



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-01306
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Emilio Jaksetic, Esquire, Department Counsel
For Applicant: Sheldon I. Cohen, Esquire

July 31, 2009

Decision

CURRY, Marc E., Administrative Judge:

Applicant’s history of criminal charges, arrests, and citations generates a criminal conduct security concern. His failure to disclose his entire criminal history on his security clearance application raises a personal conduct security concern. After carefully considering the evidence, I conclude Applicant’s conduct remains a security concern. Clearance is denied.

On July 31, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines J, criminal conduct, and E, personal conduct. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; 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 September 5, 2008, admitting all of the allegations except SOR subparagraph 2.d, and requesting a hearing. On January 23,

2009, Applicant filed an amended SOR answer changing his admissions of SOR subparagraphs 1.b through 1.c, 1.e, 1.g, and SOR paragraph 2 to denials. The case was assigned to me on April 30, 2009. On May 8, 2009, a Notice of Hearing was issued scheduling the case for June 2, 2009. It was held as scheduled. At the hearing, I received nine government exhibits, four Applicant exhibits, and the testimony of five Applicant witnesses. The transcript was received on June 12, 2009.

Ruling on Procedure

SOR subparagraph 1.g alleges that Applicant “falsified at least one response on [his] Electronic Questionnaire for Investigations Processing, dated July 23, 2007, in violation of 18 U.S.C. § 1001, a federal felony.” This allegation is overbroad because it does not identify a specific question on the Electronic Questionnaire that Applicant allegedly falsified. Although an SOR does not have to satisfy the strict requirements of a criminal indictment, it must still place an applicant on adequate notice of the allegations so that he may have a reasonable opportunity to respond and prepare a defense.¹ Subparagraph 1.g. does not meet this minimum threshold, therefore, I conclude that it is not justiciable.

Findings of Fact

Applicant is a 25-year-old married man. He earned a bachelor’s degree in business administration in 2006, graduating with a 3.0 grade point average (Exhibit A). Since 2007, he has worked for a defense contractor as a financial analyst in support of an agency within the DoD. He manages a multi-million dollar budget, and assists the agency in developing financial plans and analyzing the agency’s fiscal relationship with other contractors (Tr. 144; Exhibit B). According to Applicant’s supervisor, he is an outstanding employee who works well without much guidance (Tr. 91). Applicant volunteers in the community assisting the homeowner’s association in organizing annual festivals (Tr. 270).

Applicant’s parents separated when he was approximately 14 years old. Approximately one month after they separated, Applicant’s mother’s boyfriend relocated to the home of Applicant and his mother. One morning, as Applicant was preparing to leave for school, his mother admonished him for running late (Tr. 152). Her boyfriend then interjected, ordering him in an abrasive and profane manner, to go to school. (*Id.*).

A heated argument then ensued between Applicant and his mother’s boyfriend (Tr. 153). Applicant ran out of the house, realized he forgot something, then returned to the house, and ran up the stairs toward his room. As Applicant was running up the stairs, his mother’s boyfriend met him at the top of the stairs, and kneed him in the face, breaking his nose (*Id.*). His mother’s boyfriend continued to yell at him. Fearing the situation was “going to turn worse,” Applicant reached into the linen closet, grabbed his mother’s pistol, pointed it at her boyfriend, and told him to leave the house (Tr. 154).

¹ISCR Case No. 03-07826 (App. Board June 17, 2005) at 3.

Applicant sought medical treatment, and did not go to school that day. He returned to school the following day. By then both of his eyes had bruised, attracting the attention of school personnel who called his mother, and asked her to come to the school immediately (Tr. 157). After a meeting with Applicant and his mother, school personnel then contacted the school police officer who took him to the police station (Tr. 158). Applicant was then charged with brandishing a firearm. Later, Applicant pleaded no contest, at his mother's advice, and was sentenced to probation (Tr. 159). The boyfriend was not charged.

At the hearing, a longtime family friend of Applicant testified. This friend is a retired Army veteran who met Applicant's parents shortly after enlisting, and knew Applicant since Applicant was a toddler. Shortly after Applicant's parents separated, he met Applicant's mother's boyfriend. According to the family friend, the boyfriend was a "bully," and a "total SOB" who frequently attempted to intimidate people (Tr. 127). Once, the witness nearly had a physical altercation with the boyfriend related to an incident.

In 2002, during Applicant's freshman year in college, while leaving a keg party at a college fraternity house, he was stopped by a police officer, and issued a ticket for "possession by consumption" of alcohol (Tr. 161). Applicant was not arrested (Tr. 164). The officer stopped him because she smelled beer on his breath. Applicant went to court, and was ordered to attend alcohol safety awareness classes (Tr. 162). He did so, and the court dropped the charge (*Id.*).

On September 7, 2003, Applicant and a college classmate went to a tow truck company to retrieve a towed vehicle. Applicant got into a heated argument with the tow truck company owner regarding damage to the vehicle that allegedly occurred while the car was in the company owner's custody (Tr. 164). The tow truck company owner's son then pushed Applicant out of the front door, and began to "grapple" with him (Tr. 167). At some point during the melee, Applicant pushed the front door inwards hitting the tow truck company owner in the face (Tr. 167, 253).

After the scuffle ended, Applicant and his friend left the premises, and called the police (Tr. 168). The police arrived, spoke with Applicant and the tow truck company owner, and characterized the dispute as a "he said/she said thing" (Tr. 168).

The next day, the tow truck company owner pressed charges against Applicant alleging assault and battery. The police then arrested Applicant. After a bench trial, Applicant was found guilty of the charge, a misdemeanor. He appealed it. While the appeal was pending, the parties settled the matter. Under the settlement, Applicant agreed to pay the tow truck company owner \$1,100 in restitution, and the charges were nolle prossed (Tr. 174).

In March 2004, while on spring break, Applicant was arrested and charged with misdemeanor marijuana possession, possession of narcotic equipment, and walking in a public area with an open container of alcohol (Tr. 174). Subsequently, Applicant attended a diversion program, whereupon the state dismissed the charges (Tr. 177).

On September 2, 2005, while attending an off-campus block party, Applicant was issued a citation for carrying an open container of alcohol in public (Tr. 180). He was fined \$76, which he paid through the mail (Tr. 182).

On May 3, 2006 Applicant and some friends went to a late-night carryout/convenience store after an evening of carousing (Tr. 183). Applicant got into an argument with the store clerk regarding an erroneous sandwich order. He contends he was "speaking sensibly" during the argument (Tr. 257). An undercover officer then approached Applicant from behind and grabbed him by the arm (Tr. 187, 257). When Applicant "pulled [his] arm back," the officer "started going for her mace" (Tr. 187). Applicant placed his hands in the air, and said, "are you going to mace me right here, right [in] front of all these people?" (*Id.*). The officer then handcuffed Applicant, arrested him, and charged him with felony assault and battery, in addition to public swearing/intoxication (Tr. 184-186).

The assault charge was later amended to disorderly conduct. Ultimately, Applicant was found guilty of both charges, sentenced to 30 days in jail, suspended, placed on probation for a year, ordered to do 30 hours of community service, and fined \$25 (Tr. 260).

Applicant completed a security clearance application on July 23, 2007. In response to Section 23d (*Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?*), he disclosed the 2006 charges stemming from the convenience store incident, but did not disclose the alcohol-related charges of 2002 and 2005, and the alcohol and drug-related charge of 2004. In response to Section 23f (*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, or d, above?*). Applicant did not disclose the 2003 arrest stemming from the tow truck company incident.

As for the alcohol-related charges of 2005, Applicant contends that he was unaware it was a charge because he was merely issued a ticket which he paid through the mail without a court appearance. As for the remainder of the offenses, Applicant contends he misinterpreted the questions believing that he did not need to list charges that did not result in his arrest, or were either dismissed or nolle prossed (Tr. 241, 249). When asked during cross examination why he misconstrued Section 23 in light of instructions directing applicants to report information regardless of whether it was stricken from the record, Applicant responded, "I moved right from reading Section 23 'Your Police Record,' to 'answer the following questions,' and just began checking them off" (Tr. 228). In response to Section 23b (*Have you ever been charged with or convicted of a firearms or explosives offense?*), Applicant disclosed the 1998 firearm charge.

In response to Section 24a (*Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics . . . or prescription drugs?*) Applicant disclosed marijuana use that occurred between February 1998 and April 1998, but did not disclose marijuana use that occurred in 2004. He contends that he erroneously

listed April 1998 as the time his marijuana use ended. Instead, it ended in April 2004. In response to a March 2008 interrogatory, Applicant disclosed the 2004 marijuana use, including two incidents when the marijuana was laced with cocaine unbeknownst to him when he smoked it (Exhibit 8 at 4).

On the March 2008 interrogatory, Applicant also disclosed the 2004 alcohol and drug-related charge (*Id.*). He did not disclose the 2003 assault and battery charge, or the alcohol possession charges of 2002 and 2005. He offered the same explanation for omitting these charges from the interrogatory that he offered for omitting them from the security clearance application.

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 overarching adjudicative goal is a fair, impartial, and commonsense 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."

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.

Analysis

Guideline J, Criminal Conduct

Under this guideline, "criminal activity creates doubt about a person's judgment, reliability, and trustworthiness" Moreover, "by its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations (AG ¶ 30).

Applicant's history of criminal conduct triggers the application of AG ¶ 31(a), a single serious crime or multiple lesser offenses."

Applicant was 15 years old when he was charged with brandishing a firearm. During the two months before the incident which precipitated the charge, Applicant's parents divorced, and his mother's volatile boyfriend moved into their home, and attempted to exercise parental authority over Applicant. Under these circumstances, conflict was inevitable. Given the longtime family friend's characterization of Applicant's mother's boyfriend, Applicant's explanation for drawing the gun on the boyfriend was credible. I resolve SOR subparagraph 1.a in Applicant's favor.

Applicant committed the offenses when he was in his late teens and early twenties while in college. They were minor in nature. Since graduating from college, Applicant obtained a job where he has excelled, and he has gotten married. Also, he volunteers in the community. AG ¶ 31(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," applies.

Guideline E, Personal Conduct

The security concern under this guideline is as follows:

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's omissions from his 2007 security clearance application and 2008 interrogatory responses raise the issue of whether AG ¶ 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," applies.

Applicant was an exceptional college student who has excelled, since graduating, in a highly challenging job. His employer praised his ability at working without much supervision. Under these circumstances, it is not credible that Applicant did not read Section 23 of the security clearance application carefully, as he testified.

In reaching this conclusion, I also considered Applicant's unbelievable testimony regarding the 2006 arrest. Specifically, his argument with a convenience store proprietor was disruptive enough to prompt an undercover police officer to grab him, threaten to mace him, and ultimately arrest him. Applicant, however, maintains that he was

speaking sensibly during the entire incident. AG ¶ 16(a) applies to SOR subparagraphs 2.a, 2.b and 2.e without mitigation.

I conclude that Applicant did not falsify Section 24a regarding past drug use. He answered “yes” and disclosed marijuana use from 1998 even though he was not required to do so.² Under these circumstances, it is credible that he made a mistake when he incorrectly stated the drug use ended in 1998. Also, on an interrogatory completed the following year, he disclosed the correct extent of his marijuana use, in addition to two episodes of cocaine use, without prompting. AG ¶ 16(a) does not apply to Applicant’s response to Section 24a. I find in his favor as to SOR subparagraph 2.c.

The SOR also alleges Applicant deliberately provided false information to a representative of the Office of Personal Management (OPM) in 2007 (subparagraph 1.d). Applicant denied this allegation, and the government did not provide any evidence supporting the allegation. SOR subparagraph 2.d is resolved in Applicant’s favor.

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.”

Applicant’s immaturity was a major contributing factor for his past criminal conduct. Given the maturity he has demonstrated since graduating from college (getting married, excelling on the job, volunteering in the community), I conclude that the arrests and charges which occurred while in college are not predictive of future behavior. Applicant, however, falsified his security clearance application, a crime under 18 U.S.C. § 1001. This occurred just two years ago, after Applicant finished college. Given this falsification, I cannot conclude Applicant has mitigated either the criminal or personal conduct security concerns. Upon evaluating this case in the context of the whole person concept, I conclude Applicant’s application for a security clearance must be denied.

²Applicant’s 2007 security clearance application only required him to list drug use that occurred within seven years of its completion.

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
Subparagraph 1.a:	For Applicant
Subparagraphs 1.b - 1.f:	Against Applicant
Subparagraph 1.g:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a - 2.b:	Against Applicant
Subparagraphs 2.c - 2.d:	For Applicant
Subparagraph 2.e:	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 grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

MARC E. CURRY
Administrative Judge