



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



In the matter of:)	
)	
-----)	ISCR Case No.08-01309
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: *Pro se*

October 31, 2008

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines J (Criminal Conduct), H (Drug Involvement), E (Personal Conduct), and F (Financial Considerations). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on February 14, 2007. On June 5, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines J, H, E, and F. 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 June 27, 2008, and requested a determination on the record without a hearing. He submitted a second answer on August 1, 2008, which was received by DOHA on August 5, 2008. On August 21, 2008, Department Counsel requested a hearing. Department Counsel was ready to proceed on September 17, 2008, and the case was assigned to me on September 22, 2008. DOHA issued a notice of hearing on September 29, 2008, scheduling the hearing for October 20, 2008. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 7 were admitted in evidence without objection. Applicant testified on his own behalf. I granted Applicant's request to keep the record open until October 27, 2008, to enable him to submit documentary evidence, but he submitted nothing. The record closed on October 27, 2008. DOHA received the electronic transcript on October 24, 2008, and the paper transcript (Tr.) on October 28, 2008.

Amendment of SOR

Department Counsel moved to amend SOR ¶¶ 3.a and 3.b to allege that the security clearance application that Applicant allegedly falsified was executed on February 14, 2007 (Tr. 44-45). Applicant objected on the ground he could not remember when he actually submitted his application (Tr. 45-46). I granted the motion to amend (Tr. 50). The amendments are handwritten on the SOR.

Findings of Fact

Applicant admitted all the allegations in his answer to the SOR and at the hearing, except one delinquent debt for cable service alleged in SOR ¶ 4.c. His admissions are incorporated in my findings of fact.

Applicant is a 36-year-old sheet metal mechanic employed by a defense contractor (Tr. 56). He has a high school education and two years of technical college (Tr. 8). He has worked for his current employer since March 2006. He has never held a security clearance.

In March 1995, Applicant was charged with distribution of crack cocaine, a felony. He pleaded guilty and was sentenced to 97 months in prison, supervised release for 48 months, and a \$15,000 fine (GX 5 at 3). He began distributing crack cocaine because he saw the "easy money" a friend was making. His friend supplied him with crack cocaine for resale, and he sold it for about a year until he was arrested (Tr. 79).

In August 1995, Applicant was charged with aiding or harboring a federal fugitive, also a felony. The fugitive was the friend who supplied Applicant with cocaine for resale (Tr. 80). Applicant pleaded guilty and was sentenced to 30 months in prison and two years of supervised release (GX 5 at 3). His sentences on the two felonies were served concurrently, and he was released from prison in October 2002, after spending about six years and eight months in prison (GX 7 at 2; Tr. 82).

Applicant worked in private industry as a sheet metal mechanic from November 2003 to December 2005. He was unemployed from December 2005 until February 2006 and employed in private industry from February to March 2006, when he was hired for his current job.

In November 2006, Applicant was charged with assault and battery against his live-in girlfriend (GX 6 at 1). He appeared in court in February 2007, shortly after he submitted his security clearance application, and he pleaded guilty (Tr. 90). The record does not indicate what sentence was imposed.

When Applicant submitted his security clearance application, he answered “no” to question 23a, asking: “Have you ever been charged with or convicted of any felony offense? (Include those under Uniform Code of Military Justice).” He did not disclose his two felony convictions. He testified he was confused by the reference to the Uniform Code of Military Justice and thought it applied only to persons in military service (Tr. 54). He testified he left the answer to question 23a blank on his draft application, asked someone in the security office what it meant, and was told it did not apply to him. He also testified he did not intend to falsify his answer because his security office knew he was a convicted felon (Tr. 54).

Applicant answered “yes” to question 23d of his application, asking, “Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?” He did not check the block identifying the offense as a felony. In the block for explaining affirmative answers to any question, he stated that in March 2005 he had been charged with drug possession and sentenced to probation and a fine. He listed fictitious jobs in Section 11 of his application and fictitious home addresses in Section 9 to cover up the six years and eight months he spent in prison (Tr. 86, 88, 93).

Applicant also answered “no” to question 23f, asking, “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?” He did not disclose that he was charged with assault and battery in November 2006. He testified he filled out a rough draft of his application before the November 2006 incident and submitted his rough draft four or five months after he was hired, which would have been in July or August of 2006 (Tr. 104). He admitted being interviewed by a security investigator and telling the investigator that he was “still in court with it or whatever.” No evidence was presented showing when the security investigator’s interview occurred (Tr. 109). Applicant testified he did not review the final application before signing it (Tr. 107).

In March 2007, Applicant was charged with brandishing a firearm and assault and battery against a cohabitant (GX 6 at 1). Applicant testified his live-in girlfriend falsely accused him of assaulting her and threatening her with a firearm. He was advised of her accusation by a co-worker. He stayed overnight in a hotel instead of going home, and he turned himself in the next day (Tr. 102-03). He testified he does not own a firearm (Tr. 103). The charges were disposed of by a nolle prosequi on August 1, 2007 (GX 4 at 6-9).

The SOR alleges 13 delinquent debts totaling about \$25,644. In his answer, Applicant admitted all the debts except a \$44 cable bill alleged in SOR ¶ 4.c. At the hearing, he testified he paid the cable bill and one of the three medical bills alleged in SOR ¶¶ 4.b, 4.d, and 4.e, but he could not remember which one he paid (Tr. 61). He produced no documentary evidence of payment, either at the hearing or during the time allotted after the hearing. He admitted the remaining delinquent debts were unresolved. He testified he incurred the delinquent debts by living above his means and spending more than he was making (Tr. 67). He has not sought credit counseling (Tr. 71). He did not disclose any delinquent debts in response to question 28 on his security clearance application.

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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.

Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline J (Criminal Conduct)

The SOR alleges Applicant was convicted of two felonies in 1995, pleaded guilty to an assault and battery in November 2006, was charged with an assault and battery and brandishing a firearm in March 2007, and falsified his security clearance application in violation of 18 U.S.C. § 1001. The concern raised by criminal conduct is that it “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. Conditions that could raise a security concern and may be disqualifying include “a single serious crime or multiple lesser offenses” and “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted.” AG ¶¶ 31(a) and (c).

Although the evidence suggests that the charges of assault and battery and brandishing a firearm in March 2007 were unfounded, Applicant’s two felony convictions in 1995, his conviction of assault and battery in November 2006, and his falsification of his security clearance application, discussed below under Guideline E, are sufficient to raise AG ¶¶ 31(a) and (b), shifting the burden to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns under this guideline may be mitigated by evidence that “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 good judgment.” AG ¶ 32(a). The first prong of

AG ¶ 32(a) (“so much time has elapsed”) focuses on the recentness of criminal conduct. There are no “bright line” rules for determining when conduct is “recent.” The determination must be based on a careful evaluation of the totality of the evidence. ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” *Id.*

Applicant was released from prison in October 2002, about six years ago. Since then, he has been convicted of assault and battery in November 2006, and he admitted at the hearing that he falsified his employment record and list of residences on his security clearance application in February 2007. His continued misconduct precludes a finding of rehabilitation and negates the first prong of AG ¶ 32(a). None of his offenses occurred under unusual circumstances, but they do raise doubt about his reliability, trustworthiness, and good judgment. I conclude AG ¶ 32(a) is not established.

Security concerns based on criminal conduct may be mitigated by “evidence that the person did not commit the offense.” AG 32(c). This mitigating condition is established for the charges of assault and battery and brandishing a weapon that arose in March 2007 and were disposed of by a nolle prosequi (SOR ¶ 1.a), but it is not established for the remaining allegations under Guideline J.

Security concerns under this guideline also may be mitigated if “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.” AG ¶ 32(d). As noted above, Applicant’s continued criminal conduct after his release from prison precludes a finding of successful rehabilitation. I conclude AG ¶ 32(d) is not established.

Guideline H (Drug Involvement)

The SOR ¶ 2.a cross-alleges Applicant’s conviction for distribution of crack cocaine, also alleged in SOR ¶ 1.d. The concern under this guideline is as follows: “Use of an illegal drug or misuse of a prescription drug can raise questions about an individual’s reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations.” AG ¶ 24. This guideline encompasses behavior involving “Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens)” AG ¶ 24(a)(1).

The relevant disqualifying condition is “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.” AG ¶ 25 (c). The evidence in this case establishes Applicant’s possession and distribution of crack cocaine, a controlled substance.

Security concerns raised by drug involvement may be mitigated by showing that “the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment.” AG ¶ 26(a). The first prong (“so long ago”) is not established. Although Applicant’s last drug involvement was about 13 years ago, he continued his pattern of criminal conduct after his release from prison. Significantly, his conduct in 1995 was not motivated by drug addiction, but rather by a desire for “easy money” and a disregard for the law. He has continued to demonstrate his disregard for the law, as evidenced by his assault and battery conviction in 2006 and his falsification of his security clearance application. His conduct was not infrequent, because he sold crack cocaine for about a year before he was arrested, and he continued to violate the law after his release from prison. His drug involvement did not happen under unusual circumstances, and his pattern of criminal conduct casts doubt on his current reliability, trustworthiness and good judgment. I conclude AG ¶ 26(a) is not established. No other enumerated mitigating conditions under this guideline are relevant.

Guideline E (Personal Conduct)

The SOR alleges Applicant falsified his security clearance application by deliberately failing to disclose two felony convictions in 1995 and a charge of assault and battery in 2006. The concern under this guideline is set out in AG ¶ 15 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.

The relevant disqualifying condition in this case is “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.” AG ¶ 16(a).

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’s explanation that he answered question 23a in the negative because he thought it applied only to military personnel might be plausible if he had been candid

elsewhere in his application. Instead, he understated his offense and sentence in response to question 23d, did not check the block identifying it as a felony, and falsified his employment record and list of residences to cover up his six years and eight months in prison. Based on all the circumstances, I found his explanation neither plausible nor credible. I conclude he intentionally falsified his answer to question 23a.

Applicant testified he answered “no” to question 23f and did not disclose the assault and battery charges based on his November 2006 altercation because it happened before he submitted his rough draft of his application. This was Applicant’s first trip through the security clearance application process. Although he may have been careless by not reviewing the final version of his application before signing it, the evidence is unclear on issue whether he intentionally falsified the answer to question 23f. Accordingly, I have resolved SOR ¶ 3.b in his favor. Based on his false answer to question 23a, however, I conclude AG ¶ 16(a) is raised.

Security concerns raised by false or misleading answers on a security clearance application may be mitigated by showing that “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.” AG ¶ 17(a). This mitigating condition is not established, because Applicant made no effort to correct his omissions and misstatements.

Security concerns based on false or misleading answers also may be mitigated by showing that “the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process.” AG ¶ 17(b). Although Applicant testified he was advised by someone in his security officer that question 23a was not applicable to him, his testimony was uncorroborated, and it is not plausible or credible in light of his falsifications of his responses to questions 23d, his employment record, and his list of residences. I conclude this mitigating condition is not established.

Security concerns based on personal conduct may be mitigated if “the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.” AG ¶ 17(c). This mitigating condition is not established because Applicant’s falsification was a felony, was recent, was one of several significant falsifications in his application, did not occur under unique circumstances, and casts doubt on his reliability and trustworthiness.

Security concerns based on personal conduct also may be mitigated if “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.” AG ¶ 17(e). Applicant receives some credit under this mitigating condition because it appears that he disclosed to his employer that he was a convicted felon, although it also appears that he understated the severity of his criminal conduct and did not disclose his time in prison.

Guideline F (Financial Considerations)

The SOR alleges 13 delinquent debts totaling about \$25,644. The concern under this guideline is set out in AG ¶ 18 as follows:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Several disqualifying conditions under this guideline are relevant. AG ¶ 19(a) is raised where there is an "inability or unwillingness to satisfy debts." AG ¶ 19(b) is a two-pronged condition that is raised where there is "indebtedness caused by frivolous or irresponsible spending and the absence of any evidence of willingness or intent to pay the debt or establish a realistic plan to pay the debt." AG ¶ 19(c) is raised when there is "a history of not meeting financial obligations." AG ¶ 19(e) is raised when there is "consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis." Applicant's financial history, including his admission that his financial problems arose from spending more than he earned, raises all these disqualifying conditions.

Security concerns based on financial problems can be mitigated by showing that "the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment." AG ¶ 20(a). This mitigating condition is not established because Applicant's delinquent debts are numerous, recent, and did not occur under unusual circumstances.

Security concerns under this guideline also can be mitigated by showing that "the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances." AG ¶ 20(b). Applicant experienced a period of unemployment after his release from prison, but this mitigating condition is not established because he admitted living beyond his means even when he was employed.

Security concerns under this guideline also can be mitigated by showing that "the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control." AG ¶ 20(c). This mitigating condition is not established because Applicant has not sought counseling and his problem is not being resolved.

Security concerns under this guideline also can be mitigated by showing that “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” AG ¶ 20(d). The concept of good faith “requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.” ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). Applicant testified he paid a cable bill and one of three delinquent medical bills, but he failed to provide documentation even after being given additional time to produce it. He admitted doing virtually nothing to resolve the remaining delinquent debts. I conclude this mitigating condition is not established.

Whole Person Concept

Under the whole person concept, an 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. An 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 common sense judgment based upon careful consideration of the guidelines and the whole person concept. I have incorporated my comments under Guidelines J, H, E, and F in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed in my analysis of those guidelines, but some warrant additional comment.

Applicant is a mature, intelligent adult who is struggling to overcome his past mistakes. His recent brushes with the law have arisen from a tumultuous relationship with a live-in-girlfriend. He has foolishly tried to overcome his past by attempting to conceal it. He has done virtually nothing to resolve his financial situation. After weighing the disqualifying and mitigating conditions under Guidelines J, H, E, and F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on criminal conduct, drug involvement, personal conduct, and financial considerations. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25:

Paragraph 1, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraphs 1.b-1.e:	Against Applicant
Paragraph 2, Guideline H (Drug Involvement):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant
Subparagraph 3.b:	For Applicant
Paragraph 4, Guideline F (Financial Considerations):	AGAINST APPLICANT
Subparagraphs 4.a-4.m:	Against Applicant

Conclusion

In light of all of the circumstances, 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.

LeRoy F. Foreman
Administrative Judge