



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



In the matter of:)	
)	
)	ISCR Case No. 08-08380
)	
)	
Applicant for Security Clearance)	

Appearances

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

March 25, 2009

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated the security concerns raised by his criminal and personal conduct. Eligibility for access to classified information is denied.

On November 21, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant 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.

Applicant answered the SOR on December 30, 2008, and requested a hearing before an administrative judge. The case was assigned to me on February 10, 2009. DOHA issued a notice of hearing on February 11, 2008, and the hearing was convened as scheduled on March 9, 2009. The Government offered Exhibits (GE) 1 through 3,

which were received without objection. Applicant testified on his own behalf and submitted Exhibits (AE) A through G, which were received without objection. I granted Applicant's request to keep the record open to submit additional information. Applicant submitted four documents which were marked AE H through K, and admitted without objection. Department Counsel's memo is marked Hearing Exhibit (HE) I. DOHA received the transcript of the hearing (Tr.) on March 17, 2009.

Procedural Rulings

Discovery and Notice

Applicant stated that he never received a copy of Department Counsel's discovery package, which included copies of the Government's exhibits. He also stated that he did not receive a copy of the notice of hearing. I advised Applicant of his right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing. I also advised Applicant that because he did not receive copies of the Government's exhibits until the morning of the hearing that I would postpone the case for at least several weeks. Applicant affirmatively waived his right to 15 days notice or a continuance, and requested to hold the hearing on March 9, 2009.

Motion to Amend SOR

Department Counsel moved to amend the SOR by changing the dates in all the allegations from "December 4, 2007" to "December 7, 2004." Applicant did not object to the amendment and it was granted. Applicant was asked if he desired additional time to address the allegations as amended. He affirmatively waived his right to additional time and stated that he wanted the hearing to proceed that day.

Findings of Fact

Applicant is a 43-year-old employee of a defense contractor. He attended college for a number of years but has not yet earned a degree. He is divorced, with no children.¹

Applicant was arrested on December 7, 2004, and charged with controlled dangerous substance (CDS), manufacture and distribute; destructive device, manufacture, possession, and distribution; narcotics production/equipment; CDS possession not marijuana; firearm/drug trafficking; possession explosive/incendiary with intent; explosive possession without license; and four counts of destructive device, manufacture/possess/distribute. He pled guilty to CDS, manufacture and distribute; and destructive device, manufacture, possession, and distribution. The remaining charges were Nolle Prosequi (dismissed). For the first charge, he was sentenced to 20 years confinement, with all but 29 days suspended, given credit for 29 days time served, and placed on probation for five years. He was sentenced to 20 years confinement on the second charge with all the confinement suspended. He is not required to report to a

¹ Tr. at 48-49, 73, 92-93; GE 1, 2.

probation officer. His probation is scheduled to run through July 2010. Once Applicant has completed his probation, the state has agreed to not oppose the court striking the guilty findings and imposing Probation Before Judgment for the charges, which would negate the conviction. He could then move to expunge his record.²

Applicant stated that he did not feel that he was guilty of any offense, but he accepted the plea bargain because his attorney told him that it would cost about \$40,000 to fight the case, and he did not have the money. He explains the circumstances leading to his arrest and conviction as follows. Applicant has been fascinated with science since he was a child. His hero was the noted scientist and inventor, Nikola Tesla, who accomplished most of his work in his home laboratory. Applicant studied physics, chemistry, and electrical engineering in college and obtained his dream job of working in a research laboratory. He held a security clearance without incident during his employment at the laboratory. After about ten years of working in the laboratory, he became very ill and lost the job in about 2000. He was out of work for several years. He started conducting experiments at a makeshift laboratory he built in his townhouse and yard.³

Applicant became interested in how easy it was to make illegal drugs, specifically methamphetamine, from over-the-counter cold medications. He began to experiment with the cold medications. His stated purpose was to alter the chemical composition of the active ingredient so that it could not be synthesized into methamphetamine. He stated he had a couple packages of the cold medication when he was arrested. Applicant was asked if he had actually manufactured any methamphetamine in his lab. He stated he was not certain because he attempted to chemically change the substance so that what was produced was not methamphetamine, but his experiment may have been unsuccessful and methamphetamine could have been produced.⁴

Applicant denied that he was attempting to make explosives, but he admitted that many chemicals can be combined to create an explosion. He stated that he was careful to keep any chemicals that could have an explosive reaction separated. He admitted that he was interested in amateur rockets, known as "candy rockets." The fuel for the rockets is sugar and "saltpeter." He stated that he was working on a transponder for the rockets so that the rockets could be located after they came down. He also had about 1,000 empty blasting caps. He was attempting to create an electromagnetic field (EMF) resistant blasting cap.⁵

² Tr. at 55-56, 80-89; Applicant's response to SOR; GE 1-3; AE E, H.

³ Tr. at 49-51, 74-76, 81-82, 93-95; GE 1, 3.

⁴ Tr. at 51-53, 59-60.

⁵ Tr. at 53-62, 80-81; GE 1, 3.

Applicant stated that he will never again conduct laboratory experiments outside the confines of an approved lab. Any outside research will be conducted purely theoretically.⁶

Applicant's employer is not aware of his criminal record. He stated that the company did not ask about his criminal record. He stated that if the company ever asks, he will tell them about his record. He listed his criminal record on his Questionnaire for National Security Positions (SF 86) signed on April 11, 2008.⁷

Applicant is highly regarded by friends, co-workers, and supervisors. He is regarded as an exceptional scientist and engineer, who is a hard worker, dependable, reliable, trustworthy, and honest. His performance appraisals have been excellent. He has received numerous awards and has been recognized by his company as employee of the year. He has published several scientific publications. He is active in his church and is a frequent volunteer.⁸

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 to be used 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, administrative judges apply the 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.

⁶ Tr. at 65, 68, 70, 94.

⁷ Tr. at 66-68; GE 1.

⁸ AE A-D, F, G, I-K.

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 the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that adverse 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

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant’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 ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

- (a) a single serious crime or multiple lesser offenses;

- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and

- (d) individual is currently on parole or probation.

Applicant was arrested in December 2004, and charged with numerous felony offenses. Through a plea bargain, he pled guilty to, and was convicted of, controlled dangerous substance, manufacture and distribute; and destructive device, manufacture, possession, and distribution. He was sentenced to 20 years confinement, with all but his

time served suspended. He was placed on probation for five years, which is scheduled to run through July 2010. The evidence is sufficient to raise all of the above disqualifying conditions.

Four Criminal Conduct mitigating conditions under AG ¶¶ 32(a) through (d) are potentially applicable:

- (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;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) evidence that the person did not commit the offense; and
- (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.

Applicant's criminal conduct occurred more than four years ago. He pled guilty to two serious offenses. All of his 20-year-sentence, except for the 29 days he served before the trial, has been suspended. His probation runs through July 2010. With his long confinement sentence suspended, Applicant faces the potential of lengthy prison time for any probation violation. This is Applicant's only criminal record. I find that his criminal behavior is unlikely to recur. AG ¶ 32(a) is partially applicable. I am unable to find full mitigation under AG ¶ 32(a) because Applicant remains on probation. I also find there is evidence of successful rehabilitation; including the passage of time without recurrence of criminal activity, remorse, higher education, good employment record, and constructive community involvement. AG ¶ 32(d) is applicable.

Applicant denied that he intentionally violated the law. He stated that he pled guilty because he could not afford the estimated \$40,000 that it would cost to plead not guilty and fully contest the charges. The doctrine of collateral estoppel prevents me from finding that he did not commit the offenses.⁹ Furthermore, Applicant has admitted that

⁹ The Appeal Board has addressed the doctrine of collateral estoppel:

It is well-settled that, with narrow exceptions not applicable in this case, an applicant is collaterally estopped from contending that he or she did not engage in the criminal acts for which he or she was convicted. Collateral estoppel applies to a criminal conviction whether the conviction is based on a verdict after trial or based on a guilty plea. Due process of law does not give an applicant the right to relitigate matters that have been adjudicated in a prior due process proceeding. Federal and state criminal proceedings are entitled to be given full recognition and respect under the doctrine of collateral estoppel because they are conducted under procedural and evidentiary requirements that exceed those applicable to industrial security clearance cases, and must satisfy Federal

he may have actually manufactured methamphetamine. He admitted that he had chemicals that when combined would be explosive and he admitted he had about 1,000 empty blasting caps. He did not submit sufficient evidence for a finding that he is innocent of the criminal offenses, even without the constraints of the collateral estoppel doctrine. AG ¶ 32(c) is not applicable to the offenses to which Applicant was convicted. It is applicable to the charges that were dismissed. He was not pressured or coerced into committing the criminal acts. AG ¶ 32(b) is not applicable.

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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 ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following is potentially applicable:

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant's personal conduct was also alleged under the Criminal Conduct guideline, as addressed above. His employer is not aware of his criminal record. He is on probation until July 2010, and he has a suspended 20-year-sentence hanging over his head. His criminal conduct has made him vulnerable to exploitation, manipulation, and duress. AG ¶ 16(e) is applicable.

and state constitutional requirements of due process that pay special attention to the rights of criminal defendants. Furthermore, DOHA Administrative Judges and this Board lack the jurisdiction and authority to pass judgment on the proceedings and decisions in criminal cases conducted by Federal and state courts.

In this case, Applicant entered a guilty plea to a felony drug charge as part of a plea agreement. Applicant's guilty plea constituted an admission that he committed the acts covered by the criminal charge to which he pleaded guilty. Applicant's motivation for entering the guilty plea is irrelevant to its legal effect. Having gained the benefits of a plea bargain, it is inequitable for Applicant to seek to retain the benefits of that plea bargain and then turn around and seek to repudiate his guilty plea and its legal effect in these proceedings.

(internal citations and footnotes omitted) ISCR Case No. 99-0116 at 2 (App. Bd. May 1, 2000).

Conditions that could mitigate Personal Conduct security concerns are provided under AG ¶ 17. The following are potentially applicable:

(c) 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;

(d) 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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

The discussion under the guideline for Criminal Conduct is equally appropriate for this guideline. AG ¶ 17(c) is partially applicable under the same rationale that I found AG ¶ 32(a) to be partially applicable. His criminal behavior is unlikely to recur. AG ¶ 17(d) is applicable. Applicant has fully revealed his criminal conduct to the Department of Defense. He has taken some steps to reduce his vulnerability to exploitation, manipulation, or duress. However, he is on probation under the threat of a suspended 20-year-sentence, and his company is completely unaware of his criminal record. He remains vulnerable to exploitation, manipulation, and duress. AG ¶ 17(e) is partially applicable.

Whole Person Concept

Under the whole person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall 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 43 years old. He is a highly regarded scientist and engineer. Clearly science is his life. When he was out of work for an extended period, he started experimenting in his townhouse. He chemically altered over-the-counter cold medications that are used to manufacture methamphetamine. He stated his intent was not to manufacture methamphetamine, but to change the chemical composition of the ingredient in the medication so that methamphetamine could not be produced from the medication. He admitted that he may have actually manufactured methamphetamine in the process. He also admitted that he had about 1,000 empty blasting caps and chemicals that when combined could be explosive. He pled guilty to controlled dangerous substance, manufacture and distribute; and destructive device, manufacture, possession, and distribution. Applicant's actions were either that of a man who is very bright, but extremely naïve; or someone who was attempting something much more nefarious. In either event, his actions constituted serious criminal violations.

Applicant is on probation until July 2010, under the threat of a suspended 20-year-sentence. His company is completely unaware of his criminal record. While I find that Applicant's criminal behavior is unlikely to recur, he is vulnerable to exploitation, manipulation, and duress. In sum, I conclude that security concerns are still present despite the presence of some mitigation.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated 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:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

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

Edward W. Loughran
Administrative Judge