



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-05015
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Emilio Jaksetic, Esquire, Department Counsel

For Applicant: *Pro Se*

February 26, 2009

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant submitted Electronic Questionnaires for Investigations Processing (e-QIP), dated January 11, 2008. On August 20, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline J (Criminal Activity) and Guideline E (Personal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended, the 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.

In Applicant's response to the SOR, notarized on September 9, 2008, he admitted two of the four allegations raised under Guideline J and admitted the two allegations, with explanations, raised under Guideline E. He also requested a determination based on the written record.

In response to Applicant's answer, Department Counsel prepared a File of Relevant Material (FORM), dated November 6, 2008. Applicant received the FORM on November 26, 2008. He declined the opportunity to submit a response to the FORM within 30 days of receipt of the FORM.

The case was forwarded to DOHA for assignment to an Administrative Judge for an administrative determination. The case was assigned to me on January 21, 2009. Based upon a review of the case file, pleadings, and exhibits, I find it is not clearly consistent with the national security to grant Applicant a security clearance.

Findings of Fact

Applicant is a 37-year-old driver employed by a Defense contractor. Applicant was married in 1994 and the couple has three minor children. Applicant also has two older children from a previous relationship.

Because Applicant submitted a brief response to the allegations and declined a hearing on the record, the facts of record are scant. In April 1997, Applicant was arrested and charged with Disturbing the Peace, Profanity, Disorderly Conduct, and Resisting Arrest. The case was never prosecuted. Applicant has no recollection of the incident, remembering only an incident in which he was asked by security police to turn down his music. In his materials, Applicant failed to provide any documentary evidence refuting the Government's submission of records regarding the charges from a county district court.¹

Applicant admits that in about September 1999, he was arrested and charged with Driving Under The Influence (DUI). He was sentenced to pay a fine. Also, Applicant's driver's license was suspended for one year.

On or about August 26, 2006, Applicant was charged with Possession of Cocaine, a felony, and Using Abusive Language.² Represented by counsel, Applicant pled guilty. On or about February 5, 2007, he was convicted of Possession of Cocaine and sentenced to Unsupervised Probation for two years, to 100 hours of community service, and to complete a drug awareness class.³

On January 11, 2008, Applicant executed his security clearance application. That form included "Section 23: Your Police Record-For this item, report information regardless of whether the record has been 'sealed' or otherwise stricken from the court

¹ Item 5 (Case Search Inquiry, dated Jul. 24, 2008).

² In his response to the SOR, Applicant sets forth his explanation that he took possession of his passenger's cocaine in order to protect his passenger, who had a criminal record. Applicant states that he thought his clean record would preclude his being charged for cocaine possession. Collateral estoppel applies, and Applicant cannot contest the validity of his felony conviction in this forum. Moreover, possession of cocaine on behalf of someone else does not constitute a defense to this crime.

³ Item 7 (Courts Case Information, dated Jun. 26, 2008).

record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607.” With regard to subsection a. (“Have you ever been charged with or convicted of any felony offense?”) and subsection d. (“Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?”), he answered “No.” Applicant answered those questions in the negative because it was his understanding that if he satisfied the court’s sentencing requirements (two years probation, community service, and completion of a drug awareness class) his case would be put in a hold status until February 9, 2009. As long as no further issues were presented, it was his understanding that the charge would be dismissed. Elsewhere, Applicant stated that he misunderstood the question and that, had he known the conviction was on his record, he would have answered differently.⁴

In submitting his materials, Applicant limited his submissions to his response to the SOR. No documentation was presented indicating his progress with regard to his period of unsupervised probation, 100 hours of community service, or completed a drug awareness class. No evidence was presented indicating the court has otherwise dropped the charges or nullified the conviction.

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, they 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 process is a conscientious scrutiny of a number of variables comprising 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting “witnesses and other evidence to

⁴ Item 2 (Answer to the SOR), at 4-6. Department Counsel argues that the differing explanations makes the suspect and not credible. FORM at 5-6.

rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .”⁵ The burden of proof is something less than a preponderance of evidence.⁶ The ultimate burden of persuasion to obtain a favorable clearance decision is on the applicant.⁷

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). “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁸ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁹ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.¹⁰ It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon consideration of the evidence, I find the following adjudicative guidelines to be the most pertinent to the evaluation of the facts in this case:

Guideline J – Criminal Conduct. *The Concern: Criminal activity 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.

⁵ See *also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

⁶ *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

⁷ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁸ *Id.*

⁹ *Id.*

¹⁰ Executive Order 10865 § 7.

Guideline E – Personal Conduct. *The Concern:* 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.

Analysis

Guideline J, Criminal Conduct

With respect to Guideline J (Criminal Conduct), the Government has established its case. Applicant admits that he was arrested, charged, and convicted of Possession of Cocaine, a felony, in August 2006. As part of that disposition, on February 5, 2007, he was sentenced to two years of unsupervised probation, 100 hours of community service, and required to complete a drug awareness class. He also admits that he was arrested, charged, and convicted of DUI in September 1999. Further, he failed to refute evidence that he was charged in 1997 with Disturbing the Peace, Profanity, Disorderly Conduct, and Resisting Arrest. Such admissions and conduct are sufficient to raise security concerns, invoke Criminal Conduct Disqualifying Conditions (CC DC) AG ¶ 31(a) (“a single serious crime or multiple lesser offenses”), CC DC AG ¶ 31(c) (“allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted”), and CC DC AG ¶ 31(d) (“individual is currently on parole or probation”) and initiate inquiry.

The 1997 incidents are remote in time and details are vague. Moreover, they are not accompanied by charges or allegations related to drugs or alcohol which would provide a nexus to the more recent convictions. Therefore, with regard to the 1997 charges, Criminal Conduct Mitigating Condition (CC MC) AG ¶ 32(a) (“so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment”) applies to a limited extent.

Applicant presented no evidence that he was pressured or coerced into excessively consuming alcohol in 1999 or possessing cocaine in 2006. Therefore, CC MC AG ¶ 32(b) (“the person was pressured or coerced into committing the act and those pressures are no longer present in the person’s life”) does not apply. Moreover, Applicant admits to the DUI conviction and the cocaine possession charge, obviating application of CC MC AG ¶ 32(c) (“evidence that the person did not commit the offense”) as to the actual offense. However, this section mitigating condition does apply with regard to SOR allegation 1.d (regarding the allegation discussed below that Applicant falsified his security clearance application)..

Neither alcohol abuse nor cocaine use are compatible with the professional driving of vehicles utilizing the public roads and highways, nor are they compatible with the maintenance of a security clearance. While nearly 10 years has passed since Applicant was last cited for alcohol abuse, Applicant failed to introduce any efforts

undertaken to rehabilitate himself following his conviction for DUI. Moreover, his maintenance of a clean record following that conviction was interrupted by a cocaine possession charge which occurred within the past two and a half years. Further, as part of the adjudication of that charge, Applicant was ordered to successfully serve two years of probation, complete 10 hours of community service, and complete a drug awareness class. Applicant failed to present evidence that any of these requirements have been successfully or substantially completed. Consequently, the available record evidence is that the court retains jurisdiction over the matter and the matter remains open. Given these facts, neither CC MC AG ¶ 32(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”) nor any remaining mitigating condition fully applies.

Guideline E, Personal Conduct

Under this guideline, examination is made of an Applicant’s reliability, trustworthiness, and ability to protect classified information based on his past personal conduct and actions. 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. Applicant is cited by the Government for failing to disclose that he had been charged with Possession of Cocaine, a felony, in response to Section 23 a. and d. on his security clearance application. It alleges that Applicant’s failure to do so was deliberate. Such facts, if true, give rise to Personal Conduct (PC) Disqualifying Condition (DC) 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*).

To his defense, Applicant’s explanation as to why he did not include this charge and conviction is not implausible. He stated that it was his understanding that if he satisfied the court’s sentencing requirements (two years probation, community service, and completion of a drug awareness class) his case, and no doubt his conviction, would be on hold through February 2009, providing him the opportunity to fulfill the court ordered requirements. Such a tentative arrangement could be confusing to a non-lawyer and its nuance difficult to absorb. Department Counsel is correct in noting that Applicant’s diverse arguments on this matter make them suspect. That does not, however, necessarily make them not credible. Nor is there any other indication or evidence indicating deliberate falsity on the part of Applicant. Without an element of falsity or deliberate concealment, the disqualifying condition cannot be sustained. Applicant has presented sufficient argument to mitigate personal conduct security concerns.

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 public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of the scant facts and circumstances introduced in this case, as well as the "whole person" factors noted above. Applicant is a mature man with a wife and several children. A professional driver by profession, he must be familiar with the dangers of alcohol abuse and drug use, both on the road and off. Similarly, he must be aware of the stigma such behavior carries when associated with the driving profession and with one seeking access to classified information. Although two and a half years have passed since his arrest for cocaine possession, he has failed to show successful completion of his two years of probation, 100 hours of community service, and drug awareness course. Also, he has failed to show that he has continued to distance himself from drugs and other criminal conduct to the satisfaction of the court retaining jurisdiction of the cocaine possession case, and to this tribunal's satisfaction as well.

Any doubt concerning personnel being considered for access to classified information must be resolved in favor of the national security.¹¹ Because Applicant's status with regard to his drug possession conviction and court ordered requirements remain unresolved, and not enough time has elapsed since his cocaine possession, security concerns remain. Clearance is denied.

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:	Against Applicant
Subparagraph 1.b:	Against Applicant

¹¹ AG ¶ 2(b).

Subparagraph 1.c
Subparagraph 1.d

For Applicant
For Applicant

Paragraph 2, Guideline E:

FOR APPLICANT

Subparagraph 2.a
Subparagraph 2.b

For Applicant
For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Clearance is denied.

ARTHUR E. MARSHALL, JR.
Administrative Judge