



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



In the matter of:)	
)	
XXXXXXXX, XXXXXXXXXXXX XXXXXX)	ISCR Case No. 07-15361
SSN: XXX-XX-XXXX)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Robert E. Coacher, Esquire, Department Counsel
For Applicant: *Pro se*

March 16, 2009

Decision

METZ, John Grattan, Jr., Administrative Judge:

On 9 June 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines J and E.¹ Applicant answered the SOR 21 August 2008, and requested a decision without hearing. DOHA assigned the case to me 10 February 2009. The record in this case closed 31 December 2008, the day Applicant’s response to the government’s File of Relevant Material (FORM) was due. Applicant did not respond to the FORM. DOHA assigned the case to me 10 February 2009.

¹DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), 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 (RAG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Findings of Fact

Applicant admitted the SOR allegations. Accordingly, I incorporate those admissions as findings of fact. He is a 30-year-old graphic artist employed by a defense contractor since July 2006. He has not previously held a security clearance.

Applicant has an extensive history of criminal conduct dating back to 1996. Most of his criminal conduct occurred in 1996, the year he turned 18 years old, and all the crimes had negative implications for his honesty and trustworthiness. He was arrested in April 1996 for felony unauthorized use of a vehicle. In May 1996, he was arrested for shoplifting/ theft under \$300. The charge was placed on the stet docket. In June 1996, he was again arrested for theft under \$300, found guilty, and fined. In November 1996, he was arrested for petty larceny, found guilty, and served 50-days' jail time of the 18 months he was awarded. In December 1996, he was charged with burglary/forced entry, and ultimately incarcerated until May 1999.

Applicant attributed his misconduct in 1996 to his extensive drug and alcohol abuse during that time in his life, brought on by his troubled childhood and the ensuing depression. When he was incarcerated between 1997 and 1999, he sought help through county-run drug and alcohol counseling programs. He claims no further drug and alcohol abuse since he completed those programs.²

In May 2001, Applicant was arrested on felony charges of scheme/theft over \$500 and 14 counts of theft over \$500 from his employer of nine months, a well-known direct seller of frozen food products to individual homeowners. A driver for the company, he had been caught skimming money from his daily sales over a period of time. At the time, Applicant had experienced financial problems when his live-in girlfriend left her job and he was unable to keep up with their household expenses on his earnings alone. The company fired him.

Applicant eventually pled guilty to the scheme/theft charge and the remaining charges were nolle prossed. He was awarded 18 months imprisonment, three years' supervised probation, and indefinite probation until he made the \$11,000 court-ordered restitution to his employer. Applicant was released from prison in May 2002, and completed the terms of his probation in July 2007.

Applicant was also arrested for failure to appear in April 2005. However, police records contain no information regarding the underlying charge, or the disposition. That tends to confirm Applicant's claim that the arrest was a mistake based on incorrect information obtained by the police.

When Applicant applied for a security clearance in June 2007 (Item 4), he failed to disclose that he had been fired from his driving job by answering "no" to question 22

²And the government did not allege any security concerns under drugs or alcohol. I mention the drug and alcohol history only as necessary background for Applicant's criminal conduct.

(adverse employment terminations). He misrepresented the date of his felony arrest in question 23 (police record—felonies) by placing it in May 1999 instead of May 2001.

Applicant admits the omissions, but denies any intent to deceive. He claims he forgot the correct date of his felony arrest, and did not intend to conceal his adverse termination from employment because he disclosed the felony arrest that arose from the conduct that caused him to be fired. This explanation might have been more plausible if Applicant had disclosed this employer in question 11 (employments—last seven years). Instead, he disclosed only a single employer between June 1999 and June 2003.

Applicant claims to have settled down and become a productive worker for his employer. However, aside from the fact that he has had no significant criminal involvement since May 2001, he has provided no independent corroboration of his claimed rehabilitation and changed lifestyle.

Policies

The Revised Adjudicative Guidelines (RAG) list factors to be considered in evaluating an Applicant's suitability for access to classified information. Administrative Judges must assess both disqualifying and mitigating conditions under each issue fairly raised by the facts and circumstances presented. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in RAG ¶ 2(a). The presence or absence of a disqualifying or mitigating condition is not determinative for or against Applicant. However, specific adjudicative guidelines should be followed where a case can be measured against them, as they represent policy guidance governing the grant or denial of access to classified information. Considering the SOR allegations and the evidence as a whole, the relevant, applicable, adjudicative guidelines are Guideline J (Criminal Conduct) and Guideline E (Personal Conduct).

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an Applicant's security clearance. The government must prove, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If it does so, it establishes a *prima facie* case against access to classified information. Applicant must then refute, extenuate, or mitigate the government's case. Because no one has a right to a security clearance, the Applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability, and trustworthiness of those who must protect national interests as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.³

³See, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

Analysis

The government established a case for disqualification under Guideline J, and Applicant did not mitigate the personal conduct security concerns. Under different circumstances, Applicant's five arrests in 1996⁴ might be considered mitigated by the passage of time, no further criminal conduct, and the substance abuse issues that contributed to the conduct.⁵ However, the lingering security concern is that each of these offenses goes directly to Applicant's honesty and trustworthiness. That security concern is heightened by Applicant's May 2001 arrest for what amounted to embezzlement from his employer. To the honesty and trustworthiness issues raised by his earlier criminal activity, Applicant added a breach of the fiduciary duty he had to his employer. Although he was released from jail in May 2002, he was not released from probation until July 2007—about 18 months ago. I resolve Guideline J against Applicant.

The government established a case for disqualification under Guideline E, and Applicant did not mitigate the security concerns. He deliberately concealed his May 2001 firing from his job (as he did the employment itself, although not alleged by the government).⁶ Disclosing a "May 1999" arrest for the charges that were actually brought in May 2001, does not constitute full disclosure of his employment and the adverse termination from it. Further, I believe Applicant deliberately concealed the correct date of the arrest to put it farther in the past from his July 2007 clearance application.

None of the Guideline E mitigating conditions apply. The concealed information was relevant to a clearance decision. Applicant did not disclose the information until his subject interview later in July 2007 (Item 7).⁷ Record evidence clearly suggests that Applicant intended to conceal the fact of his termination for cause in May 2001. This conduct violated 18 U.S.C. §1001, whether or not he was successful in effecting the course of his investigation.

Applicant's concealment of relevant and material information demonstrates a lack of candor required of cleared personnel. The government has an interest in examining all relevant and material adverse information about an applicant before making a

⁴¶31.(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;

⁵¶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 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, . . . good employment record . . .

⁶¶16.(a) deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, . . . [or] determine security clearance eligibility or trustworthiness. . . ;

⁷¶17.(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

clearance decision. The government relies on applicants to truthfully disclose that adverse information in a timely fashion, not when it is perceived to be prudent or convenient. Further, an applicant's willingness to report adverse information about himself provides some indication of his willingness to report inadvertent security violations or other security concerns in the future, something the government relies on to perform damage assessments and limit the compromise of classified information. Applicant's conduct suggests he is willing to put his personal needs ahead of legitimate government interests. I resolve Guideline E against Applicant.

Beyond the specific guidelines alleged by the government, the generally applicable disqualifying and mitigating conditions lead to the same result. Theft, breach of fiduciary duty, and falsifications are core security concerns [RAG ¶2(a)(1)]. His behavior was deliberate and not due to circumstances beyond his control [RAG ¶2(a)(2); RAG ¶2(a)(5)]. His misconduct was both recent and frequent [RAG ¶2(a)(3)]. Applicant was not a neophyte when he made his falsifications [RAG ¶2(a)(4).]. Rehabilitation and other behavioral changes are difficult to measure under these circumstances, as he produced no evidence to corroborate his claims [RAG ¶ 2(a)(6)]. He clearly sought to mislead the government about employment and arrest [RAG ¶2(a)(7)].

Applicant's willingness to put his personal needs ahead of legitimate government interests increases his potential vulnerability and he has not demonstrated that the misconduct is unlikely to recur [RAG ¶ 2(a)(8); RAG ¶ 2(a)(9)]. The concern is whether Applicant would disclose situations or circumstances, whether deliberate or inadvertent, that raise security concerns. Overall, the record evidence leaves substantial doubt about Applicant's eligibility and suitability for a security clearance. Accordingly, I conclude Applicant has not mitigated the security concerns arising from his criminal record and falsifications.

Formal Findings

Paragraph 1. Guideline J: AGAINST APPLICANT

- Subparagraph a: Against Applicant
- Subparagraph b: Against Applicant
- Subparagraph c: Against Applicant
- Subparagraph d: Against Applicant
- Subparagraph e: Against Applicant
- Subparagraph f: Against Applicant
- Subparagraph g: For Applicant
- Subparagraph h: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

- Subparagraph a: Against Applicant
- Subparagraph b: 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 a security clearance for Applicant. Clearance denied.

JOHN GRATTAN METZ, JR
Administrative Judge