



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



In the matter of:)
)
) ISCR Case No. 08-00212
)
)
Applicant for Security Clearance)

Appearances

For Government: John Bayard Glendon, Esquire, Department Counsel
For Applicant: *Pro Se*

October 30, 2008

Decision

RIVERA, Juan J., Administrative Judge:

Applicant failed to mitigate the criminal conduct security concerns raised by his misconduct. Furthermore, he falsified his security clearance application. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) or Questionnaire for National Security Positions (SF 86 Format) on June 15, 2007. On June 12, 2008, 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 (Answer) on August 6, 2008, and requested a hearing before an administrative judge. The case was assigned to me on September 3, 2008. The Notice of Hearing was issued on September 17, 2008, convening a hearing on October 9, 2008. At the hearing, the Government presented five exhibits, marked GE 1-5. GEs 1, and 3 - 5, were admitted without objection. Applicant objected to GE 2 and I excluded the exhibit (Tr. 32).² Applicant testified on his own behalf, and presented no witnesses or documents. DOHA received the transcript (Tr.) on October 17, 2008.

Findings of Fact

In his Answer, Applicant admitted the allegations in SOR ¶¶ 1.a and 1.b, with explanations. He denied, however, that the alleged criminal charges were valid. Concerning SOR ¶ 2.a, Applicant admitted he provided incorrect information in his answers to e-QIP section 23. 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 24-year-old computer hardware technician working for a government contractor. He has never been married and has no children. He graduated from college in December 2006, and received a Bachelor of Science degree in computer information systems (Tr. 5). He intends to pursue a master's degree in computer science.

In October 2006, Applicant was arrested and charged with Abduction and Kidnapping (both felony charges) of his then girlfriend; Assault and Battery on his girlfriend, and Petit Larceny.

Applicant explained that during his last year in college, he shared an apartment with his girlfriend (Tr. 49-51). In October 2006, he invited some of his relatives to stay with them during a homecoming football game weekend. His girlfriend disapproved because she was not consulted ahead of time and they became involved in a verbal argument. During the argument, Applicant told his girlfriend he was leaving her. According to Applicant, his girlfriend lost it and began hitting him. To defend himself, he had to restrain her for some time until he was able to leave the apartment. The neighbors heard the commotion and called the police department. Applicant's girlfriend accused him of blocking and preventing her from leaving her apartment. This allegation led to the abduction and kidnapping charges. She also accused him of assault and battery, and with stealing money from her.

After leaving his apartment, Applicant was stopped by a police officer, placed under arrest, and transported to a magistrate. At the magistrate's office, Applicant used abusive language and made some improper comments (Tr. 72). He was arrested and

² GE 2 is a report of investigation summarizing Applicant's interview conducted by a Government investigator in July 31, 2007. I excluded it pursuant to Directive, Enclosure 3, Additional Procedural Guidance.

placed in jail for four days pending bail (Tr. 100). Applicant was assigned a court-appointed attorney to assist him with his criminal defense representation (Tr. 88).

Applicant denied he ever assaulted his girlfriend. He claimed he had to restrain her for some time to prevent her from hitting him. He denied he prevented her from leaving their apartment. He claimed he was trying to enter the apartment to retrieve his car keys and leave and she kept blocking and preventing him from entering the apartment (Tr. 52-57).

Several days after his release from jail, Applicant confronted his girlfriend about the charges she filed against him. They became involved in another verbal argument and he lost his temper. He took her car keys from her and threw the keys away. He also broke her car's side mirror and the windshield. Additionally, he used abusive language against her. On November 27, 2006, Applicant appeared in court to address the initial set of charges filed against him in early October 2006 (Tr. 86). At the arraignment, Applicant was served with the following additional charges resulting from his second altercation: Petit Larceny Under \$200, Destruction of Property of a Value Under \$1,000, and Abusive Language to Another (Tr. 102).

Applicant's trial was scheduled for January 22, 2007 (Tr. 88-91). With the assistance of his court appointed attorney, Applicant entered into a pre-trial agreement. He pled *Nolo Contendere* to the assault and battery charge. Applicant was required to make restitution, to pay a fine, to attend a five week anger management counseling, to perform 40 hours community service, and to serve two years probation. The disposition of the assault and battery charge was deferred until February 2009 (Tr. 92). Pursuant to the pre-trial agreement, all the remaining charges against him were *Nolle Prossed*.

Applicant believes that if he complies with all the conditions imposed by the court and stays out of trouble, all the charges against him, including the assault and battery charge, will be dismissed and/or set aside. As of his hearing day, Applicant was serving probation waiting for the final disposition of the assault and battery charge scheduled for February 2009.

In June 2007, Applicant submitted a security clearance application. In his response to Section 23.a,³ Applicant answered "No" to the question of whether he had ever been charged with or convicted of any felony offense. He deliberately failed to disclose his October 2006 charges of Abduction and Kidnapping, both felony charges. In response to Section 23.c, Applicant answered "No" to the questions of whether there were currently any charges pending against him for any criminal offenses. He deliberately failed to disclose he is pending the adjudication of the Assault and Battery charge scheduled for February 2009. Question 23.f asked whether in the last seven years Applicant had been arrested for, charged with, or convicted of any offenses not

³ Section 23 of the security clearance application reads in its pertinent part as follow: "Section 23: Your Police Record. For this item, report information regardless of whether the record in your case has been sealed or otherwise stricken from the court record. The single exception to this requirement is for certain conviction under the Federal Control Substances Act for which the court issued and expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607."

listed in response to other questions in the security clearance application. Applicant answered “No” and failed to disclose his October 2006 arrest and charges of Abduction and Kidnapping (both felony charges), Assault and Battery, and Petit Larceny. He also failed to disclose his November 2006 charges of Petit Larceny, Destruction of Property less than \$1,000, and Abusive Language to Another.

Applicant explained he failed to disclose his arrest and the charges for several reasons: (1) he was unfamiliar with the application and did not fully understand the questions (Answer, Tr. 97); (2) he believed the charges were dismissed (Nolle Process), and as such, the questions did not apply to him (Answer), and (3) his girlfriend admitted the charges were false and they were dropped (Tr. 39-41, 96); (4) the assault and battery charge was to be set aside and removed from his records in February 2009 (Tr. 111); (5) he did not know the abduction and kidnapping charges were felony charges (Tr. 95); (6) he had not seen his criminal record and did not know the charges would show up (Tr. 98); and (7) he did not read the questions (Tr. 101).

In mitigation, Applicant asserted that although he mistakenly failed to disclose his arrest and charges, he corrected his mistake by being candid and forthcoming with a Government investigator during an interview conducted after he submitted his security clearance application. Applicant was called for a follow-up interview with a Government investigator in July 2007. Applicant did not request the interview. During the interview, the investigator confronted Applicant with the undisclosed arrest and charges.

Applicant has been working for his current employer, a defense contractor, since April 2007. He has performed well and has received no complaints from his supervisors or customers. There is no evidence he has ever compromised or caused others to compromise classified information. Outside of the arrest and charges involved in this SOR, Applicant has never been arrested, charged or convicted of any offenses. He has been involved in community and volunteer work with his fraternity and church. Applicant expressed remorse for his questionable behavior and lack of judgment. He averred he has matured and now understands the serious consequences of 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.⁴

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.

⁴ See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

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."⁵ 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

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

⁵ *Egan, supra*, at 528, 531.

question a person's ability or willingness to comply with laws, rules and regulations.” AG ¶ 30.

Applicant was 22 years old and had almost completed four years of college when he was involved in two altercations with his girlfriend. As a result of the first altercation he was arrested and charged with Abduction and Kidnapping (both felony charges), Assault and Battery, and Petit Larceny. After the second altercation he was charged with Petit Larceny Under \$200, Destruction of Property of a Value Under \$1,000, and Abusive Language to Another. He pled *Nolo Contendere* to the Assault and Battery charge. The disposition of the Assault and Battery charge was deferred until February 2009. He was placed on probation pending the disposition of the Assault and Battery charge. All of the remaining charges were *Nolle Prossed*.

Furthermore, Applicant falsified his security clearance application when he failed to disclose he was arrested and charged with the above charges in 2006. His falsification of the security clearance application is material and a violation of 18 U.S.C. § 1001. Making a false statement under 18 U.S.C. § 1001 is a serious crime, a felony (the maximum potential sentence includes confinement for five years and a \$10,000 fine).⁶

Applicant’s overall behavior raises security concerns under Criminal Conduct disqualifying conditions AG ¶ 31(a) “a single serious crime or multiple lesser offenses,” AG ¶ 31(c) “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted,” and AG ¶ 31(d) “individual is currently on probation or parole or probation.” Applicant’s recent falsification brings to the forefront the criminal conduct concerns raised by his past behavior. The Government did not allege the falsification under Guideline J. Thus, the falsification of the security clearance cannot be used as grounds to deny Applicant’s application under Guideline J. However, I am required to consider Applicant’s overall questionable behavior when evaluating the seriousness of the conduct alleged in the SOR to determine factors such as the extent to which his behavior is recent; the likelihood of recurrence; Applicant’s explanations concerning the circumstances of the incidents alleged; and his rehabilitation.⁷

AG ¶ 32 lists four conditions that could mitigate the criminal conduct security concerns raised under AG ¶ 31. After considering all the mitigating conditions, I find that none apply. Applicant’s arrest and charges are recent. He is serving probation and pending the adjudication of the assault and battery charge. Applicant receives some

⁶ It is a criminal offense to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation, or knowingly make or use a false writing in any matter within the jurisdiction of the executive branch of the Government of the United States. Security clearances are within the jurisdiction of the executive branch of the Government of the United States. *See Egan*, 484 U.S. at 527. The SOR does not allege a violation of 18 U.S.C. § 1001 as criminal conduct, and I have not based my determination on the applicability of 18 U.S.C. § 1001.

⁷ ISCR Case No. 04-09959 at 3 (App. Bd. May 19, 2006).

credit in mitigation because he expressed remorse for his past behavior, attended anger management counseling, participated in community work, is doing well during his probation, and he has a good employment record working for a defense contractor.

Several factors weigh against mitigation including the nature and seriousness of the offenses, his age, education, and the fact that he is still on probation. Other factors tend to mitigate concerns such as the passage of time, his counseling, ongoing rehabilitation, expressed remorse, and good job performance. The positive factors are insufficient to mitigate his criminal behavior. Applicant's overall behavior casts serious doubts about his judgment, reliability, and willingness to comply with laws, rules and regulations.

Personal Conduct

Under Guideline E (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 ¶ 15.

Applicant failed to disclose relevant information in his answers to Section 23 of his security clearance application. Considering the record as a whole, I am convinced Applicant deliberately failed to disclose the information. Numerous factors weighed in my analysis to reach that conclusion, including: Applicant's age, his level of education, and his demeanor and testimony.

I find Applicant's excuses for his failure to disclose the information not credible. Section 23 of the security clearance application is written in plain, simple English language. Applicant is a college graduate and is an articulate and bright person. He provided extensive explanations minimizing his actions on the events that led to his arrest and the filing of charges against him. He completed the security clearance application in June 2007, only five months after his criminal trial hearing in which all but one of the charges against him were *Nolle Prossed*. At the time he completed the application, he was serving probation and pending the adjudication of his Assault and Battery charge, which was scheduled for disposition in February 2009. He knew that it would not be until his February 2009 trial when all charges against him would be "completely removed" from his record (Answer, 3rd paragraph).

Applicant knew or should have known the importance of accurate completion of his security clearance application, and nevertheless failed to provide information that was material to making an informed security decision. Disqualifying condition AG ¶ 16(a): "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire," applies.

I considered all Guideline E mitigating conditions and conclude that none apply. Applicant's falsification is recent, and his favorable information is not sufficient to apply any of the mitigating conditions. I specifically considered AG ¶ 17.a: "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts," and find it does not apply. A Government investigator arranged for the interview and confronted Applicant with the undisclosed information. Applicant's evidence failed to establish he disclosed his arrest and charges before confrontation. Applicant's omission was not caused by improper advice of legal counsel advising him concerning the security clearance process, thus, AG ¶ 17.b, does not apply. I do not consider Applicant's falsification a minor offense, and it is temporally recent, AG ¶ 17.c, does not apply. Additionally, for the same reasons outlined under the discussion of Guidelines J, incorporated herein, I conclude Applicant's behavior shows questionable judgment, lack of reliability, and untrustworthiness. Finally, Applicant was unable to candidly admit the falsification at his hearing. He attempted to rationalize and minimize his falsification.

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 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. I considered Applicant's age, education, maturity level, both at the time of each incident of misconduct and at the time of his hearing. I considered his good performance for a defense contractor. I considered that he is doing well on his probation, and in his rehabilitation efforts. On balance, the record evidence does not convince me of Applicant's eligibility and suitability for a security clearance. Applicant has failed to mitigate the security concerns arising from his criminal conduct and personal conduct 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:	AGAINST APPLICANT
Subparagraphs 1.a - 1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to continue Applicant's security clearance. Eligibility for access to classified information is denied.

JUAN J. RIVERA
Administrative Judge