



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



In the matter of:)
)
) ISCR Case No. 09-03362
)
)
Applicant for Security Clearance)

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

January 31, 2011

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline J, Criminal Conduct, and Guideline E, Personal Conduct. Applicant’s eligibility for a security clearance is denied.

On March 15, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines J and E. 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 adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

In undated responses received on June 7, 2010, August 30, 2010, and November 1, 2010, Applicant requested a hearing before an administrative judge. The case was assigned to me on December 6, 2010. DOHA issued a Notice of Hearing on December 8, 2010. I convened the hearing as scheduled on January 6, 2011. The

Government offered Exhibits (GE) 1 through 25. Applicant did not object and they were admitted. The Government also offered an exhibit list that was marked as Hearing Exhibit I. Applicant and one witness testified on his behalf. He offered Exhibits (AE) A and B, which were admitted without objections. DOHA received the hearing transcript (Tr.) on January 13, 2011.

Procedural Issues

Department Counsel moved to amend SOR ¶1.o to read as follows: "You were arrested and incarcerated in [State] on two convictions for felony stealing." Applicant was made aware of his right to delay the case to provide him with proper notice and time to prepare. He waived the notice requirement and elected to proceed. The motion was granted.

Findings of Fact

Applicant admitted the allegations in SOR ¶¶ 1.a through 1.o, and 2.b. He denied the allegation in SOR ¶ 1.a. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is a 37 years. He is married a second time and has two children, ages four and two years old, and his wife is pregnant with their third child. Applicant is in the process of determining the paternity of two children from his first wife. Applicant has worked for a federal contractor since 2008.¹

Applicant enlisted in the Army in February 1993. In November 1993, he pled guilty pursuant to a pretrial agreement, at a general court-martial, to the offenses of forgery, disobeying a lawful order, and breaking restriction. Applicant stole 25 checks from a fellow soldier, forged them, and cashed them. He was sentenced to 48 months confinement and a dishonorable discharge. Under his pretrial agreement he was to serve 39 months confinement. He estimated he cashed checks in the total amount of \$6,000 to \$7,000. He was released on parole after he served 18 months confinement and was required to make restitution. He failed to make restitution and his parole was suspended.²

In approximately March or April 1996, Applicant was arrested for stealing a check from his grandfather. He forged the check, obtained cash, and made purchases for his girlfriend. Applicant pled guilty and was sentenced to a year and three months in jail. He went to a correctional facility and completed six months of the sentence before he was released.³

¹ Tr. 26-28.

² Tr. 28-32, 34.

³ Tr. 32-34.

In May 1996, Applicant was arrested for felony burglary. He was accused by his girlfriend of breaking into her house and stealing items. She failed to appear for the hearing and the charges were nolle prosequi. In April 1996, Applicant was charged with misuse of a telephone. He stated his girlfriend accused him of the offense. The charge was later nolle prosequi.⁴

In May 1996, Applicant was charged with four counts of theft for less than \$300, one count of theft over \$300, and unlawfully taking a vehicle. He pled guilty to both theft charges. He admitted he stole a car. Inside the car there was a briefcase that contained stock certificates. He was arrested at the airport attempting to buy a plane ticket. He was sentenced to 12 months in jail, 6 months was suspended, and he was placed on probation for two years.⁵

After Applicant's parole was suspended, officials from the Army apprehended him and returned him to confinement. There is confusion about when his apprehension actually occurred. His testimony is that he was incarcerated from May 1996 to July 1997. He had his parole hearing on August 1997, and was required to complete the remaining months of his court-martial sentence. His parole was suspended because he failed to make restitution and he failed to comply with the terms of the probation. He stated he was apprehended at the correctional facility where he was serving his sentence. He was then returned to the military to complete the terms of the court-martial sentence.⁶

Applicant was charged in October 1996 with six counts of forgery, six counts of uttering false documents, and theft over \$300. Applicant explained that he knowingly wrote checks on accounts that did not have sufficient funds. He explained that because he was already going to jail the jurisdiction decided to nolle prosequi the charges.⁷

In August 1999, Applicant took his sister's car without her permission. He was charged with tampering. The charge was later nolle prosequi.⁸

In September 1999, Applicant was charged with two counts of uttering a check without sufficient funds under \$300. He was found guilty of one count. He did not recall the sentence.⁹

⁴ Tr. 35, 47.

⁵ Tr. 36-40.

⁶ Tr. 40-45; GE 15.

⁷ Tr. 46-48.

⁸ Tr. 46, 48-49; GE 2

⁹ Tr. 51-53.

Applicant was arrested in about September 1999, and charged with burglary-first degree, theft over \$300, burglary-4th degree theft, malicious destruction of property valued more than \$300, and unauthorized removal of property. In November 1999 he was found guilty of felony theft over \$300. The burglary charge was nolle prosequi, and the remaining charges were not pursued. Applicant stole his sister's car. He was sentenced to 18 months in jail, with 389 days suspended, and he was placed on probation. He stated he spent about three to four months in jail and was on probation until 2001.¹⁰

Applicant stated that in approximately September 2000, he and was charged with stealing the night deposits from his employer. He stated he was charged with two felony counts of theft. This lead to a fugitive warrant being issued. He stated he was sentenced to seven years in jail, with five years suspended. He was to pay \$250 a month for seven years, as restitution. He made one payment and failed to report for probation as required. He stated he was aware at the time he was violating his probation. Applicant's failure to abide by the terms of his probation is the subject of the violation of probation warrant alleged in SOR ¶ 1. k. Applicant explained that the fugitive warrants alleged in SOR ¶¶ 1.1 dated January 2001, and 1.m dated July 2001, were issued for his failure to pay restitution as was ordered by the court.¹¹

In December 2001, after Applicant was released from jail, he was at a hotel with friends. The people he was with had a vehicle with stolen tags. Applicant was arrested and released on his personal recognizance. He stated he thought the charges had been dismissed. In approximately 2006 or 2007, he learned the charges were still pending. He hired an attorney and the charge was nolle prosequi in 2007.¹²

Applicant continued to violate the terms of his probation and additional warrants were issued for his arrest. In March 2002, he was apprehended on a fugitive warrant and returned to jail. He stated he was released from jail in October 2004 and remained on parole until October 2008. He stated that from October 2004 to the present he has not committed any criminal offenses. He has not had any association with people involved in criminal activity.¹³

Applicant signed his security clearance application on December 16, 2008. He estimated it took him about two weeks to complete. In response to question 23f, which asked Applicant if in the last seven years he had been arrested for, charged with, or convicted of any offenses not previous listed, he answered "no." Applicant answered

¹⁰ Tr. 53-56.

¹¹ Tr. 56-62; GE 24; I have not considered any of the arrests, charges, or convictions that were not alleged for disqualifying purposes. I have considered them for mitigation purposes, analyzing Applicant's credibility, and when considering the "whole-person" concept.

¹² Tr. 62-65; GE 23.

¹³ Tr. 59-67; SOR ¶ 1.k.

“yes” under question 23a that asked if he had been charged with or convicted of any felony offenses. He answered “yes” under question 23e that he had been subject to a court-martial. In the section requesting Applicant provide an explanation, he listed that in October 1993 he was court-martialed for larceny. He added the following comments: “in the early 1990s I had problems with the law [b]ut that chapter is now closed now.”¹⁴ Applicant did not list any of his other felony convictions. He stated he could not list his other felony convictions because he could not remember the dates and the details. He stated he disclosed on his employment application that he had a criminal record. Applicant denied he intentionally failed to disclose the fugitive from justice warrants as alleged. Applicant listed he was employed from October 2001 to November 2004, when in fact he was incarcerated. He listed as his place of residence from November 2001 to September 2004, a residence where he was not living because he was incarcerated during this period. Applicant also failed to disclose he had been fired from a job. Applicant stated he was not trying to hide anything, but rather had difficulty with the electronic questionnaire. He stated he was required to put some entry into the space or he could not complete the application. Applicant completed the terms of his parole in October 2008, six weeks before completing his SCA.¹⁵

Applicant admitted that if people he worked with were aware of his criminal past it would affect his professional standing. He has not discussed his criminal background with his supervisor or security officer. When asked what he thought would happen if they became aware of his criminal background, he stated he thought he would lose his job.¹⁶

Applicant was interviewed by an OPM investigator in January 2009. In July 2009, he was provided a copy of the interview summary and given an opportunity to correct and make changes to his statement. He signed the document indicating it was accurate and did not make any changes or corrections to it. Applicant had an opportunity to disclose to the OPM investigator that he omitted on his SCA his arrests after December 2001, his felony fugitive warrant, and to correct his other omissions. He did not disclose the accurate information or make changes. I find Applicant deliberately failed to disclose his felony fugitive warrant and other arrests after December 2001 on his SCA.¹⁷

Applicant admitted that he had problems with the law in the past, but he is now a changed person. He pays his taxes, he is a home owner, and he has a wife and children. He stated he is different than he was ten years ago. He has a good job and has received a promotion. He stated he no longer associates with others involved in

¹⁴ GE 1 at 34.

¹⁵ Tr. 70-88; 93-94; GE 1. I have not considered the information Applicant provided regarding his residence and employment for disqualifying purposes, but I have considered them when analyzing his credibility, for mitigating purposes, and the “whole-person” concept.

¹⁶ Tr. 88-89.

¹⁷ Tr. 90-92.

criminal activities. He stated because he served the remainder of his sentences and was released from probation, he was no longer required to pay restitution.¹⁸

A friend of Applicant's testified on his behalf. He met Applicant 11 years ago, but has really gotten to know him in the last five years. He is aware of Applicant's past. The witness serves as the associate pastor at the church where Applicant attends. It is also the church where Applicant's father is the pastor and the witness' supervisor. He believes Applicant is a changed person. He believes Applicant has changed his life and is now on the right track.¹⁹

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 are 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, 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 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, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and 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

¹⁸ Tr. 24-25, 67-69, 92.

¹⁹ Tr. 96-100.

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 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

AG ¶ 30 sets out the security concern for criminal conduct:

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.

I have considered the disqualifying conditions under Criminal Conduct AG ¶ 31 and the following are potentially applicable:

- (a) a single serious crime or multiple lesser offense;
- (b) discharge or dismissal from the Armed Forces under dishonorable conditions;
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;
- (d) violation of parole or probation, or failure to complete a court-mandated rehabilitation program; and
- (e) 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.

Applicant has an extensive criminal history. He was court-martialed and was convicted of forgery and other offenses. He was awarded 48 months confinement and a dishonorable discharge. He served 39 months in confinement before being released on parole. He was arrested other times for theft, burglary, unlawful taking of a motor vehicle, uttering false documents, forgery, malicious destruction of property, and unauthorized removal of property, which were both felony and misdemeanor offenses.

Applicant's parole was suspended and he violated his probation on several occasions. Applicant deliberately failed to disclose on his SCA his criminal arrest that occurred after December 2001. I find all of the above disqualifying conditions apply.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and the following 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; 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 has a significant criminal record. It began in 1993 and extended until his most recent criminal violation under Title 18 United States Code § 1001, when he intentionally failed to disclose on his SCA his arrest in 2002. Although Applicant's last arrest was in 2002, he was incarcerated until 2004, and he failed to be truthful on his SCA, raising doubts about his rehabilitation. He was released from incarceration in 2004 and from parole in October 2008. I have considered Applicant's long pattern of arrests, convictions, incarcerations, and parole and probation violations. I have also considered that he is attempting to change his life, has a job, and attends church, and no longer associates with people involved in criminal activity. I am concerned that Applicant failed to be honest on his SCA, which raises questions about his rehabilitation and trustworthiness. Not enough time has passed to conclude that Applicant's criminal conduct is in his past. There is insufficient evidence to conclude Applicant is successfully rehabilitated. Therefore, I find none of the above mitigating conditions apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern for personal conduct;

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. I have specifically considered:

(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; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging activities which, if known, may affect the person's personal, professional, or community standing.

Applicant intentionally and deliberately failed to disclose all of his criminal activity. Applicant has an extensive criminal background that includes numerous arrests, multiple convictions for felonies and misdemeanors, and significant periods of incarceration. I find the above disqualifying conditions apply to Applicant's personal conduct.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered the following mitigating conditions under AG ¶ 17:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

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

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with person involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

There is no evidence that Applicant made prompt, good-faith efforts to correct his omission. There is no evidence Applicant's concealment and omission was caused or contributed to by improper or inadequate advice. The concealment and omission is serious because it was accompanied by Applicant also listing false information about his employment and residence during a time when he was actually incarcerated. This supports the fact that Applicant was attempting to hide some of his past conduct. Applicant's convictions are serious. He has a 15-year history of criminal conduct, from 1993 to 2008. He failed to be completely honest on his SCA, and his criminal arrests and convictions for crimes of forgery, theft, and burglary cast doubt on his reliability, trustworthiness, and judgment. Although Applicant has made changes in his life and appears to no longer associate with people involved in criminal activity, his extensive criminal history, his relatively recent release from parole, and his failure to be honest on his SCA causes continued concern. I find none of the above mitigating conditions 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 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 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. I have incorporated my comments under Guidelines J and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment. Applicant

was convicted by a general court-martial and received a dishonorable discharge. Pursuant to his pretrial agreement he was to be confined for 39 months, and was released on parole after 18 months. He violated his parole and it was suspended. Applicant was arrested, charged, and convicted of numerous felony and misdemeanor offenses. He was incarcerated for significant periods. He failed to abide by the terms of his probation. When confronted with providing accurate information about his past, he concealed information. Although Applicant stated he is a changed man, it is too early to come to that conclusion. His recent failure to be truthful on his SCA continues to raise questions about his reliability, trustworthiness, and judgment. Applicant failed to meet her burden of persuasion. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the guidelines 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
Subparagraphs 1.a-1.o:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	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 a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge