



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-03035
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O'Connell, Esquire, Department Counsel
For Applicant: *Pro Se*

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant submitted his security clearance application (e-QIP) on September 28, 2006. On June 11, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under Guideline J and Guideline E. 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 June 15, 2007. He answered the SOR in writing on July 24, 2007, and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on November 16, 2007. The case was assigned to me on November 28, 2007, to make a decision as to whether it was clearly consistent with the national interest to grant or renew a security clearance for Applicant. On December 10, 2007, I scheduled a hearing for January 23, 2008.

I convened the hearing as scheduled on January 23, 2008. Two government exhibits (Ex. 1-2) and three Applicant exhibits (Ex. A-C, Exhibit B over the government's objection) were admitted, and Applicant testified, as reflected in a transcript (Tr.) received by DOHA on February 1, 2008. Based on a review of the case file, pleadings, exhibits, pertinent federal statutes and case law, and testimony, eligibility for access to classified information is denied.

Procedural and Evidentiary Rulings

Request for Administrative Notice

At the hearing, Department Counsel requested administrative notice of federal statutes and case law pertinent to the Military Selective Service Act, 50 U.S.C. App. § 451 et seq., and of information published by the Selective Service System concerning conscientious objection and alternative service, prohibitions on registering after age 26, and federal benefits and programs available only to registrants. Applicant objected to considering the information from the Selective Service System based on its publication after the requirement to register for him had expired. I agreed to take administrative notice of applicable federal statutes, the case law concerning whether the failure to register was a continuing offense, and the information furnished by the Selective Service System, but I will also take into account the general nature of the information provided by the Selective Service System.

Findings of Fact

DOHA alleged under Guideline J and Guideline E that Applicant willfully failed to register with the Selective Service Act as required by 50 U.S.C. App. § 453. Applicant admitted he failed to register as alleged under Guideline J but denied it was willful ("I deny that my actions were 'willful' because of my confusion and ignorance of the proper way to assert conscientious objector status with the Selective Service"). Applicant disputed the Guideline E concern on the basis that his failure to register occurred many years ago when he was a young man. After consideration of the evidence of record, I make the following findings of fact.

Applicant is a senior imaging engineer who has worked for his current employer, a defense contractor, since May 2004. His employer designs and manufactures computer tomography (CT) scanners for automatic detection of explosives and weapons, and Applicant seeks a secret-level security clearance for his complex technical work in developing algorithms (Ex. A). He has never held a clearance (Tr. 64).

Applicant was born in February 1961. During his youth, all males in the U.S. between the ages of 18 and 26 were required to register with the Selective Service System (50 U.S.C. App. § 451 et seq.):

Except as otherwise provided in this title, it shall be the duty of every male citizen of the United States, and every other male person now or hereafter

in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

50 U.S.C. App. § 453. Effective March 29, 1975, U.S. President Ford terminated the procedures for registration under the Military Selective Service Act. When Applicant turned 18 in February 1979, there was no requirement to register.

On July 2, 1980, U.S. President Carter, by proclamation, ordered male citizens and male resident aliens, who were born on or after January 1, 1960, and had attained their 18th birthday, to register with the Selective Service System unless otherwise exempt. Registration was to commence on July 21, 1980, with male persons born in 1961 to present themselves for registration on any of the six days beginning Monday, July 28, 1980. Covered males born on or after January 1, 1963, had 60 days to register (from 30 days before to 30 days after reaching age 18). Under 50 U.S.C. § 462(a), the knowing failure, neglect, or refusal to perform any duty required under the Selective Service Act was punishable by a term of imprisonment of up to five years and/or a fine of not more than \$10,000.

Applicant, then a college student on summer break, knew of his obligation to register with the Selective Service and he did not register (Tr. 54-55, 64-65). During the summer, he received a letter from an acquaintance encouraging him to not register. Applicant began to consider whether he could kill someone, and he did not want to risk being placed in a battle situation. In 1980 and 1981, Applicant contacted an organization of conscientious objectors and inquired as to whether there was any way that he could avoid combat. They had no answer for him (Tr. 71). Aware that the government had not granted conscientious objector status to those who avoided the draft (Tr. 57-58, 72), Applicant took a "wait and see attitude," even while he feared prosecution ("I kept saying to myself, well, if I was prosecuted, I guess I would have to, I would have to register." Tr. 55):

I believed that the government should have made some provisions for registering as a conscientious objector, there was [sic] no provisions, and I believed at the time that if I didn't register, and maybe it would change, there would be something that would happen over time where, you know, they would start allowing people to register as a conscientious objector (Tr. 59).

Over the next year or so, it became clear to him there would be no criminal consequences for his failure to register.¹ Applicant continued his education without much thought to his failure to register as the years passed, although on occasion he was reminded through posted signs of the requirement to register for all males between 18 and 26 years of age. See Tr. 54-59, 64-65, 73, 78.

In 1982, the Selective Service Act was amended under Public Law 97-252 to provide that those persons who fail to comply with the registration requirement are ineligible for any form of assistance or benefit (loans, grants, or work assistance) provided under title IV of the Higher Education Act of 1965 for instruction beginning after June 30, 1983 (50 U.S.C. App. § 453(f)(1)). In November 1985, a statutory bar to employment with the executive branch of the federal government was enacted for those persons who were required to register under the Selective Service Act and who knowingly and willfully had not registered before the requirement terminated or became inapplicable to them (5 U.S.C. § 3328). In November 1986, pursuant to Public Law 99-661, the Selective Service Act was amended to make some non-registrants eligible for educational assistance and other federal benefits:

(g) A person may not be denied a right, privilege, or benefit under Federal Law by reason of failure to present himself for and submit to registration under section 3 [section 453 of this Appendix] if--

(1) the requirement for the person to so register has terminated or become inapplicable to the person; and

(2) the person shows by the preponderance of the evidence that the failure of the person to register was not a knowing and willful failure to register.

50 U.S.C. App. § 462(g).

In 1983, Applicant earned his bachelor's degree in physics (Tr. 61, Ex. C). He pursued graduate studies in physics through teaching and then research fellowships (Tr. 62). When his source of funding ran out, Applicant applied for a federal guaranteed student loan in 1990. His application was denied because he could not produce a registration number with the Selective Service. Applicant maintains he would have registered at that time but was not allowed to do so because he was over 26 (Tr. 45, 67, Answer). Applicant was awarded his doctorate degree in physics in 1991 (Tr. 62, Ex. C).

In June 1991, Applicant and his spouse married. From 1992 to 1994, Applicant was a postdoctoral research fellow at a university (Ex. C). From September 1994 to August 1996, Applicant pursued a master's degree in media arts and sciences while

¹Applicant's belief came from the lack of any efforts to prosecute him. He was unaware that the Government had a passive enforcement policy of prosecuting only those who report themselves or who were reported by others as having violated the registration requirement (Tr. 76-77). See *Wayte v. U.S.*, 470 U.S. 598 (1985).

starting a family. His has two daughters, who were born in August 1995 and July 1997 (Ex. 1).

In 1997, Applicant founded a video and still image processing software start-up business with venture capital funding. During 1998, he worked as a software engineer for a company where he wrote special effects plug-ins for video post production. From August 1999 to April 2004 he was employed as a senior software engineer by another commercial firm (Ex. 1). He designed and implemented image processing filters and optical flow algorithms (Ex. C).

Applicant began working for his present employer as a senior imaging engineer in May 2004 (Ex. 1, Ex. C). Applicant's work in algorithm development for X-ray and CT scanners is largely unclassified (Tr. 64, Ex. A, Ex. C), but the resulting scanner is tested against a classified performance standard (Ex. A). At the request of his employer, Applicant applied for a secret clearance by completing an electronic questionnaire for investigations processing (e-QIP) on September 28, 2006 (Ex. 1). Applicant admitted in response to question 20.b that he had not registered with the Selective Service System, and stated, "I chose not to register with selective service because I was a conscientious objector to war. I was opposed to all killing because of my religious and moral beliefs." (Ex. 1).

Applicant now regrets his failure to register with the Selective Service System, primarily because his conduct was unfair to those registrants who complied with their obligation ("I'm sorry because I know it's unfair, it's unfair to think that I was different than every other man of my age. If I could do it, if I could do it, if I could, if I could register now, I certainly would, I want to serve my country." Tr. 80). He is not proud of his noncompliance (Tr. 66, 81).

His employer's vice president for engineering is aware of Applicant's contributions since May 2004 and he has had the opportunity to assess Applicant's work directly since August 2006. He vouches for Applicant's judgment, reliability, honesty, and trustworthiness (Ex. A).

Applicant has been a member of his religious congregation for the past eight years. He has shown himself to be a trustworthy contributor. Applicant informed his rabbi of his failure to register with the Selective Service System when he was 19. She considers him to be a mature and reliable adult who "recognizes his mistake and is duly repentant" (Ex. B).

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

The security concern relating to the guideline for criminal conduct is set out in AG ¶ 30: "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.” Every male U.S. citizen between the ages of 18 and 26 is required to register under the Selective Service Act in the manner determined by proclamation of the President. The President determined that persons required to register under 50 U.S.C. App. § 453, born in calendar year 1961 were required to present themselves for registration on any of the six days beginning Monday, July 28, 1980. Exec. Proc. 4771, 45 F.R. 45247, 94 Stat. 3775 (1980). Since he was born in February 1961, Applicant was required to register with the Selective Service on any of those six days. By his own admission, Applicant was notified of the requirement to register and chose to not do so. Applicant could have registered late until his 26th birthday in February 1987, and he did not do so.

Citing ISCR Case No. 01-23890 (A.J. Mar. 18, 2003), Applicant proffered “a technical argument” against violation of 50 U.S.C. App. § 453 because there was no requirement to register in 1979 when he turned 18 (Tr. 44-45). While both he and the applicant in ISCR Case No. 01-23890 were born in 1961 and therefore were not required to register with the Selective Service in 1979, the government is not repeating the mistake of ISCR Case No. 01-23890 and alleging here that Applicant violated the Selective Service Act by not registering within 30 days of his 18th birthday. Rather, the government’s position is that Applicant was required to register with the Selective Service on any of the six days beginning Monday, July 28, 1980, and that late registration would have been accepted until he turned 26. In ISCR Case No. 01-23890, DOHA Administrative Judge Gales recognized this requirement to register for males born in 1961, and concluded the applicant in his case had a “continuing duty” to register with the Selective Service commencing July 28, 1980, until his 26th birthday, but that the uncharged conduct was mitigated by the passage of time and absence of willful disregard. Applicant’s case is factually distinguishable in that he knew he had a duty to register and did not do so.

Applicant committed serious criminal conduct by his knowing and willful noncompliance with 50 U.S.C. App. § 453. Pursuant to 50 U.S.C. App. § 462, Applicant could have been prosecuted for failure to register, and if convicted, sentenced to up to five years in a prison and/or a substantial fine.² Furthermore, the statutory bars from federal executive agency employment under 5 U.S.C. § 3328 and from eligibility for federal educational assistance under 50 U.S.C. App. § 462(f)(1), confirm the seriousness with which the failure to register is viewed by the government. Under Guideline J, disqualifying conditions AG ¶ 31(a) (“a single serious crime or multiple lesser offenses”) and AG ¶ 31(c) (“allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted”) apply.

²50 U.S.C. App. § 462(d) provides:

No person shall be prosecuted, tried, or punished for evading, neglecting, or refusing to perform the duty of registering imposed by section 3 of this title (section 453 of this Appendix) unless the indictment is found within five years next after the last day before such person attains the age of twenty-six, or within five years next after the last day before such person does perform his duty to register, whichever shall first occur.

Even serious criminal conduct may be mitigated by the passage of time, provided it is not likely to recur and no longer casts doubt on an individual's judgment, reliability, or trustworthiness (see 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")). As to whether the failure to register should be viewed as a completed offense at the expiration of the six-day period established for registration by Presidential Proclamation 4771 or as a continuing offense until he turned 26, the Selective Service regulations effective in 1980 do not contain a provision imposing a continuing duty to register. The Tenth Circuit has held it a single offense (see *U.S. v. Harmon*, 486 F.2d 363 (1973)), although other federal appellate courts have more recently interpreted § 462(d) in conjunction with § 453 to conclude that Congress intended failure to register to be a continuing offense. See, e.g., *U.S. v. Eklund*, 733 F.2d 1287 (8th Cir. 1984) (offense is not complete until the statute of limitations begins to run, which for those who never file is at age 26); *U.S. v. Kerley*, 838 F. 2d 932 (7th Cir. 1988). Even DOHA administrative judges have disagreed. See ISCR Case No. 01-2380, *supra*; ISCR Case No. 03-02799 (A.J. Young, Jul. 26, 2004) (refusal to register for draft within 60 days of applicant's 18th birthday an isolated act). I am inclined to agree with those federal courts that have imposed a continuing duty. Even so, 20 years have passed since the requirement to register applied to Applicant. Moreover, the offense cannot recur as a matter of law. AG ¶ 32(a) partially applies because of the passage of time and he is no longer subject to the registration requirement. However, his deliberate disregard for the law continues to cast doubt about his judgment, reliability, and trustworthiness.

Successful rehabilitation encompasses several factors, including "passage of time without recurrence of criminal activity, remorse or rehabilitation, job training or higher education, good employment record, or constructive community involvement." AG ¶ 32(d). Applicant has a record of significant educational achievement and stable employment. He has also been involved in his religious congregation for the past eight years. The failure to register with the Selective Service is the only blemish on his record of productive citizenship, but it is a very serious concern. The Government recognizes that some individuals are conscientiously opposed to fighting wars, and has made specific provisions for avoiding combat by applying for conscientious objector status. Applicant did not apply for conscientious objector status.

Statutory bars to federal employment and to eligibility for federal student loans were enacted after Applicant was required to register, although before the requirement became inapplicable to him. There is no evidence that Applicant knew of these consequences until his student loan application was denied in 1991, but the government must be assured that those with classified access can be counted on to fulfill their obligations even when there are no negative consequences for failure to do so. Applicant now expresses regret over his failure to register ("I know what I did was wrong." Tr. 43), and he cannot as a matter of law repeat the same criminal conduct. However, his failure to provide a consistent, credible explanation for his failure to register between July 28, 1980, and his 26th birthday in February 1987, precludes me from finding that he is successfully rehabilitated.

When he completed his SF 86 in September 2006, Applicant indicated that he had made a choice in not registering with the Selective Service because he was a conscientious objector. Yet, when he answered the SOR, Applicant denied that his conduct was willful, and asserted “confusion and ignorance of the proper way to assert conscientious objector status with the Selective Service.” At his hearing, Applicant never explained why he did not register during the six days set forth for registration by proclamation. He testified that late in summer 1980, he received a letter from an acquaintance urging him not to register, and it was then that he began to think about conscientious objector status (Tr. 54-55). He decided not to register because he objected to the government’s failure to exempt or otherwise provide for registration as a conscientious objector (see Tr. 59). As for his failure to register by his 26th birthday, Applicant initially indicated that during the year or so after he should have registered, he feared prosecution (“I kept saying to myself, well, if I was prosecuted, I guess I would have to, I would have to register.” (Tr. 55)). This suggests Applicant knew he could have registered late. After it became clear to him that the government wasn’t going to prosecute, Applicant claimed he gave it little thought (“completely fallen off his radar” (Tr. 78-79)). While the requirement to register was likely not something that kept Applicant awake at night (Tr. 80), it is difficult to believe that he never gave it another thought, especially where he had seen publicly posted reminders of the requirement to register (Tr. 78). His explanation for failing to register despite these reminders, “it just didn’t occur that it applied to me . . . Well, I thought it was, it was, you know, that it was a done deal” (Tr. 79), is inconsistent with his testimony that he would have registered to avoid a credible threat of prosecution. Furthermore, it would require a finding of naivete that the record does not support. By his 26th birthday, Applicant was well into his graduate studies toward a doctorate in physics. Had he any intent to comply with his obligation, he would have at least inquired into the procedures.

Guideline E, Personal Conduct

The security concern related 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.

Applicant acknowledges that he exercised poor judgment by not registering with the Selective Service. His conduct falls within the general security concern underlying Guideline E, but none of the disqualifying conditions under AG ¶ 16 apply to his failure to register. The government’s reliance on AG ¶ 16(c) is not well taken in the absence of evidence of credible adverse information **in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline**. The only adverse information of security concern is the failure to register with the Selective

Service, which is sufficient for an adverse determination under Guideline J in the absence of successful rehabilitation. The record does not support any concerns of vulnerability to exploitation, manipulation, or duress (see AG ¶ 16(e) (“personal conduct, or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person’s personal, professional, or community standing”)). Applicant disclosed his failure to register with the Selective Service when he applied for his security clearance (Ex. 1), and to his rabbi (Ex. B). The security concerns raised by Applicant’s deliberate disregard of the registration requirement are more appropriately considered under Guideline J.

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. There is no statutory bar to holding a security clearance by those males who deliberately defy the requirement to register with the Selective Service. Since he was only 19 when ordered to register by Presidential proclamation, his immaturity (see AG ¶ 2(4)) must be considered but it does not excuse his failure to comply with his ongoing duty to rectify his misconduct by registering before his 26th birthday. As the criminal penalties for a violation reflect, failure to register is viewed as very serious (see AG ¶ 2(a)). Applicant’s decision not to register was premeditated, deliberate, and repeated over the years. He failed to comply with an important obligation of citizenship. Congress and the President specifically emphasized this obligation by statutory bars to federal employment and student loans. Such bars are not in place for many felonies with similar penalties.

Applicant’s personal and work accomplishments are indicators of reform (see AG ¶ 2(a)(6)) but he has not yet shown that he can fulfill his obligations without regard to his

self-interest. While he provided character references who vouch for his good character, integrity, and work ethic, I did not find his testimony at his hearing about his reasons for not registering to be credible. His efforts to excuse or minimize his defiance of the law show he is unwilling to accept full responsibility for his conduct. In response to the SOR, he stated, "I believe I was poorly counseled before making my decision." But at his hearing, he testified that the organization for conscientious objectors that he consulted in 1980 and 1981 "couldn't really tell [him] what to do." (Tr. 71). Given the concerns for his credibility, I am unable to conclude that it is clearly consistent with the national interest to grant Applicant a security clearance.

Formal Findings

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

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For 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.

ELIZABETH M. MATCHINSKI
Administrative Judge