



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 07-10400
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Jeff A. Nagel, Esquire, Department Counsel  
For Applicant: *Pro Se*

October 31, 2008

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**Decision**  
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ABLARD, Charles D., Administrative Judge:

Applicant failed to mitigate security concerns regarding Guidelines J, and E. Clearance is denied.

**Statement of the Case**

On September 14, 2005, Applicant submitted an Electronic Questionnaires For Investigations Processing (e-QIP) also known as Security Clearance Application (SF 86). On March 24, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated 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, modified and revised. The SOR alleges security concerns under Guidelines J, and E.

The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative

judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant responded to the SOR allegations in a sworn statement signed on May 13, 2008, and elected to have his case decided on the written record in lieu of a hearing. Documents were attached to the answer with explanatory information. A complete copy of the file of relevant material (FORM), dated June 5, 2008, was provided to him, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant provided no additional material. The case was assigned to me on October 21, 2008.

### **Findings of Fact**

Applicant admitted all of the allegations in his answer to the SOR, and offered explanations. After a complete and thorough review of the evidence of record, I make the following findings of fact:

Applicant is 36 years old. He has been an employee of a defense contractor since 2004 working as a warehouse specialist. He has a record over a dozen years of criminal activity which is alleged under Guideline J as criminal conduct (SOR ¶¶ 1.a.-e.). These activities began in 1992 when he was 20 years old when he was arrested and charged with felony burglary and sentenced to summary probation for 3 years and 70 days in county jail. His second offense was less than a year later in 1993 when he was arrested and charged with misdemeanor marijuana possession of less than an ounce and fined.

In April 1996 he was cited for having an open container of alcohol in an automobile, found guilty and fined. Less than a year later in 1997 he was arrested and charged with transporting narcotics. The charges were dismissed because the drugs were in the possession of a passenger. His last arrest was in December, 2003 when he was charged with possession of less than one ounce of marijuana in a vehicle. He plead guilty and was sentenced to three years of summary probation and paid fines and fees totaling \$365.

Applicant has attempted to change his conduct since his last drug arrest. He states that he is not a habitual drug user, has a stable family environment, and that he has matured in the past five years through a steady job. He offered no specific evidence to support these assertions but appears not to have had any further conduct problems.

Applicant was also alleged to have violated 18 U.S.C. § 1001 by failing to answer correctly on his SF 86 Question 23 relating to his police record and Question 24 relating to drug activity (SOR ¶ 1.f.). These allegations are also repeated in SOR ¶¶ 2. a.- d. under Guideline E as personal conduct. In his answer (Exh. 3) he stated that the reason for doing so was confusion about the question. However, he acknowledge in his interrogatory answers and supplemental answers that he withheld the information

deliberately to protect his employment, but now recognizes that doing so was not proper behavior (Exhs. 6 and 8).

## **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.

In the decision-making process, the Government has the initial burden of establishing controverted facts alleged in the SOR by "substantial evidence," demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence "to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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* Executive Order 12968 (Aug. 2, 1995), Section 3.

### **Analysis**

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude that the following Adjudicative Guidelines provide the standard for resolution of the allegations set forth in the SOR.

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

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30, “[c]riminal 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.”

AG ¶ 31(c) provides that “an allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted” is a disqualifying condition. Applicant was arrested for four offenses and cited for a fifth between 1992 and 2003. He was found guilty of four offenses and one of them was dismissed. Thus, the evidence submitted clearly raises the potentially disqualifying conditions.

AG ¶ 32 provide two conditions that could be applicable to mitigate the alleged security concerns:

(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;

(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.

Although almost five years has elapsed since the last offense, they all related to criminal activity some of which concerned drugs. His probation for the last offense expired less than two years ago. Applicant has provided insufficient evidence of rehabilitation and it is premature at this time to apply the mitigating conditions.

The allegation concerning 18 U.S.C. § 1101 requires that the omission be deliberate. Applicant admitted in his interrogatory answers (Exh. 6), and his supplemental answers (Exh. 8), that his omissions were because he did not want to endanger his employment. Thus, I conclude that the omissions were deliberate.

### **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.

AG ¶ 16 describes two conditions that could raise a security concern and may be disqualifying in this case:

- (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; and,
- (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

Applicant is alleged to have falsified material facts in response to Questions 23 and 24 on his application for a security clearance. This prompted security concerns under AG ¶¶ 16(a) and (b).

AG ¶ 17(c) provides that Applicant could mitigate security concerns from the facts in this case. It is that if the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.”

Many of the offenses alleged occurred between ten and fifteen years ago and could be mitigated on this basis. Applicant falsified his answers to the security clearance questionnaire approximately three years ago. The last offense resulted in a second drug conviction that occurred less than five years ago. Also, the probation imposed for that conviction did not cease until less than two years ago. Thus, I conclude

that it would be inappropriate, under these circumstances, to mitigate any of these allegations.

### **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.

After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the security concerns pertaining to criminal and personal conduct allegations. He has made some progress in changing his conduct through family responsibilities and stable employment. However, the most recent conduct alleged cannot be attributed to youthful indiscretions for it occurred when he was 31 years old. The fact that he acknowledges deliberately failing to answer the two critical question on his SF 86 also militates against a favorable finding under the whole person doctrine.

Applicant should not be permanently disabled from obtaining a security clearance since most of the offenses are now quite old and he will have learned a valuable lesson which he now knows he needs to be totally candid in his responses to questions and interrogatories.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), a careful consideration of the whole person factors and supporting evidence, application of the pertinent factors under the adjudicative process, and interpretation of my responsibilities under the guidelines. Applicant has not mitigated or overcome the government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

## **Formal Findings**

Formal findings For or For 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  
Subparagraph 1.b.: Against Applicant  
Subparagraph 1.c.: Against Applicant  
Subparagraph 1.d.: Against Applicant  
Subparagraph 1.e.: Against Applicant  
Subparagraph 1.f.: Against Applicant

Paragraph 2, Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant  
Subparagraph 2.b.: Against Applicant  
Subparagraph 2.c.: Against Applicant  
Subparagraph 2.d.: Against Applicant

## **Conclusion**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Clearance is denied.

Charles D. Ablard  
Administrative Judge