



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



In the matter of:)	
)	
)	ISCR Case No. 07-15218
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Emilio Jaksetic, Esquire, Department Counsel
For Applicant: *Pro Se*

March 26, 2008

Decision

RIVERA, Juan J., Administrative Judge:

Applicant mitigated the criminal conduct security concerns raised by his behavior under the whole person concept. His omission of material information from his security clearance application was not with the intent to deceive or to falsify his application. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted Security Clearance Applications on October 8, 1996, and May 9, 2007. On November 30, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the Government's security concerns under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct).¹

¹ 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 answered the SOR on January 4, 2008, and requested a hearing before an Administrative Judge. The case was assigned to me on January 31, 2008. The Notice of Hearing was issued on February 12, 2008, convening a hearing on March 3, 2008. The hearing was convened as scheduled. The Government presented eight exhibits, marked GE 1-8, which were admitted without objection. Applicant testified on his own behalf, and presented one exhibit, marked AE 1, which was admitted without objection. DOHA received the transcript (Tr.) on March 11, 2008.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in all the SOR allegations and provided explanations. He denied, however, the validity of the charges reflected in SOR ¶¶ 1.a, 1.b, and 1.e-1.h. Concerning the falsification allegations in SOR ¶¶ 2.a and 2.b, he admitted his failure to disclose the required information, but claimed his omissions were an innocent mistake and not with the intent to mislead or falsify his application. His admissions are incorporated herein as findings of fact. After a thorough review of all evidence of record, including his demeanor, I make the following additional findings of fact.

Applicant is a 58-year-old systems engineer. He enlisted in the U.S. Navy the day after he graduated from high school. He served aboard submarines as a sonar technician from 1968 to 1974. He achieved the rank of E-6 (Tr. 61). Applicant was medically discharged with a 10% disability for suffering from an aggressive personality disorder (Tr. 66). His service was characterized as honorable (Tr. 66). From 1975 to 1977, he completed a Bachelor of Science degree in Ocean Engineering (Tr. 61). In 1977, Applicant was hired by a defense contractor, and he has been working basically the same job (testing computer hardware and software), albeit for succeeding companies, ever since (Tr. 33).

Applicant had access to classified information while serving in the Navy. When he was hired by the defense contractor in 1977, he received access to classified information at the secret level. He has maintained his access to classified information to the present. There is no evidence Applicant has ever compromised or caused others to compromise classified information. He has never been cited or reprimanded because of security issues, or for his failure to follow security rules and regulations (Tr. 61).

Applicant has been married three times. He could not recall when he married or divorced his first wife. He married his second wife in 2000, and divorced her in 2002. He married his third wife in 2004 (Tr. 34-35).

Criminal Conduct Allegations

From 1985 to 2006, Applicant was implicated in eight incidents involving criminal activity. In 1985, Applicant's then wife requested police to open an investigation concerning Applicant's hiring a person to murder her. Applicant denied the allegation.

He satisfactorily explained a 16-year-old foster child he and his wife were caring for started the rumor. After the allegation was investigated by the police, there were no charges filed against him, and the child was removed from the family's care (Tr. 40).

In 1985, Applicant also was charged with two counts of assault and battery on his spouse. Applicant admitted he was charged as alleged, but explained these were heated verbal arguments which involved no physical contact. Both charges were dismissed after the prosecutors interviewed his then wife (Tr. 41-43).

In 1993, Applicant was convicted of assault and battery on his then girlfriend. He claimed that during a verbal argument she threw hot coffee at him, and he pushed her. She fell down against a kitchen cabinet and received a laceration to her head and broke a leg. He was sentenced to serve 60 days in jail, which was suspended on the condition that he attend an anger management training class (Tr. 43, GE 3).

In September 1996, Applicant was arrested and charged with domestic assault and battery. The following month, Applicant was issued a protective order requiring him to refrain from family violence and requiring him to undergo a mental evaluation. The charge was later dismissed, because it only involved a verbal altercation, and he complied with both protective order provisions (Tr. 45-46).

As a result of the court ordered mental evaluation, Applicant was diagnosed with a bipolar personality disorder with mood swings and manic depression (Tr. 62). He was prescribed two medications which he has been diligently taking since September 1996. Additionally, he sees a doctor every month to readjust his medications and to check for possible collateral adverse effects from the medications. Applicant repeatedly emphasized he takes the medications diligently and never skips them because the medications make him feel good (Tr. 47-49, 58).

Applicant explained he and his second wife had frequent heated arguments because of infidelity and other marital problems which were exacerbated by his mental condition. After he started his medications, his mood and demeanor changed and they stopped having so many arguments (Tr. 48).

In 2001, Applicant shoplifted an \$11 item from a retail store. He was involved in a verbal argument with the store's detective and was also charged with breach of peace. He was convicted and sentenced to three months in jail (suspended), placed on 18 months probation, and released on his own recognizance (Tr. 49-51). Applicant was frank, candid, and forthcoming in his explanations of this incident.

In February 2004 and January 2006, Applicant was arrested and charged with assault and battery on his brother-in-law. Both charges were latter Nolle Processed. In his response to the SOR, Applicant claimed his brother-in-law was upset at him and filed the allegations to get even. At his hearing, Applicant explained his brother-in-law is an alcoholic who lives with Applicant and his wife sporadically. His wife is trying to save her brother from his alcohol addiction (Tr. 64). Applicant claimed in 2004 and 2006, his

brother-in-law was drunk, rude, and verbally abusive towards Applicant's wife. On both occasions, Applicant and his brother-in-law were involved in verbal arguments which escalated into a shoving and pushing match. Applicant's brother-in-law filed charges against Applicant, failed to appear at the court proceedings, and the charges were dismissed (Tr. 51-54).

Since January 2006, Applicant has been involved in one more incident with his brother-in-law. In late 2007 or early 2008, Applicant's brother-in-law was again drunk and abusive towards Applicant's wife. Applicant claimed he has learned his lesson and he no longer resorts to pushing and shoving his brother-in-law (Tr. 56). He was able to control his brother-in-law by talking and reasoning with him. As a result of this last incident, Applicant received a subpoena to testify in court (AE 1). Since the January 2006 incident, Applicant has not been arrested, charged, or involved in any other police related incidents (Tr. 54, 59).

Applicant has not consumed alcoholic beverages since he left the Navy. He is diabetic and requires shots to control the disease. His left hip was replaced and walks with a cane because he has a bad right hip (Tr. 57).

Falsification Allegations

SOR ¶ 2a and ¶ 2b alleged Applicant falsified his answers to question 23(f) of his May 2007 security clearance application. Question 23(f) asked whether in the last seven years he had been arrested, charged with, or convicted of any offenses not previously disclosed elsewhere in his application. Applicant failed to disclose that in January 2006 (SOR ¶ 2(a)) and in February 2004 (SOR ¶ 2(b)) he was arrested and charged with assault on his brother-in-law.

Applicant admitted his failure to disclose the required information. He satisfactorily explained his omissions were a mistake and not made with the intent to mislead the government or to falsify his application. He averred he misread the security clearance application. He believed that since the charges were dropped (Nolle Processed) he did not have to disclose them in response to question 23(f). He admitted he did not pay sufficient attention to his application when he was completing it due to interruptions at work (Tr. 36). However, Applicant took responsibility for his lack of diligence. He testified nobody rushed him to complete the application, that he rushed himself. He acknowledged that if he had questions about the application he should have asked for assistance, but he failed to do so (Tr. 38).

Applicant's prior security clearance application was submitted in October 1996. At that time, he properly disclosed in response to question 23(f) his 1993 arrest and conviction for domestic assault and battery. Moreover, in his response to question 23(c) (asking whether he had any charges pending against him for any criminal offenses), Applicant answer "Yes," and disclosed his September 1996 arrest for assault and battery on his wife. He further disclosed his scheduled court date for December 1996, and the jurisdiction where the charges were pending (GE 1).

Having observed closely Applicant's demeanor, I find his testimony credible. I find his omissions were not made with the intent to mislead the government or to falsify his application. At his hearing, Applicant promptly answered all the questions asked. He was frank, candid, and forthcoming in his answers and explained his answers without hesitation. He readily admitted his bad behavior and apologized numerous times for his questionable behavior. Applicant expressed sincere remorse for his actions.

Policies

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information.²

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). The adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be considered 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 controlling 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."³ 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.

² See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

³ *Egan, supra*, at 528, 531.

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

Under Guideline J, the security 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.” AG ¶ 30.

From 1985 to 2006, Applicant was involved in six criminal conduct related incidents. He was convicted of domestic assault and battery in 1993, and shoplifting in 2001. Four of the remaining incidents involved charges for assault and battery on family members that were dismissed or not prosecuted.⁴ Taken together, these incidents create doubts about Applicant's judgment, and his ability or willingness to comply with laws, rules, and regulations. Criminal Conduct 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.

Applicant's last criminal related incident occurred in January 2006. The 2007-2008 incident with his brother-in-law (disclosed at the hearing) did not involve questionable behavior and raised no further security concerns. Because of his history or episodic criminal behavior over an extended period of time, the passage of time mitigates his behavior but only to a certain extent. AG ¶ 32(a).

Most of Applicant's aberrational behavior was evidently caused by his bipolar personality disorder. Although he has been diligently taking medication since 1996, it is possible that fluctuation in his mental condition related to his medicine could have

⁴ I considered SOR ¶ 1d (the October 1996 protective order allegation) part and parcel of SOR ¶ 1e (the September 1996 assault and battery charge). Concerning SOR ¶ 1h, I find Applicant satisfactorily explained it was investigated and dismissed by the police as a false allegation.

contributed to his questionable behavior. Applicant visits his doctor monthly to insure the proper balance of his medications. Since January 2006, Applicant has been able to control his impulses. For example, the 2007-2008 incident with his brother-in-law was resolved peacefully by Applicant, and he was not subsequently arrested or charged.

Applicant credibly testified he has learned his lesson and no longer will rely on violence to resolve problems with his brother-in-law. He also expressed sincere remorse for his questionable behavior. Applicant other afflictions, i.e., his diabetes and bad hip, will make it unlikely he will be able to rely on violence to resolve his disputes. Moreover, because of the DOHA hearing process, Applicant has come to realize for the first time the adverse impact his questionable behavior could have on his ability to have access to classified information, and to retain his employment. Mitigating condition AG ¶ 32(c) “there is successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse . . .,” applies.

Guideline E, Personal Conduct

Under Guideline E, the security concern is that “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.” AG ¶ 15.

The government’s evidence established Applicant failed to disclose relevant information in his answer to question 23(f) of his security clearance application. Notwithstanding, I find Applicant’s omissions were not deliberate or with the intent to mislead or falsify his application. Considering the record as a whole, I find Applicant’s omissions were caused by his lack of diligence. He failed to carefully read and pay attention to the questions asked of him in his security clearance application. My findings are corroborated by his candid disclosure of adverse information in his 1996 security clearance application and his hearing testimony. Having observed Applicant’s demeanor, and weighing his testimony in light of all available evidence, I find him to be credible. His testimony refutes the allegation of deliberate falsification. Applicant’s testimony was frank, candid, and forthright. I also believe Applicant expressed sincere remorse for his omissions. Based on Applicant’s demeanor and testimony, I believe he has learned his lesson from his past mistakes, and similar questionable behavior is unlikely.

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.

From 1985 to 2006, Applicant was involved in six criminal conduct related incidents. He was convicted of domestic assault and battery in 1993, and shoplifting in 2001. Four of the remaining incidents involved charges for assault and battery on family members that were dismissed or not prosecuted.

I have carefully weighed all evidence, and I applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guidelines in light of all the facts and circumstances surrounding this case. Applicant is a mature and educated man. He served honorably in the Navy for approximately seven years. He has worked for the same defense contractor (albeit the contractor has changed names) and has had access to classified information at the secret level for approximately 31 years. He has received treatment for bipolar disease, and has responded to that treatment. He scrupulously takes his medications and meets with his doctor once a month to check the effectiveness of his medication. His current marriage and resolution of conflict show effective relationships and anger management. Except for the pending allegations, there is no evidence of Applicant's questionable behavior or, more importantly that he has ever compromised or caused others to compromise classified information.

Considering his demeanor and testimony, I believe Applicant has learned from his mistakes, and his questionable behavior is unlikely to recur. He is now a more mature and savvy person as a result of his brushes with the law and the security clearance process. There is no credible evidence Applicant has been involved in additional misconduct or questionable behavior since January 2006. In sum, I find Applicant has presented sufficient evidence of rehabilitation.

Overall, the record evidence convinces me of Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his criminal conduct and personal conduct security concerns.

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:	FOR APPLICANT
Subparagraphs 1.a - 1.h:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a-2.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to continue Applicant's security clearance. Eligibility for access to classified information is granted.

JUAN J. RIVERA
Administrative Judge