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

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| In the matter of: | ) | |
| | ) | |
| [Redacted] | ) | ISCR Case No. 09-07151 |
| | ) | |
| Applicant for Security Clearance | ) | |

## Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: *Pro se*

September 30, 2011

## Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines J (Criminal Conduct). Eligibility for access to classified information is denied.

## Statement of the Case

Applicant submitted a security clearance application on August 17, 2010. On June 6, 2011, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline J. DOHA acted 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) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR on June 13, 2011; answered it on June 24, 2011; and requested a hearing before an administrative judge. DOHA received the request on June 27, 2011. Department Counsel was ready to proceed on July 20, 2011, and the

case was assigned to me on July 25, 2011. DOHA issued a notice of hearing on August 17, 2011, scheduling it for September 8, 2011. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibit (AX) A, which was admitted without objection. DOHA received the transcript (Tr.) on September 16, 2011.

## Findings of Fact

In his answer to the SOR, Applicant admitted all the allegations in the SOR. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant has worked for a defense contractor since December 2003. He began an apprenticeship program in June 2005 and completed the electrician apprenticeship in June 2007. He then applied for an advanced apprenticeship, became a design apprentice, and completed this apprenticeship in June 2010. During his apprenticeship, he received two associate's degrees from a community college. He is now taking college courses leading to a bachelor's degree. (Tr. 31.) He has never held a security clearance.

Applicant married in July 2006 and separated in October 2007. He and his wife have a five-year-old child, and his wife has a thirteen-year-old daughter from a previous relationship. He and his wife are trying to work out the difficulties in their marriage. (Tr. 31.) He recently purchased a home. (Tr. 27.)

In 1999, Applicant was in college. He and two roommates found a backpack containing books, personal articles, and a checkbook. They did not attempt to locate the owner. In April 2000, they tried to use one of the checks to pay for a pizza. Applicant did not write the check, but he handed it to the person delivering the pizza. In July 2000, he was charged with conspiracy to commit a felony, *i.e.,* uttering a forged check. (GX 4.) In August 2000, he pleaded guilty to acting under false pretenses, a misdemeanor, and he was sentenced to probation for one year, which he successfully completed. (GX 5 at 7-8.)

In February 2010, Applicant was charged with selling bootleg digital video discs (DVDs), a felony. He had about 20 DVDs that he had purchased from various individuals on the street. He knew that they were bootleg copies. (Tr. 49.) At the hearing, he testified that he bought the DVDs for personal use and did not intend to resell them. (Tr. 50.) In February 2012, he appeared in court with counsel, and disposition of the charges was deferred for one year. He was required to pay court costs of $400, but he had not paid them as of the hearing date. (Tr. 38-39; GX 3.)

Applicant owns a firearm, and he has purchased and sold several firearms in the past. (Tr. 39.) In July 2010, Applicant tried to purchase a firearm at a gun show. As part of the purchase, he was required to complete a statement of criminal history. The document was not introduced in evidence, and the only evidence of the content of the document is Applicant's statement to a security investigator in September 2010 and his

testimony at the hearing. He told the security investigator he answered "No" to a question whether he had ever been convicted of a felony. At the hearing, he testified that he answered "No" to a question asking "have I been charged or convicted of an offense, or a felony, or something like that." (Tr. 28.)

Applicant submitted the document to the vendor and waited for his purchase application to be approved. After waiting about two hours, he was arrested and charged with falsifying the criminal history form.

Applicant told the arresting officer that he had not falsified the form because he had not been convicted of a crime. He told a security investigator that he answered "No" to all the questions because he had never been convicted of a felony. (Tr. 28-29; GX 5 at 7-8.) At the hearing, he testified he had previously purchased firearms and so he "just went down and checked no, no, no, for everything, not realizing that one of the boxes was, I guess, saying have I been charged or convicted of an offense, or a felony, or something like that." At the hearing, he admitted he should have answered "Yes" to one of the questions. (Tr. 41.)

In November 2010, Applicant appeared in court with counsel and pleaded guilty to obstruction of justice, a misdemeanor. The factual predicate for the lesser offense is not reflected in the record. He received a suspended sentence to jail for 12 months, and he was placed on probation for three years. (GX 2.) He testified that he did not report this conviction to the court that deferred disposition on the bootleg DVD case, and he did not know if he was required to report it. (Tr. 42-43.)

The attorney who represented Applicant at the trials of the charges involving the bootleg DVDs and the criminal history form submitted a statement reciting that the disposition of the charges in both cases was pursuant to a plea agreement to avoid having felony charges pending for a long time. The attorney has known Applicant for more than 20 years, and he considers him to be reliable, trustworthy, dependable, and "the polar opposite of what one traditionally thinks of when you see that someone has been charged with a crime." (AX A.)

## Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead,

recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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 about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

## Analysis

### Guideline J, Criminal Conduct

The SOR alleges Applicant was arrested in July 2010 for making a false statement on a criminal history form, a felony; that he pleaded guilty to obstruction of

justice, a misdemeanor; and that he was sentenced to 12 months in jail, suspended and placed on probation for three years (SOR ¶ 1.a). It also alleges that in February 2010, he was arrested for selling bootleg DVDs, a felony, and that disposition was deferred until February 21, 2012 (SOR ¶ 1.b). Finally, it alleges that in April 2000, he was charged with conspiracy to commit a felony, found guilty of a misdemeanor, and placed on probation for one year (SOR ¶ 1.c).

The concern raised by criminal conduct is set out in AG ¶ 30: "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." Disqualifying conditions under this guideline include AG ¶ 31(a) ("a single serious crime or multiple lesser offenses"); AG ¶ 31(c) ("allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted"); and AG ¶ 31(d) ("individual is currently on parole or probation").

The circumstances of the arrests in April 2000 and February 2010 are well-documented in the record. The circumstances of the July 2010 arrest are less clear, because there is no documentary evidence of the questions on the document he was alleged to have falsified. There also is no indication in the record of the factual predicate for his guilty plea to obstructing justice.

I found Applicant's explanation for answering "No" to all the questions on the criminal history form unconvincing. He is an intelligent, educated adult. He had completed the criminal history form on several previous occasions in connection with previous gun purchases. He was pending trial for a felony offense when he completed the criminal history form. He admitted at the hearing that he should have answered "Yes" to at least one of the questions. Either he intentionally falsified the form or he was grossly negligent in completing it. Either explanation raises serious questions about his ability to adhere to rules and regulations pertaining to classified information.

Based on the evidence of record, I conclude that AG ¶¶ 31(a), (c), and (d) are established. Thus, the burden shifted to Applicant to rebut, explain, extenuate, or mitigate the facts.

Security concerns under this guideline may be mitigated by evidence that "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). The first prong of this mitigating condition focuses on whether the criminal conduct was recent. There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of the 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 arrest in April 2000 occurred when he was an immature college student. He had no further criminal involvement for 11 years. During that time he found gainful employment, completed a challenging apprenticeship program, obtained two associate's degrees, and earned additional college credits toward a bachelor's degree. On the other hand, his two felony arrests in 2010 are recent. His February 2010 arrest is still pending disposition, and he is on probation for his July 2010 offense. None of the offenses occurred under unusual circumstances making them unlikely to recur. I conclude that AG ¶ 32(a) is established for the April 2000 arrest, but not for the others.

Security concerns based on criminal conduct also may be mitigated by "evidence that the person did not commit the offense." AG ¶ 32(c). Applicant denied falsifying his criminal history form, but I found his explanation unconvincing. I conclude that AG ¶ 32(c) is not established.

Finally, security concerns 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." AG ¶ 32(d). Applicant has an impressive employment record and has made significant strides in furthering his education, but he is still under court supervision for his two arrests in 2010. I conclude that insufficient time has passed to determine if he is rehabilitated. Thus, I conclude that AG ¶ 32(d) is not established.

**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 the applicant's conduct and all relevant circumstances. An 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 have incorporated my comments under Guideline J in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant expressed remorse at the hearing, but his remorse is for the adverse consequences of his conduct on his career aspirations rather than his lack of honesty. His current job is his first opportunity for a meaningful career. He expressed enthusiasm for his job and pride in his work. He is intelligent and determined to improve himself. However, he needs more time to demonstrate a sense of obligation and the ability to comply with rules and regulations.

After weighing the disqualifying and mitigating conditions under Guideline J, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on criminal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

## Formal Findings

I make the following formal findings on the allegations in the SOR:

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| Paragraph 1, Guideline J (Criminal Conduct): | AGAINST APPLICANT |
| Subparagraph 1.a: | For Applicant |
| Subparagraphs 1.b.-1.c: | Against Applicant |

## Conclusion

I conclude that 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.

LeRoy F. Foreman
Administrative Judge