



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



|                                  |   |                        |
|----------------------------------|---|------------------------|
| In the matter of:                | ) |                        |
|                                  | ) |                        |
|                                  | ) | ISCR Case No. 09-03022 |
|                                  | ) |                        |
| Applicant for Security Clearance | ) |                        |

**Appearances**

For Government: Daniel Crowley, Esq., Department Counsel  
For Applicant: *Pro se*

January 27, 2012

**Decision**

HEINY, Claude R., Administrative Judge:

Between 1991 and 1993, Applicant was found guilty of six offenses that resulted in him being sent to prison. Since his release from prison, he has been gainfully employed. When he completed a security clearance questionnaire, he listed some of his convictions, including the most serious and recent criminal conduct, but not all of his convictions. His five delinquent accounts have been paid. Applicant has rebutted or mitigated the security concerns under criminal conduct, personal conduct, and financial considerations. Clearance is granted.

**Statement of the Case**

Applicant contests the Department of Defense's (DoD) intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,<sup>1</sup> the Defense Office of Hearings and Appeals (DOHA) issued

<sup>1</sup> Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security*

a Statement of Reasons (SOR) on May 16, 2011, detailing security concerns under Guideline J, criminal conduct, Guideline E, personal conduct, and Guideline F, financial considerations.

On May 27, 2011, Applicant answered the SOR and requested a hearing. On August 1, 2011, I was assigned the case. On August 15, 2011, DOHA issued a Notice of Hearing for the hearing held on September 1, 2011.

The Government offered exhibits (Ex.) 1 through 18, which were admitted into evidence without objection. Applicant testified, as did his mother, and submitted Exhibits A through M, which were admitted into evidence without objection. The record was held open to allow Applicant to submit additional information. On August 29, 2011, additional material was submitted. Department Counsel had no objection to the material, which was admitted into the record as Ex. N through Q. On September 12, 2011, DOHA received the hearing transcript (Tr.).

### **Findings of Fact**

In Applicant's Answer to the SOR, he denied the factual allegations in SOR ¶¶ 1, 2, 2.a, 2.b, 3, and 3.e. He admitted the remaining factual allegations. His admissions are incorporated herein. After a thorough review of the pleadings and exhibits, I make the following findings of fact.

Applicant is a 41-year-old senior vehicle operator who has worked for a defense contractor since December 2008, and seeks to maintain a security clearance. (Tr. 32, 39) His project manager states Applicant is a good employee who does his job and carries himself in a professional manner. (Ex. B) His employer has no derogatory information about him. (Ex. C) His mother testified favorably on his behalf. Following the death of her sister, his mother came to live with her son. (Tr. 51)

At age 15, Applicant – then in junior high school – began using marijuana and cocaine. He dropped out of school in the 9<sup>th</sup> grade at age 16. (Ex. 16) If he could get it, he would use cocaine and marijuana daily. In 1992, Applicant then 21, moved from State A, where he was born and raised to State B. (Tr. 34) He fell in with the wrong crowd. He has come to realize that only his family has stuck with him. He does not remember many of the things he did in State A before his move to his current state. (Tr. 46)

In 1991, 1992, and 1993, Applicant – then between the ages of 21 and 23 – was arrested and found guilty of six offenses, all of which he admits. In March 1991, Applicant was charged with drug abuse and possession of cocaine, a felony. He was with three others when approached by the police. He was observed throwing an object to the ground, which was determined to be cocaine. (Ex. 3, 4) In November 1991, he pleaded guilty to attempted drug abuse, a misdemeanor, and was fined \$150 and

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*Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

sentenced to 30 days in jail. (Ex. 5) In October 1991, he was charged with driving under suspension/revocation, a misdemeanor. (Ex. 7) Also in October 1991, he was charged with "theft from a building." When he asked his mother for money, she refused to allow him into the house, but he entered against her wishes, and took \$70. (Ex. 8) In January 1992, he was found guilty, fined \$1,000, and sentenced to six months in jail.

In October 1992, Applicant was charged with forgery, a felony. He found a briefcase containing checks and tried to cash one of the checks for \$300. Before the transaction was completed he got the check back and returned the briefcase to its owner. He received a check of \$50 as a reward for returning the briefcase. He returned to the same loan cashing establishment and attempted to cash the reward check. He was then arrested for the earlier attempt to cash the \$300 check. (Ex. 11) He was found guilty and sentenced to five years probation. In October 1993, his probation was revoked due to an August aggravated robbery and he was sentenced<sup>2</sup> to four years in prison.

In November 1992, Applicant was charged with failure to ID and possession of cocaine, a felony. Applicant and an acquaintance were observed sitting in a parked car in a high-drug-activity area. When questioned by police, Applicant could not remember his birth date and gave the officer a false name. (Ex. 12) When arrested, he had a small amount of marijuana and cocaine in his pocket. He pleaded guilty and was sentenced to four years in prison. After serving eight months in jail, he received probation.

In August 1993, Applicant entered a convenience store where he had formerly worked. (Tr. 34) He asked the store clerk, a coworker he knew, for food and \$15, wrote a note to the manager in which he gave the manager his address, and in which he told the manager he could come by Applicant's work address on Monday, and he would repay the \$15. (Ex. 13) When the clerk refused his request, he came behind the counter, displayed a pocket knife, and took \$30. He was charged with aggravated robbery, a felony, found guilty and sentenced to 15 years in prison. He served eight years and nine months in prison. In June 2002, he was released from prison and placed on parole until September 2008. (Tr. 37) He successfully completed his parole.

In January 2009, Applicant completed a Questionnaire for National Security Positions, Standard Form (SF) 86. The plain language of the first four questions, in section 23, which related to his felony police record and drug convictions, ask if he was "currently" or had "ever been" charged with or convicted of certain offenses. (Ex. 1) The language of the final two questions limits the scope of the questions to the "last 7 years." In response to section 23 questions, he answered "yes" and listed his September 1993 aggravated robbery and possession of cocaine. He did not list his March 1991, possession of cocaine/drug abuse or his October 1992 forgery conviction. Applicant thought the scope of the questions was limited to the 10 years before he completed the form. (Tr. 44) He also stated his memory of what occurred in State A was not good.

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<sup>2</sup> The record is silent, but it appears this sentence ran concurrently with the sentence for aggravated robbery, with the total time served being eight years and nine months.

Applicant stated he had fully informed his employers about his convictions. (Tr. 45) He stated:

I try to tell everybody what's going on in my life, what I've done in my past. After that, if you feel like I should have it [a security clearance], okay. If you don't, okay. But I know in my conscience that I told you what I've done. I don't want this to come back to haunt me. (Tr. 70)

Since leaving prison, Applicant has always been gainfully employed. Upon his release, he immediately went to work at a dry cleaning establishment. (Tr. 37) He has moved from there to successive jobs, each job being better than the previous job. Since Applicant's parole, he has obtained a real estate license and a commercial driver's license, which cost him \$6,000. (Ex. 16, K, Tr. 38) He obtained a job at the officers' club before obtaining his current job. (Tr. 52) Applicant is hard working, always attempting to maintain two jobs at a time. (Tr. 37-38, 55) He works six days a week. (Tr. 68) His list of equipment qualifications is found at Ex. N.

When Applicant obtained his current job, he quit one of his other jobs and got behind on his debts. (Tr. 40) He had five accounts placed for collection, which totaled approximately \$9,000. The accounts included a credit card account (SOR 3.d, \$2,075), a telephone service account (SOR 3.e, \$533) and three different department store accounts: (SOR 3.a, \$2,253), (SOR 3.b, \$1,222), and (SOR 3.c, \$2,960). In 2009, shortly after obtaining his current job which he obtained in December 2008, he enrolled in a credit repair program. (Ex. L, Tr. 47) All of the delinquent SOR accounts have been satisfied. The credit card account (SOR 3.d) was paid. (Ex. D, Tr. 41) His telephone account (SOR 3.e) was settled and closed (Ex. I) as were the department store accounts: SOR 3.a (Ex. E), (Ex. SOR 3.b (Ex. M), and SOR 3.c (Ex. J). He has also paid one additional account and settled two more. (Ex. F, G, H, Tr. 40-42)

Applicant's credit bureau report (CBR) lists no outstanding delinquent debts and his credit scores are good. (Ex. A) He supports his mother who lives with him. (Tr. 16, 50) He has more than \$12,000 in his 401(k) retirement plan and more than \$2,000 in his bank accounts. (Exs. O, P, Q)

Applicant no longer drinks or uses illegal drugs. (Tr. 70) In August 1993, he stopped using illegal drugs when he was arrested for aggravated robbery. While in prison, he received drug counseling. He acknowledges he made some bad mistakes when he was younger. (Tr. 69) As to the robbery he stated:

Yes. It was just stupid. I just don't know how stupid I was, and I'm just trying to do what's right. And whether I get the clearance or not, I'm going to continue to do what's right, because I don't want to go back down that [road] no more. (Tr. 58)

I'm 41 years old, and I got – I don't have too many times to get life right, and this is what I'm trying to do. I've made so much accomplishments since I've been out . . . [a]ll I want to do is earn your trust. (Tr. 69)

I don't drink. I don't do drugs. I just take care of my mom, and I work. And that's all I want to be recognized for. And at some point in time, my past should be in my past. That was 20 years ago. (Tr. 70)

## **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the interests of 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.

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 to obtain 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order (EO) 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**

Adjudicative Guideline ¶ 30 expresses the security concern pertaining to criminal conduct as follows: “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.”

Between March 1991 and August 1993, Applicant was arrested and convicted six times. The charges involved: drug possession, driving under suspension, theft, forgery, and aggravated robbery. Disqualifying Conditions AG ¶ 31(a), “a single serious crime or multiple lesser offenses,” and AG ¶ 31(c), “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted,” apply.<sup>3</sup>

Security concerns raised by criminal conduct may be mitigated under AG ¶ 17(c), 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.” In 1991, he used illegal drugs, drove on a revoked driver's license, and entered his mother's home against her wishes, and took \$70. In 1992, he again possessed cocaine and also wrongfully attempted to cash a check he had found. But his most serious crime occurred in 1993, when he went to a convenience store where he had previously worked, knew the clerk, wrote a note to the manager telling the manager where he could come for money he intended to borrow. When the clerk refused his request to borrow money, he displayed a knife and took the money. This aggravated robbery resulted in a 15 year incarceration sentence of which he served more than eight years. His offenses were not “minor” within the meaning of this guideline.

The key question is whether Applicant's conduct is mitigated by the passage of time. There are no bright line rules for determining when conduct has been mitigated by the passage of time. The determination must be based on a careful evaluation of the

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<sup>3</sup> AG ¶ 31(f), “conviction in a Federal or State court, including a court-martial of a crime, sentenced to imprisonment for a term exceeding one year and incarcerated as a result of that sentence for not less than a year” does not apply because Applicant is not seeking a clearance granting him access to Special Access Programs (SAP), Restricted Date (RD), or Sensitive Compartmented Information (SCI). See Office of the Under Secretary of Defense memo: Interim Guidance for the Implementation of Public Law 110-181, Section 3002 (the Bond Amendment) Regarding Adjudication of Security Clearance, dated June 20, 2008.

totality of the evidence. See 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’s last misconduct was in August 1993, more than 18 years ago when he was 23 years old. He is now 41 years old. Since his release from prison, he has been gainfully employed. Immediately after leaving prison, he secured a job, which was followed by a succession of better jobs. He has worked for defense contractors since December 2008. He was remorseful, sincere, and credible at the hearing. I conclude that AG ¶ 17(c) is established.

Under AG ¶ 17(d) the security concerns raised by criminal conduct 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.” There has been no criminal conduct since 1993, he is remorseful, he has obtained his real estate license and CDL, and has a good employment record. He works hard and takes care of his mother.

Applicant has 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. Applicant realizes he made some bad mistakes when he was younger. In his earlier years, he used illegal drugs frequently. While in prison, he obtained drug counseling and has not used illegal drugs since his arrest in 1993. He does not drink. He has learned from his mistakes, matured, and become a responsible member of the community.

**Guideline E, Personal Conduct**

AG ¶ 15 expresses the security concern pertaining to personal conduct, which is 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.

Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government, when applying for a security clearance, is a security concern. But every inaccurate statement is not a falsification. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully. (AG ¶¶ 16(a), 16(b))

In January 2009, when Applicant completed his SF-86, he failed to list his March 1991 cocaine possession and 1992 forgery conviction, but did list his 1993 aggravated robbery conduct, which was his most serious and most recent criminal conduct. He also

listed one arrest and conviction for cocaine possession. The Government has shown Applicant's answers to questions in Section 23 were incorrect, but this does not prove he deliberately failed to disclose information about his police record. He has denied intentional falsification.

Even though the plain wording of the two questions asked if he had “ever” been charged with or convicted of certain offenses, Applicant believed the conduct was beyond the scope of the questions as some of the Section 23 questions are limited to the previous seven years. He revealed his most recent misconduct occurring more than 16 years earlier. He credibly testified he does not remember many of the things he did before his move to his current state. Having observed Applicant’s demeanor and listened to his testimony, I find his answers were not deliberate omissions, concealments, or falsifications. I find for him as to personal conduct.

### **Guideline F, Financial Considerations**

(AG) ¶ 18 articulates the security concerns relating to financial problems:

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.

Additionally, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

A person’s relationship with his creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts as agreed. Absent substantial evidence of extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a position of risk that is inconsistent with holding a security clearance. An applicant is not required to be debt free, but is required to manage his finances to meet his financial obligations.

Applicant had five collection accounts totaling approximately \$9,000. Disqualifying Conditions AG ¶ 19(a), “inability or unwillingness to satisfy debts” and AG ¶ 19(c), “a history of not meeting financial obligations,” apply. Applicant often worked two jobs. When he gave up one of this other job, his debts became delinquent. In 2009, he sought the services of a credit repair company and all the delinquent accounts have been paid. He has \$12,000 in his retirement account and more than \$2,000 in his bank accounts. The mitigating conditions in AG ¶ 20 (c) and ¶ 20 (d) apply.



## **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 relevant 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 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 all the facts and circumstances surrounding this case. When Applicant was younger, more than 18 years ago, he was with the wrong group of people, frequently used illegal drugs, and, as he admits, made some bad mistakes. But he is not the same person he was in his early 20s. He is now 41 years old, has matured, has learned from his mistakes, is hard working, and has been gainfully employed since leaving prison. His employer knows of his past. Not only are his delinquent obligations paid, but he maintains a 401(k) retirement fund and has money in the bank.

Given the passage of time, Applicant's contrition, his appreciation of the severity of his misconduct, his intervening growth, and the absence of any other dubious expressions of judgment, the record evidence leaves me without questions or doubts about his eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his criminal conduct, personal conduct, and financial considerations.

### **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, Criminal Conduct: | FOR APPLICANT |
| Subparagraphs 1.a –1.f:        | For Applicant |
| Paragraph 2, Personal Conduct: | FOR APPLICANT |

Subparagraphs 2.a and 2.b: For Applicant

Paragraph 3, Financial Considerations: FOR APPLICANT

Subparagraph 3.a – 3.e: For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant a security clearance. Eligibility for access to classified information is granted.

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CLAUDE R. HEINY II  
Administrative Judge