



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



In the matter of:)
)
) ISCR Case No. 07-06060
)
)
Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: Kristine C. Spicker, Esq.

February 25, 2010

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the government’s security concerns under Guidelines J, Criminal Conduct, and E, Personal Conduct. Applicant’s eligibility for a security clearance is denied.

On August 5, 2009, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing the security concerns under Guidelines J and 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’s answer to the SOR was undated and received at DOHA on August 31, 2009. He requested a hearing before an administrative judge. On December 3, 2009, Department Counsel amended the SOR and withdrew allegations ¶¶ 1.f, 2.b, 2.c, and 2.d, and added new allegations ¶¶ 2.b, 2.c, 2.d, and 2.e, under Guideline E.

Applicant answered the amended SOR in an undated response received by DOHA on January 4, 2010. The case was assigned to me on December 21, 2009. DOHA issued a notice of hearing on January 7, 2010, and I convened the hearing as scheduled on January 26, 2010. The government offered Exhibits (GE) 1 through 12. Applicant did not object and they were admitted. Applicant testified and did not offer any exhibits. DOHA received the transcript of the hearing (Tr.) on February 3, 2010.

Findings of Fact

Applicant's admitted the allegations in SOR ¶¶ 1.a through 1.e, and denied all of the remaining allegations. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 31 years old. He graduated from college in 2002. He is not married. He has an 11 year old daughter. He began working for a federal contractor in 2004 and has held a secret security clearance. He changed jobs in 2007 and works for a different federal contractor.¹

Applicant was arrested on April 5, 1998, and was charged with attempted grand larceny and possession of burglarious tools, both felonies. He was also charged with damage to property, a misdemeanor. Applicant explained that his compact disk system was stolen from his car. He became aware of the person he believed stole his property. He went to the person's house on two occasions to confront him and have him return his property. The person was not home the third time Applicant went to the house, so he took a screw driver, that he brought with him, and attempted to break into the person's car to retrieve what he believed was his compact disk system. The police were called and Applicant was arrested and charged. Applicant stated he explained the facts to the judge and prosecutor and the charges were nolle prossed. Applicant knew he was charged with felonies.²

On May 26, 2000, Applicant was charged with reckless driving/speeding, a misdemeanor. He hired an attorney and went to court. He was found guilty of the charge. He stated he was unaware the charge was a misdemeanor.³

On September 23, 2002, Applicant was charged with reckless driving, a misdemeanor. On October 31, 2002, he was found guilty of improper driving and received a fine. Applicant stated he was unaware that he was charged with a misdemeanor.⁴

¹ Tr. 26, 39-41, 75.

² Tr. 31-32, 66-68, 86-89.

³ Tr. 53-56.

⁴ Tr. 69.

In December 2002, Applicant was working and got a new job. He told some coworkers that he was leaving his first job, but did not tell his present employer. Rather he left the job without giving notice to his employer. He stated he was not terminated and did not handle leaving his job in the correct manner.⁵

On Applicant's security clearance application (SCA) dated February 25, 2003, he did not disclose he had been arrested and charged with two felonies in 1998 and three misdemeanors, one in 1998, one in 2000, and another in 2002. He stated he did not list the felonies because "they were thrown out" although he acknowledged he was arrested and charged. He stated he did not know the reckless driving charges were misdemeanors, so he did not list those either.⁶

On January 5, 2004, Applicant was charged with fraud, a misdemeanor, and grand larceny, a felony. On May 14, 2004, he was found guilty of fraud and petit larceny, a misdemeanor. He was sentenced to one year in prison for the fraud, which was suspended. On the petit larceny charge, he was sentenced to twelve months in prison, of which 11 months were suspended. He was also placed on probation for two years. He served his sentence on the weekends. Applicant was represented by an attorney. Applicant stated despite pleading guilty, he did not commit these offenses. He stated he pled guilty to the misdemeanor because the case was continued five times and he had just stated a new job and was missing too much work. He did not know which side requested the continuances.⁷

Regarding the offenses, Applicant explained that he was at the barbershop and a friend came in and offered to sell him stereo equipment. He went home to get some money and returned and bought the stereo equipment. He then learned he needed money to pay for his daughter's school. So he pawned the stereo equipment to get the money. A couple of days later he was contacted by the police and was told that the stereo equipment he had sold to the pawn shop was stolen. The property was stolen from the same car dealership where Applicant was working at that time. Applicant stated he did not know the property was stolen. When asked what happened with his job, Applicant stated he was fired when the employer learned he pled guilty to fraud and larceny of the equipment stolen from them. Applicant did not include on his SCA that he was fired from this job. He stated he did not know why he failed to disclose this information. He admitted this would be information that the government would want to

⁵ Tr. 62-66.

⁶ Tr. 42-44; GE 1. The SOR does not allege Applicant falsified the 2003 SCA. I have not considered this information for disqualifying purposes, but have considered it when analyzing the "whole-person" and determining Applicant's credibility.

⁷ Tr. 27-28, 34-35, 90-93.

know about and was requested on his SCA. I did not find Applicant's testimony credible.⁸

Applicant completed a SCA on December 8, 2004. He did not list that he was charged with felonies in 1998. He explained he did not list the felonies because he misread the question. He did not list the January 5, 2004, felony arrest because he did not see the word "charged." He did list this charge later in the SCA and divulged the January 5, 2004, misdemeanor, but did not list any of his other misdemeanor charges.⁹

On September 7, 2005, while on probation, Applicant was charged with reckless driving/speeding, a misdemeanor. On December 13, 2005, he was found guilty and fined. He did not go to court.¹⁰

On August 29, 2008, Applicant was charged with speeding and driving with a tinted or smoked windshield. He was found guilty and was ordered to pay a fine of \$476.

Applicant completed a SCA on November 15, 2006. Section 23 asked if in the last 7 years he had been arrested for, charged with, or convicted of any offense(s) not already listed. Applicant answered "yes" but failed to divulge the September 7, 2005, conviction for reckless driving. He also failed to divulge the September 23, 2002, and the May 26, 2000, convictions for reckless driving.

Section 23 also asked if Appellant had ever been charged with or convicted of a felony offense. He failed to divulge he was arrested for fraud and grand larceny in 1998, both felonies. He failed to divulge that when he was arrested on January 4, 2004, the original charges were felony fraud and felony grand larceny. He did divulge that he was convicted of a misdemeanor. He stated he did not think he had to divulge the 1998 felony arrest because it was nolle prosque and he did not think it was on his record. He stated he did not divulge the 2004 arrest because he misunderstood the question and did not see the word "charged" in the question. He also stated that he was rushed when he completed the SCA, but then explained that it was not the November 15, 2006, application he was rushed on, but a different one he had completed. He stated he failed to divulge the information because it was an oversight. He explained he made a mistake.¹¹

Applicant testified that he was always forthcoming about his criminal offenses when he was interviewed by an Office of Personnel Management (OPM) investigator. When Applicant was interviewed by an OPM investigator on January 22, 2007, he told

⁸ Tr. 29-31, 79-86; Applicant did not divulge that he had been fired from this job. This omission was not alleged on the SOR. I have not considered this information for disqualifying purposes, but have considered it when determining Applicant's credibility and when analyzing the "whole-person."

⁹ Tr. 46-49.

¹⁰ Tr. 56.

¹¹ Tr. 31-33, 35-39, 50-53, 62.

the investigator that he pled guilty to “the original charges for petty larceny and obtaining money under false pretenses.” He did not tell the investigator that he was originally charged with grand larceny.¹²

Applicant did not tell his security manager about his January 5, 2004 arrest. At some point his security manager learned of the conviction and confronted Applicant with the information.¹³

Applicant signed a SCA on December 8, 2004, and re-certified it on November 7, 2005. He explained about the offense of January 5, 2004 by stating the following:

Purchase merchandise at a local barbershop. Short of cash a couple of days later, took merchandise to Cash Converters, cash converter call me to inform me that the merchandise was stolen. Went to court show receipts, court process was time consuming, missing hours at work, enter a plea bargain.¹⁴

Applicant pled guilty to stealing the property and fraud. Applicant knew his statements were false and he and he intentionally provided false and misleading information on his SCA. Applicant also provided false and misleading information on his November 15, 2006, SCA when he provided the following statement:

Regarding the misdemeanor offen[s]e. I purchase[d] a radio at the barbershop I got (sic) to. The guy I purchase[d] it from show[ed] a receipt which was from the internet, I believed a [P]aypal receipt with ebay logo on it. I thought it was legit so I bought it from him. A few days later I took it to Cash Converter because I miscalculated my money and I needed the cash. A couple of days later I received a phone call from the [city] police stating that it was stolen. I was in and out of court behind this missing days at work. My employer and I was getting tired of me missing days so I pleaded guilty to end it.¹⁵

On December 20, 2006 Applicant provided false information to an OPM investigator when he was questioned about his 2004 conviction for larceny and fraud. He provided the investigator the same false and misleading explanation stating he did not know the property he bought at the barbershop was stolen. When in fact, Applicant actually stole the property and knew his statements were false as he had in fact pled guilty to stealing the property that eventually led to his larceny and fraud conviction.

¹² Tr. 56-61; GE 6, 10, 11.

¹³ Tr. 76-79.

¹⁴ GE 2.

¹⁵ GE 3.

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 commonsense 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

Criminal Conduct

AG ¶ 30 sets out the security concern relating 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.

I have considered the disqualifying conditions under Criminal Conduct AG ¶ 31 and especially considered:

(a) a single serious crime or multiple lesser offenses

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant was arrested five times from April 1998 to September 2005. He was charged in 1998 and again in 2004 with felonies. He pled guilty to misdemeanor charges of larceny, fraud, and reckless driving. Appellant was sentenced to a year in prison for his larceny conviction, which was suspended. He was sentenced to twelve months in jail for the fraud conviction, of which 11 months were suspended. He was on probation for two years. I find all of the above disqualifying conditions apply.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and especially considered the following:

(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;

(c) evidence that the person did not commit the offense; and

(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.

Applicant has a seven-year history of criminal conduct, the most recent offense occurring in 2005. While on probation he committed another misdemeanor. He admitted the property was stolen from the car dealer where he worked and that he pled guilty to the offenses, but now denies the offenses. Applicant lied about his involvement regarding the larceny and fraud offenses. I find (a) does not apply because no evidence was offered to show his conduct is unlikely to recur. I find his conduct casts doubt on his

reliability, good judgment and trustworthiness. Applicant did not provide evidence to convince me he did not commit the offenses he pled guilty to. Based on Applicant's testimony and lack of credibility at his hearing I find he failed to provide any substantive evidence that he has changed his way and is successfully rehabilitated. I find mitigating conditions (c) and (d) do not apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct.

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. I have specifically considered

- (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;
- (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative; and
- (e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging activities which, if known, may affect the person's personal, professional, or community standing.

Applicant intentionally and deliberately failed to divulge he was charged with felonies. He also provided misleading and false information on his SCAs and to the OPM investigator. Applicant's numerous arrests and convictions are also a personal conduct concern. I find all of the above disqualifying conditions apply to Applicant's actions and false statements.

I have considered all of the mitigating conditions under AG ¶ 17 and conclude none apply.

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) the 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. Applicant is a college graduate. He has worked for a federal contractor since 2004, and held a security clearance. Applicant has a history of criminal conduct. He has been charged with felonies and misdemeanors. He was charged with felony larceny and fraud and pled guilty to the reduced misdemeanor offenses. He stated he was tired of the delay in the process so he accepted a plea agreement, but he was not guilty. He also admitted that the property that he was accused of stealing was taken from his employer. He was later fired by the employer because of his plea. He did not list he was fired on his SCA. He had no explanation for why he did not disclose this information. Applicant's testimony throughout the hearing lacked candor, he was not believable, and I find he deliberately lied. Overall, the record evidence leaves me with serious questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising from his Criminal Conduct 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:	AGAINST APPLICANT
Subparagraphs 1.a-1e:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT

Subparagraph 2.a:
Subparagraphs 2.b-2.e:

For Applicant
Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly in the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge