case of *Department of Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if

⁴ *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) (“it should be obvious that no one has a ‘right’ to a security clearance”); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (“It is likewise plain that there is no ‘right’ to a security clearance, so that full-scale due process standards do not apply to cases such as Duane’s.”).

they must, on the side of denials.”⁵ A favorable decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.⁶ An unfavorable decision: (1) denies any application; (2) revokes any existing security clearance; and (3) prevents access to classified information at any level.⁷ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.⁸ The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.⁹ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹⁰ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹¹ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹² The agency appellate authority has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.¹³

The Revised Guidelines set forth adjudicative guidelines to consider when evaluating a person’s security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept. A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant’s loyalty.¹⁴ Instead, it is a determination

⁵ *Egan*, 484 U.S. at 531.

⁶ Directive, ¶ 3.2.

⁷ Directive, ¶ 3.2.

⁸ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

⁹ Directive, Enclosure 3, ¶ E3.1.14.

¹⁰ Directive, Enclosure 3, ¶ E3.1.15.

¹¹ Directive, Enclosure 3, ¶ E3.1.15.

¹² *Egan*, 484 U.S. at 531.

¹³ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

¹⁴ Executive Order 10865, § 7.

that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

Analysis

Under Guideline J for criminal conduct,¹⁵ the concern is that “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.”¹⁶

In general, a security concern is raised by Applicant’s history of criminal conduct. In particular, DC 1¹⁷ and DC 3¹⁸ apply against Applicant as evidenced by his multiple arrests, charges, and convictions during the period 1992–2004. It appears Applicant has problems in his relationships with women as five of the eight incidents involved women. But the matter alleged in SOR ¶ 1.i is not much of a security concern, because being identified or described as a “domestic violence offender” on a RAP sheet is not an allegation or admission of criminal conduct, and it is not an arrest, charge, or conviction. A reasonable reading of the RAP sheet suggests it is a caution or warning to police officers. To sum up, the facts and circumstances call into question Applicant’s judgment, reliability, and trustworthiness. And it raises serious doubt about whether Applicant is a law-abiding person.

The guideline also contains several conditions that could mitigate security concerns, but none apply in Applicant’s favor.¹⁹ His last arrest in 2004 was about four years ago, and it appears he has changed or modified his behavior. This circumstance is some evidence of reform and rehabilitation. Based on the record evidence as a whole, I am optimistic, but time will tell if Applicant has truly changed his ways. In other words, the evidence of reform and rehabilitation (four years without an arrest) is outweighed by the disqualifying evidence (eight arrests and four misdemeanor convictions during a 12-year period). Accordingly, Guideline J is decided against Applicant.

¹⁵ Revised Guidelines at 21–22 (setting forth the security concern and the disqualifying and mitigating conditions).

¹⁶ Revised Guidelines at 21.

¹⁷ DC 1 is “a single serious crime or multiple lesser offenses.”

¹⁸ DC 3 is the “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.”

¹⁹ Revised Guidelines at 21–22.

Personal conduct under Guideline E²⁰ includes issues of false statements and credible adverse information that may not be enough to support action under any other guideline. In particular, a security concern may arise due to:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations [that may] 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.²¹

A statement is false when it is made deliberately (knowingly and willfully). An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported.

At issue here is the truthfulness of Applicant's answer to Question 23f in his 2005 security-clearance application. It is undisputed that Applicant was required to report the four arrests and charges that occurred during 2001–2004. He did not, reporting only the harassment conviction. He contends that he answered the question in this way because the other three incidents concluded when the charges were *nolle prossed*, which he believed meant void and did not need to be disclosed (Exhibit 2–Responses to Interrogatories 2 and 3; Tr. 26–27). His explanation is credible in light of his education and background, coupled with his disclosure of the harassment conviction, which tends to undercut an intent to deliberately omit, conceal, or falsify. Although his answer to Question 23f was incorrect, the record evidence supports a conclusion that Applicant made an honest mistake. Accordingly, Guideline E is decided for Applicant.

To conclude, Applicant did not present sufficient evidence to rebut, explain, extenuate, or mitigate the security concerns. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, the whole-person concept, to include the favorable testimony from four character witnesses (Tr. 71–105), was given due consideration and that analysis does not support a favorable decision. This case is decided against Applicant.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

²⁰ Revised Guidelines at 10–12 (setting forth the security concern and the disqualifying and mitigating conditions).

²¹ Revised Guidelines at 10.

Paragraph 1, Guideline J:	Against Applicant
Subparagraphs 1.a–1.h:	Against Applicant
Subparagraph 1.i:	For Applicant
Paragraph 2, Guideline E:	For Applicant
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Michael H. Leonard
Administrative Judge