



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



In the matter of:)	
)	
)	ISCR Case No. 07-16680
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Richard B. Stevens, Esquire, Department Counsel
For Applicant: Pro Se

October 29, 2008

Decision

HOGAN, Erin C., Administrative Judge:

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP), on January 8, 2007. On June 23, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline E, Personal Conduct for Applicant. 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.

On July 2, 2008, Applicant answered the SOR and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on July 17, 2008. The case was assigned to me on August 1, 2008. On August 15, 2008, a Notice of Hearing was issued scheduling the hearing for September 11, 2008. The hearing was held as scheduled. The Government offered four exhibits which were admitted as Government Exhibits (Gov) 1 - 4, without objection. Applicant testified and submitted five exhibits which were marked as Applicant Exhibits (AE) A through E, and admitted

without objection. The record was held open until September 25, 2008, to allow Applicant to offer additional documents. Applicant timely submitted a 14 page document which was admitted as AE F. Department Counsel's response to Applicant's post-hearing submission is marked as Hearing Exhibit 1. DOHA received the transcript of hearing on September 22, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Procedural Issue

On July 17, 2008, Department Counsel prepared a motion to amend the SOR and forwarded the amendment to Applicant. The motion to amend added language to SOR ¶ 1.a. On July 30, 2008, Applicant responded to the SOR amendment. I conclude Applicant had adequate notice of the motion to amend. There being no objection to the amendment from Applicant at hearing, the amendment was allowed in accordance with Enclosure 3, Additional Procedural Guidance, of the Directive, ¶ E3.1.17.

During the hearing, a minor amendment the SOR ¶ 1.a was made on the third line down, by changing the word "of" located between the words "alcohol" and "drugs" to word "or" due to a typographical error.

Findings of Fact

In his Answer to the SOR, and in his Answer to the Amendment to the SOR, Applicant denied all of the SOR allegations.

Applicant is a 54-year-old computer technician employed with a Department of Defense contractor seeking a security clearance. He has been employed with the defense contractor for the past five years. He served 12 years on active duty in the United States Navy. He separated as an E-6 with an Honorable Discharge. He has worked for defense contractors since separating from active duty. He has held a security clearance since 1991 with no security incidents. His highest level of education is an associates degree. He is married and has one son, age 24, from a previous marriage. (Tr at 4-6, 54; Gov 1; AE F.)

In 2003, Applicant worked as a contractor on a military installation located in Germany. On July 8, 2003, Applicant played in a softball tournament and later volunteered to work in a booth during a fest held on the military installation. He and a couple friends went out after the fest was over around midnight. Applicant drank approximately four to five half liters of alcohol. (Tr at 35-36, 39.)

Around 2 am, Applicant drove home. He was stopped by a German police officer. The German police officer smelled alcohol on Applicant's breath. He was told to lock his car. He was put in the German police vehicle and taken to the German police station. At the station, his blood was taken and paperwork was filled out. The military police arrived and Applicant was transported to the military police station. More paperwork was completed. Applicant's driver's license was confiscated and his base driving privileges

were revoked. He was released about an hour later. His car was recovered the next day. (Tr at 37-41; Gov 3.)

On the night of his apprehension, the only document Applicant received was a DA Form 4137, Evidence/Property Custody Document related to his driver's license being confiscated. Applicant consulted a judge advocate about whether any charges were being brought against him. She advised him that they were waiting for information from the German police. Applicant transferred back to the U.S. in September 2003. He was scheduled to transfer back to the U.S. prior to his apprehension. He was given his license back just prior to moving back to the U.S. In October 2003 after he moved to the U.S., he called the judge advocate again. She indicated that they had received no information from the German police. (Tr at 27, 41; Gov 4; AE A.)

While Applicant admits that he was arrested by the German police, he did not believe that charges were ever filed against him. He believed that administrative actions were taken rather than criminal charges filed. He initially was not sure that it was an arrest. He was not handcuffed or put in a jail cell. He was not photographed. No fingerprints were taken. It was his belief that these sort of actions would occur if he had been arrested. (Tr at 43; Answer to SOR; Answer to Amendment to SOR.)

On January 8, 2007, Applicant submitted an e-QIP application as part of a periodic background investigation related to his security clearance. (Gov 1.) He answered, "No," in response to section 23(d) which asks, "Have you ever been charged or convicted of any offense(s) related to alcohol or drugs?" (Gov 2) Applicant answered "No" because he believed he was never charged with any offense. (Tr at 50; Answer to SOR.)

On the same e-QIP application, Applicant answered, "No" in response to section 23(f) which asks, "In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in response to a, b, c, d, or e above? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.)" Applicant understood this question asked about other incidents that may have happened for which he was arrested. In his response to the amendment to the SOR, he indicated, "I understood the question to refer to incidents other than ones already addressed by previous questions. This is also why I responded to the OPM investigator in this same fashion. As I stated in my last answer this was something that I should have asked for clarification about but failed to do so." (Gov 1; Gov 2; Answer to Amendment to SOR.)

It is also alleged that Applicant deliberately provided false information when he initially confirmed his negative responses on his security clearance application during an interview with an employee of the Office of Personnel Management (OPM). Specifically, he denied having been charged with or convicted of any charges associated with the use of alcohol or drugs. The evidence in support of this allegation is a summary of the personal subject interview contained in the report of investigation apparently prepared by the OPM investigator. During the interview, the investigator specifically asked

whether Applicant had ever been charged with or convicted of any charges associated with the use of alcohol or drugs. Applicant answered, "No". The investigator disclosed that the government was aware of his arrest for Driving Under the Influence of Alcohol in Germany in July 2003. Applicant admitted he had been arrested and discussed the arrest in detail. (Gov 4.) Applicant admits that disclosure of his arrest had the potential to have a negative impact on his security clearance. (Tr at 45.)

Applicant maintains that the questions on the e-QIP application are not as clear as the questions pertaining to arrest history on previous applications. He provided a previous version of the security clearance application which asks the following pertaining to arrest history "18(a) Have you ever been arrested, charged, cited, held, or detained by Federal, State or other law enforcement or juvenile authorities regardless of whether the charge was dropped or dismissed or you were found not guilty?" He indicated he would have listed the arrest in response to this question. (Tr at 45-50; AE B.)

Applicant's wife wrote a letter on his behalf. They married in March 2006. They began dating when they both were working in Germany. She has no firsthand knowledge of the July 2003 incident because she was sightseeing in another country. Applicant immediately told her about the incident. She is aware that his license was taken by the military police. He never received negative counseling by his employer. He continued to work in a classified environment. His driver's license was returned when he moved back to the U.S. He contacted the judge advocate's office on at least two occasions. Having lived in Germany, she is aware that German authorities impose significant fines on individuals charged with DUIs. As far as they both know, no charges were ever imposed or fines levied. She states her husband is honest and trustworthy. He is a good father and husband. Applicant has always held his security clearance in high regard and would never jeopardize national security. (AE C.)

Applicant's manager has known Applicant since January 2007. Applicant has been one of the best and most reliable people he has working for him. Applicant is a very valuable team member because of his attention to detail and ability to figure out some of the most difficult problems. He is also willing to lend a hand to fellow team members. He socializes with Applicant outside of work and values him as a friend and mentor. (AE F at 10.)

A family friend of Applicant's has known him for three years. Their families spend almost every weekend together. She states Applicant is a very honest and kind individual with an extremely high level of integrity. When her mother underwent chemotherapy and radiation treatment for lung cancer, he would visit her every Saturday. He displayed a lot of compassion and concern. He serves as a mentor to her son. Applicant is an individual with strong morals and integrity. (AE D.)

A performance appraisal covering January 22, 2007 to December 31, 2007, indicates that Applicant exceeds expectations. (AE E.) He was awarded numerous

awards and commendations during his Navy career. He has earned four Microsoft certifications which enhances his ability to make a contribution at work. (AE F.)

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.

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

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.

There are specific disqualifying conditions which may be raised. The following Personal Conduct Disqualifying Conditions (PC DC) potentially apply to the facts of this case:

PC DC ¶ 16(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) potentially applies with respect to Applicant’s failure to list his July 2003 arrest on his e-QIP application dated January 8, 2007. Applicant denies that he intentionally falsified his e-QIP application by omitting this arrest in response to section 23(d) which reads: “Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?” and 23(f) which reads: “In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in response to a, b, c, d, or e above? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug-related.)”

When a falsification allegation is controverted, as in this case, the government has the burden of proving it. An omission, standing alone, does not prove an applicant’s state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant’s state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov 17, 2004).

Applicant claims that he responded “No” to section 23(d) because he believed he was never formally charged after his apprehension in Germany in July 2003. I find his explanation credible. Applicant is not a lawyer. Although he was taken to the police station and his driver’s license was revoked. He never received any official documents pertaining to charges or a court date. Applicant contacted the local staff judge

advocate's office prior to leaving Germany in September 2003 and after he transferred back to the U.S. in October 2003. The judge advocate's office had no information as to whether the German authorities were going to pursue charges.

Applicant responded "No" to section 23(f) because he believed that question pertained to arrests, charges or convictions for offenses that were not mentioned in the previous four questions sections 23(a) – 23(e). I find his explanation credible.

PC DC ¶ 16(b) (deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative) potentially applies in regards to the SOR ¶ 1.b. It is alleged Applicant deliberately provided false information to an OPM employee during a July 9, 2007, interview when he denied having been charged with or convicted of any charges associated with the use of alcohol or drugs.

Applicant initially confirmed his negative response on his e-QIP application pertaining to his arrest history during an interview with an OPM employee on July 9, 2007. As mentioned above, Applicant was under the belief that he was never charged with or convicted of any alcohol or drug offenses. When the OPM employee mentioned that they had information that he was arrested for DUI in Germany in July 2003, Applicant acknowledged the arrest and provided additional details related to the arrest. While Applicant acknowledged that he knew that his arrest would potentially have a negative impact on his security clearance, his explanation that he believed that he was not charged or convicted of any alcohol or drug offense(s) remains plausible.

I find Applicant did not intentionally withhold information about his 2003 arrest on his security clearance application or during his subsequent interview on July 9, 2007. The personal conduct concern is found for Applicant.

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 common sense 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. I considered Applicant's 17-year history of handling classified information with no security incidents. I considered his record of military service and his favorable duty performance. Although Applicant admits in hindsight that he should have asked for clarification when completing his security clearance application, his explanation for not listing the July 2003 arrest for DUI is credible. His explanation for not initially disclosing the arrest during an interview about his background investigation on July 9, 2007 is also credible. Applicant learned a very difficult lesson. He understands that on future security clearance applications, he should err on providing too much information as opposed to minimal information.

I find for Applicant under 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 E:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant

Conclusion

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

ERIN C. HOGAN
Administrative Judge