



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



In the matter of:	)	
	)	
	)	ISCR Case No. 09-07687
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Ray T. Blank, Jr., Esquire, Department Counsel  
For Applicant: Eric A. Eisen, Esquire

May 31, 2011

**Decision**

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METZ, John Grattan, Jr., Administrative Judge:

Based on the record in this case,<sup>1</sup> Applicant's clearance is denied.

On 21 September 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines J and E, Criminal Conduct and Personal Conduct.<sup>2</sup> Applicant timely answered the SOR, requesting a hearing. DOHA assigned the case to me 7 December 2010, and I convened a hearing 11 January 2011. DOHA received the transcript (Tr.) 20 January 2011.

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<sup>1</sup>Consisting of the transcript (Tr.), Government exhibits (GE) 1-4, and Applicant exhibits (AE) A-C.

<sup>2</sup>DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the adjudicative guidelines (AG) effective within the DoD on 1 September 2006.

## Findings of Fact

Applicant admitted the criminal conduct allegations, but denied falsifying his clearance application. Accordingly, I incorporate his admissions as findings of fact. He is a 60-year-old IT Director employed by a defense contractor since August 2007. He has not previously held a security clearance. He has an undergraduate degree in pharmacy, an MBA, and numerous IT certifications.

In 1990, Applicant and six co-defendants (two doctors, three pharmacists, and a medical clinic owner) were indicted on at least 148 felony counts involving the unlawful distribution of controlled substances through a small pharmacy chain he owned. He was tried by jury and found guilty, contrary to his pleas, of 16 felonies. The charges included racketeering conspiracy, racketeering, conspiracy to unlawfully distribute controlled substances, conspiracy to commit mail fraud, mail fraud and aiding and abetting mail fraud, unlawful distribution of controlled substances and aiding and abetting unlawful distribution, medicaid fraud, medicaid kickback conspiracy, and medicaid kickbacks. Applicant's co-defendants were also convicted. In January 1992, Applicant was sentenced. His appeal was denied and he served 42 months in jail, six months in a halfway house, and three years supervised probation. He completed the requirements of his probation and received his full release in October 1999.

Applicant states that he was offered a plea deal to testify against other defendants, but declined because he did not think he had done anything wrong. His co-defendants were offered similar deals and also declined. They were all convicted as well. They completed their sentences and went back to their former professions. Applicant changed to a different profession because he did not want to run the risk of running afoul of the law again. Even today, he claims he does not know what he did wrong.

When Applicant applied for a security clearance in June 2009 (G.E. 1), he deliberately concealed this arrest by answering "no" to questions 22 (c) (Have you EVER been charged with any felony offense? and 22 (e) (Have you EVER been charged with any offense(s) related to alcohol or drugs?). Applicant denies that he intended to mislead the Government. He explains that he received guidance about filling in his clearance application that stated he only had to answer questions with information from the last seven years.

Before completing his clearance application, Applicant, having never before applied for a clearance, contacted a long-time friend (now co-worker) who had been involved in the clearance process before to get advice on how to complete the form. The friend noted the seven-year reporting period for secret clearances and recommended Applicant provide work history and residence data for the last seven years (AE A). He received similar guidance from the company's assistant facility security officer (FSO) (AE B), who also provided a copy of the application instructions. The advice Applicant received from his friend and the FSO does no more than reiterate the special instructions for completing the form on page 3 of the application (GE 1). The

instructions specifically point out that the questions regarding residence, employment, and education require seven years of information. The instructions also direct an applicant to contact the company FSO if unsure of the amount of information to provide.

The clearance application proper contains sections that specifically limit the answers to the last seven years, sections that implicitly ask for information without limitation, and sections that specifically ask if an applicant has ever been involved in the conduct asked about. Applicant claims that as he went through the clearance application, he focused only on the last seven years and must have just read past the questions which were not so limited. He took two days to complete his clearance application. However, he did not ask his friend or his security officer specifically about whether he should report his felony conviction. Indeed, although he told the personnel official who hired him about his conviction, that official is no longer with the company, and no other official—including his FSO—is aware of the conviction. In addition, he did not ask his friend specifically about whether he should report his conviction. He never went back to check his clearance application for errors and he did not talk to his friend or his FSO about the application after completing it.

Applicant's wife, who he met in late 2000, considers him honest and generous. His rabbi considers him a man of high principle, whose integrity and character are beyond reproach.

### **Policies**

The AG list factors for evaluating a person's suitability for access to classified information. Administrative judges must assess disqualifying and mitigating conditions under each issue fairly raised by the facts and situation presented. Each decision must also reflect a fair, impartial, and commonsense consideration of the factors listed in AG ¶ 2(a). Any one disqualifying or mitigating condition is not, by itself, conclusive. Still, specific adjudicative guidelines should be followed when a case can be measured by them, as they represent policy guidance governing access to classified information. Considering the SOR allegations and the evidence as a whole, the relevant adjudicative guidelines are Guideline J (Criminal Conduct) and Guideline E (Personal Conduct).

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to applicant to refute, extenuate, or mitigate the Government's case. Because no one has a right to a security clearance, the applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the requisite judgement, reliability, and trustworthiness of those who must protect national interests as their own.

The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the government.<sup>3</sup>

### Analysis

The Government established a case for disqualification under Guideline J and E, and Applicant did not mitigate the security concerns. Applicant’s conviction on 16 felony counts constitutes multiple serious offenses.<sup>4</sup> Particularly disturbing is the fact that the conspiracy and fraud charges involve honesty offenses that go beyond mere criminal conduct.

None of the Guideline J mitigating conditions apply. While the crimes are distant, they are not particularly unusual and are such that they continue to cast doubt on Applicant’s reliability, trustworthiness, and judgment.<sup>5</sup> Similarly, there is substantial evidence of successful rehabilitation viewed by the passage of time, restitution, higher education, and good employment record, but the lack of remorse—or any acknowledgment of the criminality of his conduct—continues to raise security concerns.<sup>6</sup>

I also conclude Applicant deliberately concealed his felony convictions from the government.<sup>7</sup> He did so knowing that these issues had security concerns for the Government. Applicant is highly educated, and the advice he received about completing his clearance application was merely generic. The clearance application instructions themselves emphasize the seven-year period for residence, employment, and education. The questions themselves specify what period of time to cover, to include “EVER.” Applicant asked no one specifically about whether he should report his felony convictions, did not discuss his application with anyone afterward, and did not revisit his application to check for errors. If Applicant is to be believed, he hesitated not at all when he came to the questions about felony or drug convictions. This is simply not credible.

None of the Guideline E mitigating conditions apply. The concealed information was relevant to a clearance decision. Applicant did not disclose the arrest until his

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<sup>3</sup>See, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

<sup>4</sup>¶31 (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;

<sup>5</sup>¶32 (a) so much time has elapsed, 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;

<sup>6</sup>¶32 (d) there is evidence of successful rehabilitations; 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;

<sup>7</sup>¶16 (a) deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, . . . [or] determine security clearance eligibility or trustworthiness. . . ;

second subject interview.<sup>8</sup> The advice Applicant received about filling out his application was not incorrect, but was so generic that it cannot shield Applicant from the consequences of failing to respond truthfully to the plain language of the questions.<sup>9</sup>

Applicant's failure to disclose his felony convictions demonstrates a lack of candor required of cleared personnel. The Government has an interest in examining all relevant and material adverse information about an Applicant before making a clearance decision. The Government relies on applicants to truthfully disclose that adverse information in a timely fashion, not when it is perceived to be prudent or convenient. Further, an applicant's willingness to report adverse information about himself provides some indication of his willingness to report inadvertent security violations or other security concerns in the future, something the Government relies on to perform damage assessments and limit the compromise of classified information. Coupled with the false statements inherent in his fraud convictions in 1992, Applicant's conduct suggests he is willing to put his personal needs ahead of legitimate Government interests. I resolve Guideline J and E against Applicant.

Beyond the specific guidelines alleged by the Government, the generally applicable disqualifying and mitigating conditions lead to the same result. Falsifications are a core security concern [AG ¶2(a)(1)]. His behavior was deliberate and not due to circumstances beyond his control [AG ¶2(a)(2); AG ¶2(a)(5)]. His misconduct was both recent in not frequent [AG ¶2(a)(3)]. Applicant was not a neophyte when he made his falsifications [AG ¶2(a)(4)]. Rehabilitation or behavioral changes are difficult to measure under these circumstances [AG ¶2(a)(6)]. He clearly sought to mislead the Government about his felony convictions [AG ¶2(a)(7)]. Applicant's willingness to put his personal needs ahead of legitimate Government interests increases his potential vulnerability and he has not demonstrated that the misconduct is unlikely to recur [AG ¶2(a)(8); AG ¶2(a)(9)]. The concern is whether Applicant would disclose situations or circumstances, whether deliberate or inadvertent, that raise security concerns. Overall, the record evidence leaves substantial doubt about Applicant's eligibility and suitability for a security clearance. Accordingly, I conclude Applicant has not mitigated the security concerns arising from his falsification or his felony convictions.

### **Formal Findings**

Paragraph 1. Guideline J:                   AGAINST APPLICANT

Subparagraph a:                           Against Applicant

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<sup>8</sup>¶17 (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

<sup>9</sup>¶17 (b) the . . . 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.

Paragraph 2. Guideline E:           AGAINST APPLICANT

Subparagraph a:                   Against Applicant

**Conclusion**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance denied.

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JOHN GRATTAN METZ, JR  
Administrative Judge