



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



In the matter of:

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ISCR Case No. 08-06822

Applicant for Security Clearance

**Appearances**

For Government: Emilio Jaksetic, Esquire, Department Counsel  
For Applicant: *Pro Se*

March 16, 2009

**Decision**

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the hearing transcript, pleadings, and exhibits, I conclude that Applicant failed to mitigate security concerns under Guideline J, Criminal Conduct, and Guideline E, Personal Conduct. His eligibility for a security clearance is denied.

Applicant executed a Questionnaire for Public Trust Positions (SF-85P) on September 29, 2000. He executed a security clearance application (SF-86) on December 2, 2004, and he executed an Electronic Questionnaire for Investigation Processing (e-QIP) on June 12, 2007. On November 17, 2008, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J, Criminal Conduct, and Guideline E, Personal Conduct. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative

guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

On December 1, 2008, Applicant answered the SOR in writing and elected to have a hearing before an administrative judge. The case was assigned to me on January 5, 2009. I convened a hearing on February 6, 2009, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government called no witnesses and introduced six exhibits, which were marked Ex. 1 through 6 and admitted to the record without objection. Applicant testified on his own behalf. He called no witnesses and offered eight exhibits, which were marked Ex. A through H and admitted to the record without objection. DOHA received the transcript (Tr.) of the hearing on February 17, 2009.

### **Findings of Fact**

The SOR contains four allegations of disqualifying conduct under AG J, Criminal Conduct (SOR ¶¶ 1.a. through 1.d.) and seven allegations of disqualifying conduct under AG E, Personal Conduct (SOR ¶¶ 2.a. through 2.g.). In his Answer to the SOR, Applicant admitted all Guideline J and Guideline E allegations and provided additional information. Applicant's admissions are admitted herein as findings of fact. (Answer to SOR; Tr. 21, 35; Ex. D.)

Applicant, who is 58 years old and employed as a senior developer analyst by a federal contractor, seeks a security clearance. He holds a Bachelor of Science degree, awarded to him in 1978. He also attended graduate school for one year in the 1980s, but did not earn an advanced degree. In his youth, he married and divorced. He married a second time in 2001. He and his wife are foster parents for three special needs children. His professional specialty is computer science. He reports an annual income of over \$100,000. (Ex. G; Ex. H; Ex. 3; Ex. 4; Tr. 18, 51-53, 65, 79.)

In 1968, when he was 18 years old, Applicant left home to attend college in another state. At college he encountered the "hippie" lifestyle and its drug culture. He began using illegal drugs, including LSD. He was arrested in 1969 and charged with (1) Unlawful Possession of Drugs for Sale, (2) Transportation/Sale/Manufacture of Drugs Without Prescription, and (3) Sale of Narcotics. At the time of his arrest, Applicant was under the influence of LSD and in possession of about 20 tabs of LSD, which he planned to sell to others. He pled guilty to the charges. (Ex. 4; Ex. 5; Answer to SOR; Tr. 76-78.)

As a result of his LSD use, he was committed to a state hospital for 30 days for observation. During this period, he violated hospital policy by leaving the hospital. He was subsequently committed to a second hospital for about eleven months. Thereafter, he was placed on six years of supervised probation. From June 1970 to June 1972, he returned to college and served two years of the supervised probation. (Ex. 4; Answer to SOR.)

In 1975, Applicant went with a friend to consult with a divorce attorney. Applicant concluded the attorney was arrogant and he was angered by the way the divorce attorney spoke to his friend. Three weeks later, in what he defined as retaliation, Applicant returned to the attorney's office, broke in, and stole a lamp and some pieces of furniture. Applicant was arrested and charged with two counts of Felony Burglary and two counts of Receiving Stolen Property. He pled guilty to the charges and was sentenced to six months in jail. (Ex. 4; Ex. 5; Tr. 79-81.)

Fourteen years later, in 1989, Applicant was working as a route driver for a soft drink company. Some of the truck drivers made and used methamphetamine to stay awake while they drove. They gave the methamphetamine to Applicant, who became dependent on the drug. He began to use and sell methamphetamine to others. In October 1989, Applicant was arrested and charged with (1) Possession of Controlled Substances With Intent to Distribute and (2) Use of a Firearm in Relation to Drug Trafficking. Applicant pled guilty to the charges in federal court and was sentenced to 10 years in federal prison (five years on each count). He served about eight years of the sentence in federal prisons and was paroled in April 1998. From about April 1998 to April of 2002 or 2003, he was on supervised probation. Since his release from prison in 1998, he has not been arrested or charged with any criminal behavior, and he has not used alcohol or illegal drugs. (Ex. 4; Ex. 5; Tr. 59, 82-86. 88.)

When he was in prison, Applicant met a man who mentored him and helped him to acquire training in computer technology. When he was released from prison, Applicant returned to school and studied diligently to acquire new technical skills and abilities. In 2002, his employer honored him as Employee of the Year. (Ex. A; Ex. G; Tr. 15-16.)

In September 2000, Applicant executed a Questionnaire for Public Trust Positions (SF-85P). Question 11 on the SF-85P directed the respondent to reply as follows:

List your employment activities, beginning with the present (#1) and working back 7 years. You should list all full-time work, part-time work, military service, temporary military duty stations over 90 days, self employment, other paid work, and all periods of unemployment. The entire 7-year period must be accounted for without breaks, but you need not list employment before your 16<sup>th</sup> birthday.

In response to Question 11, Applicant stated that he was employed as a driver for a soft-drink company between July 1992 to October 1997, when, in fact, he was incarcerated in federal prison during that time. (Answer to Statement of Reasons; Ex. 1; Ex. 4; Tr. 61-62.)

In December 2004, Applicant executed an SF-86. Question 21 on the SF-86 reads as follows:

**21. Your Police Record – Felony Offenses.** Have you ever been charged with or convicted of any felony offense? (Include those under the Uniform Code of Military Justice.) 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 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.

Applicant answered “no” to Question 21. He deliberately did not list his felony offenses in 1969, 1975, and 1989. (Answer to SOR; Ex. 2; Ex. 4; Tr. 61-62.)

When Applicant executed his SF-86 in December 2004, he was asked the following question:

**22. Your Police Record – Firearms/Explosive Offenses.** Have you ever been charged with or convicted of a firearms or explosives offense? 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 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.

In response to Question 22, Applicant answered “no. He deliberately failed to report his 1989 arrest and conviction for Use of a Firearm in relation to Drug Trafficking. (Answer to SOR; Ex.2; Ex. 4; Tr. 61-62.)

Applicant was also asked the following question when he executed his SF-86 in December 2004:

**24. Your Police Record – Alcohol/Drug Offenses.** Have you even been charged with or convicted of any offense(s) related to alcohol or drugs? 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 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.

In response to Question 24, Applicant answered “no.” He deliberately failed to disclose his arrests and convictions for drug-related offenses in 1969 and 1989, as specified *supra*. (Answer to SOR; Ex. 2; Ex. 4; Tr. 61-62.)

In June 2007, Applicant executed an e-QIP. Section 23 of the e-QIP asks about an Applicant’s police record. Section 23a asks: “Have you ever been charged with or convicted of any felony offense? (Include those under the Uniform Code of Military

Justice.)” Section 23b asks: “Have you ever been charged with or convicted of a firearms or explosives offense?” Section 23d asks: “Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?” An individual responding to these questions is advised to “report information regardless of whether the record in your case has been ‘sealed’ or otherwise stricken from the 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.”

Applicant answered “no” to the questions posed in Sections 23a, 23b, and 23d of the e-QIP. In doing so, he deliberately failed to disclose his arrests and convictions for the felony crimes of Unlawful Possession of Drugs for Sale, Transportation/Sale/Manufacture of Drugs Without Prescription, Sale of Narcotics, Felony Burglary, Receiving Stolen Property, Possession of Controlled Substances With Intent to Distribute, and Use of a Firearm in relation to Drug Trafficking. Additionally, he also deliberately failed to disclose being charged and convicted of a firearms offense and his drug offenses in 1969 and 1989, as specified *supra*. (Ex. 3; Ex. 4; Ex. 5; Tr. 61-62.)

After executing the SF-85P in 2000, the SF-86 in 2004, and the e-QIP in 2007, Applicant signed certifications which read as follows: “My statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both. (See section 1001 of title 18, United States Code.)” (Ex. 1; Ex. 2; Ex. 3)

Applicant admitted his falsifications. He explained his motivation for his intentional falsifications as follows:

I omitted these offenses from three clearance applications. The first I thought got by, so much time had passed. I knew I was wrong. Okay? So I replicated the info from one to another. I omitted it because I felt the government would not approve me, especially without an accomplished resume showing reform. (Tr. 14.)

I made a conscious decision [to omit information about past criminal behavior from his security clearance applications] thinking---feeling that I would not have the opportunity to get out of the hole I was in unless I established some sort of resume. (Tr. 62.)

Applicant’s current and past supervisors and co-workers regard him with admiration and respect. They consider him to be professional, highly productive, a “self starter,” responsible, and reliable. (Ex. B; Ex. C; Ex. D; Ex. E; Ex. F.)

## Policies

When evaluating an Applicant's suitability for a security clearance, an 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, the administrative judge applies these guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. 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 in seeking 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 the Criminal Conduct guideline “[c]riminal 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.

Applicant admits a criminal history that spans 20 years. In 1969, he was charged and convicted of drug-related offenses. In 1975, he was charged and convicted of two counts of Felony Burglary and two counts of Receiving Stolen Property. In 1989, he was charged and convicted of Possession of Controlled Substances With Intent to Distribute and Use of a Firearm in relation to Drug Trafficking, crimes for which he was sentenced to federal prison for ten years. He has not been arrested for any criminal behavior since his release from prison in 1998.

In addition to his criminal history, Applicant admits deliberately falsifying three security clearance applications by concealing his criminal conduct. Applicant’s criminal history and his deliberate falsification of that history on his security clearance applications raise concerns under AG ¶ 31(a) and AG ¶ 31(c).<sup>1</sup>

Two Criminal Conduct mitigating conditions might apply to Applicant’s case. If “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) might apply. 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 involvement,” then AG ¶ 32(d) might apply.

The record demonstrates that Applicant’s criminal behavior between 1969 and 1989 was serious and substantial. He has not been arrested or charged with criminal behavior since his release from federal prison in 1998. During his incarceration, he met a mentor who helped him develop skills and abilities he could use to earn a living after he was released from prison. After his release from prison, he married and began to build his life. He and his wife are reaching out as foster parents to special needs children. Applicant’s supervisors and colleagues praise his personal attributes and his professional skills. He demonstrates a good employment record and constructive involvement in his community.

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<sup>1</sup> AG ¶ 31(a) reads as follows: “a single serious crime or multiple lesser offenses.” AG ¶ 31(c) reads: “allegation or admission or criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.”

However, in 2000, 2004, and 2007, Applicant deliberately falsified three security clearance applications by concealing and failing to report his past criminal behavior. His unwillingness or inability to inform the government about his past criminal behavior raises concerns about his reliability, trustworthiness, and good judgment. Additionally, his deliberate falsifications suggest a failure in rehabilitation. I conclude that while AG ¶ 32(a) and AG ¶ 32(d) apply in part to mitigate Applicant's criminal conduct between 1969 and 1989, they do not apply to his more recent criminal conduct involving the deliberate falsification of his 2000, 2004, and 2007 security clearance applications.

### **Guideline E, Personal Conduct**

AG ¶ 15 explains why personal conduct is a security 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.

When Applicant completed and certified his security clearance applications in 2000, 2004, and 2007, he deliberately failed to report his past criminal behavior involving illegal drug use, possession, and intent to distribute, felony burglary and receiving stolen property, and use of a firearm in relation to drug trafficking. In his answer to the SOR, he admitted that his failure to disclose this information was deliberate falsification of material facts. At his hearing, he stated that he feared the government would not grant him a security clearance if it learned of his past criminal behavior. He further stated that this fear motivated him to conceal the truth from the government.

The allegations in the SOR raise a security concern under AG ¶ 16(a), which reads: "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."

Several Guideline mitigating conditions might apply to the facts of this case. Applicant's disqualifying personal conduct might be mitigated under AG ¶ 17(a) if "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts." If "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 process" and "[u]pon being made aware of the requirement to cooperate or provide information, the individual cooperated fully and completely," then AG ¶ 17(b) might apply. 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," then AG ¶ 17(c) might apply.

AG ¶ 17(d) might apply if "the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur." AG ¶ 17(e) might apply if "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress."

Applicant deliberately falsified material facts on three security clearance applications that he executed and certified as true in 2000, 2004, and 2007. Nothing in the record suggests that he took prompt good faith action to correct the omissions, concealments or falsifications before he was confronted with the facts. To the contrary, he deliberately continued to assert the falsifications for seven years. (AG ¶ 17(a).) Nothing in the record suggests that his failure to report his criminal behavior was caused or significantly contributed to by improper or inadequate advice specifically about the security clearance process from authorized individuals or legal counsel. (AG ¶ 17(b).) When he executed his security clearance applications, Applicant knew he had a 20-year record of criminal behavior. As a mature adult, he knew that his criminal behavior was not minor, so remote in time, so infrequent, or had occurred under such unique circumstances that it would not seriously impact his eligibility for a security clearance. (AG 17(c).) Applicant failed to provide documentation that he obtained counseling or had taken other positive steps that might alleviate the circumstances that caused his unreliable conduct and, as a result, such behavior was unlikely to recur. (AG ¶ 17(d).) Nothing in the record suggests that Applicant took positive steps to reduce or eliminate the vulnerability to exploitation, manipulation, or duress that his behavior caused. (AG ¶ 17(e).) I conclude, therefore, that none of the applicable personal conduct mitigating conditions applies to the facts of Applicant's case.

### **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 an 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 common sense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a mature adult who has been recognized by his supervisors and co-workers as sensible, responsible, and trustworthy. After his release from prison, he worked diligently to acquire relevant occupational skills. He married and became a foster father to special needs children. These actions suggested successful rehabilitation.

However, over a period of seven years, from 2000 to 2007, he completed three security clearance applications and deliberately failed to report his past criminal behavior, thereby creating a situation that could seriously mislead the government about his honesty, reliability, and trustworthiness. His falsifications were not minor: they went to the heart of his capacity for truthfulness, a critical qualification for one who would hold a security clearance. Applicant's failure to be truthful was deliberate. He made no effort to correct his falsifications before the government confronted him with his lack of candor. His deliberate falsifications are recent.

Overall, the record evidence leaves me with questions and doubts at the present time as to Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate the security concerns arising from his criminal conduct and personal conduct.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a.:	For Applicant
Subparagraph 1.b.:	For Applicant
Subparagraph 1.c.:	For Applicant
Subparagraph 1.d.:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a.:	Against Applicant
Subparagraph 2.b.:	Against Applicant

Subparagraph 2.c.:	Against Applicant
Subparagraph 2.d.:	Against Applicant
Subparagraph 2.e.:	Against Applicant
Subparagraph 2.f.:	Against Applicant
Subparagraph 2.g.:	Against 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. Eligibility for access to classified information is denied.

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Joan Caton Anthony  
Administrative Judge