



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 10-07591
)	
Applicant for Security Clearance)	

Appearances

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

03/13/2014

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines J (Criminal Conduct) and E (Personal Conduct). Security concerns under Guideline J are mitigated, but security concerns under Guideline E are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on March 7, 2010. On May 9, 2013, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines J and E. DOD acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by DOD on September 1, 2006.

Applicant received the SOR on May 27, 2013, and answered it on May 29, 2013. On June 12, 2013, he requested a hearing before an administrative judge. Department Counsel was ready to proceed on December 23, 2013, and the case was assigned to

me on January 3, 2014. On January 13, 2014, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, scheduling it for February 4, 2014. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through J, which were admitted without objection. I held the record open until February 21, 2014, to enable Applicant to submit additional documentary evidence. He timely submitted AX K through P. DOHA received the transcript (Tr.) on February 19, 2014.

Findings of Fact

In his answer to the SOR, Applicant admitted SOR ¶¶ 1.a-1.e. He denied SOR ¶¶ 1.f, 1.g, 2.a, and 2.b. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 45-year-old cyber security consultant employed by a defense contractor. He has worked for his current employer since December 1999. He has never held a security clearance.

Applicant was married in June 1989, but the marriage was annulled in January 1993. He has not remarried, and he has no children.

Applicant completed four years of high school but did not receive a diploma because he lacked one credit. He received a general educational development (GED) diploma in 1991 or 1992. (Tr. 28-29.)

In March 1987, while still in high school, Applicant was charged with (1) robbery in the first degree, by forcible theft with a deadly weapon, a felony; (2) criminal possession of a weapon, a felony; (3) criminal possession of stolen property, a felony; and (4) criminal possession of stolen property, a misdemeanor. Applicant testified that he and a friend were "just hanging out" and they decided to rob someone. He did not know that his friend had a handgun until he brandished it during the robbery. They ran away but were apprehended on the same day. Applicant was released on his own recognizance and then skipped his court date. (GX 5 at 4; Tr. 30-35.)

In December 1987, Applicant was charged with (1) robbery in the first degree, causing serious injury, a felony; (2) criminal possession of stolen property, a felony; (3) assault with intent to cause physical injury, a misdemeanor; and (4) unlawful possession of noxious matter, a misdemeanor. Applicant testified that this incident arose during a shoplifting in which he stole a leather jacket. He was accused of striking a security guard in the store. He denied having any "noxious matter." He was detained for a "few days," arraigned, and released on his own recognizance. He skipped his court appearance. (GX 5 at 3; Tr. 35-37.)

In December 1987, seven days after the shoplifting incident, Applicant was charged with (1) assault with intent to cause physical injury to a police officer, a felony;

(2) grand larceny in the fourth degree, a felony; (3) resisting arrest, a misdemeanor; and (4) criminal possession of stolen property, a misdemeanor.¹ He testified that this incident was a pickpocketing, and he was apprehended by the local transit police. He left the state to avoid prosecution. (GX 5 at 3; Tr. 37-38.)

In July 1988, shortly after Applicant moved to another state to avoid the pending criminal charges, he was charged with possession of cocaine with intent to distribute. He testified that he started selling drugs because he needed money. He testified that he sold cocaine about ten times before he was arrested. He spent 51 days in jail awaiting trial and then was released on bond. In October 1988, he was charged with selling cocaine, detained overnight, and released on his own recognizance.² The June 1988 charge was dismissed in late 1988. (GX 2 at 5-6; GX 5 at 3; Tr. 39-43.)

In January 1989, Applicant was charged with (1) attempt/conspiracy to distribute a Schedule II narcotic and (2) distribution of a Schedule II controlled substance. He testified that he was living with his then girlfriend and the police raided the house and found cocaine that was left behind by his girlfriend's former boyfriend. (Tr. 49.) He testified that he did not know that the cocaine was in the house, but he decided to accept a plea agreement and pleaded guilty. As part of the plea agreement, the October 1988 drug charge was dismissed. (Tr. 42-47.) He was sentenced to imprisonment for 24 months and supervised probation for three years. (GX 3 at 3.)

After serving about 21 months in prison, Applicant was extradited to be tried in another state for the two 1987 robberies. The charges for two 1987 robberies were consolidated, and he pleaded guilty to robbery in the first degree for both incidents. He received a combined sentence of imprisonment for three to nine years for both robberies.³ (GX 1 at 36-37; GX 5 at 4.) The record does not reflect the disposition of the 1987 shoplifting charge alleged in SOR ¶ 1.c. However, in his answer to the SOR, he admitted that he pleaded guilty to it in October 1990. He was released from prison in April 1992 and placed on parole. (Tr. 50.)

In June 1994 (alleged as September 1994 in the SOR), Applicant was charged with distribution of cocaine. He violated his parole by leaving the state to visit his girlfriend. At her apartment complex, the police searched several people, including Applicant, looking for drugs. Applicant testified that there were drugs "nearby," but he denied being involved with them. (Tr. 49-52.) He was sentenced to prison for 12 to 18 months for his parole violation, and he was released after serving 15 months. (GX 3 at 4; Tr. 54.) There is no evidence that he was convicted of the cocaine charge.

¹ The SOR ¶ 1.c alleges that use of a firearm was charged in this incident, but the court records do not reflect that a firearms offense was charged. (GX 5 at 3.)

² The October 1988 charge was not alleged in the SOR.

³ The November 1990 charge, alleged in SOR ¶ 1.g, is the consolidation of the two 1987 robbery charges and did not involve a separate incident.

In his PSI and during his testimony at the hearing, Applicant stated that he has never used controlled substances, even though he sold them. Since his last arrest, he has not knowingly associated with anyone involved with drugs. (GX 2 at 8; Tr. 25, 53-54.)

Applicant received an associate's degree in computer science in December 1998 and a bachelor's degree in business administration in March 2006. (AX C; AX D.) In June 2007, he received his employer's engineering excellence award. (AX A; AX E.)

When Applicant began working for his current employer, his annual salary was about \$70,000. He now earns about \$140,000. (Tr. 57.) He owns his personal residence and a rental property. (Tr. 24; AX F through J.) He testified that he has co-authored two books on web application security. (Tr. 24.) He is the chairperson of a diversity group at his place of employment, and he chairs an outreach program designed to interest high school students in information technology. (Tr. 61.)

Applicant's current supervisor, who has known him for almost ten years, is aware of his criminal record. He regards Applicant as "truly repentant" and "an excellent example of triumph over adversity." (AX K.) Another coworker, who is aware of Applicant's criminal past and has known him for 15 years, regards him as "a bit of an IT genius," well organized, competent, a person of "tremendous personal character," and proud of his clean and healthy life style. (AX L.)

When Applicant submitted his SCA (GX 1), Section 22 (Police Record) advised him, "For this item, report information regardless of whether the record in your case has been sealed, expunged, or otherwise stricken from the court record, or the charge is dismissed." He answered "Yes" to Question 22c, asking "Have you EVER⁴ been charged with any felony offense?" He disclosed that he was charged with possession of a controlled substance in December 1988, an attempted robbery in June 1987, and a robbery in January 1987.⁵ He did not disclose the felony charges alleged in SOR ¶¶ 1.c, 1.e, and 1.g, but he disclosed the drug offense alleged in SOR ¶ 1.e in response to Question 22e. He answered "No" to Question 22d, asking "Have you EVER been charged with a firearms or explosives offense?" He did not disclose the firearms offense alleged in SOR ¶¶ 1.a. Finally, he answered "No" to Question 22e, asking, "Have you EVER been charged with any offense(s) related to alcohol or drugs?" Notwithstanding his negative answer to the question, he disclosed the drug-related charge alleged in SOR ¶ 1.e, but he did not disclose the drug-related charges alleged in SOR ¶¶ 1.d and 1.g.

In the space for additional comments in Section 22 of the SCA, Applicant stated, "For the convictions above I served a total of three years. The term of 18 months (for

⁴ This word is capitalized in Questions 22c, 22d, and 22e of the SCA.

⁵ The dates of the offenses disclosed by Applicant vary slightly from the dates alleged in the SOR, but the descriptions of the offenses and their disposition are substantially the same.

possession of cocaine) and 1 to 3 years (attempted robbery) were served concurrently. The term of 2 to 6 years (robbery) was served consecutive[ly] to the other sentences. I was released after serving 37 consecutive months.” He did not disclose the 15 additional months he served for the 1994 parole violation.

During a personal subject interview (PSI) in May 2010, Applicant told the investigator that he did not believe that he was convicted of the firearms offense alleged in SOR ¶ 1.a. He told the investigator that his co-defendant produced a handgun during the robbery, but he was unaware that his co-defendant had a handgun. He stated that he pleaded guilty to robbery but was not convicted of the firearms offense. (GX 2 at 4.) He told the investigator that he did not disclose the shoplifting incident because the charges were incorporated into the earlier robbery charges. (GX 2 at 5.)

At the hearing, Applicant was able to answer questions about his criminal record in great detail. He admitted that his negative answer to Question 22e was wrong and that he should have answered it in the affirmative. He testified that he misinterpreted the questions and believed they asked only about convictions, and that he did not disclose his drug charges in July 1988, October 1988, and June 1994 because they were dismissed. He did not explain his failure to disclose the 1987 shoplifting charge, to which he admitted pleading guilty. He testified that he did not disclose the parole violation because it was not a conviction. He admitted that he understood the difference between being charged and being convicted. (Tr. 65-69.) He also testified that he knew that his affirmative answers to Questions 22c and 22d would trigger a check of his entire criminal record. (Tr. 81.) He admitted that his criminal record is a chapter in his life that he tries not to relive if it is not necessary. (Tr. 82.)

Applicant testified that he did not disclose his felony convictions when he applied for his current job, because the job application asked only about the last seven years. He told his supervisor that he had “served time” but did not provide detailed information. (Tr. 79.)

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 and 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 that 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 a robbery charge in March 1987 that resulted in a conviction and a sentence of imprisonment for two to six years (SOR ¶ 1.a); a robbery charge in December 1987 that resulted in a conviction and a sentence of imprisonment for one to

two years (SOR ¶ 1.b); charges of assault on a police officer and grand larceny arising from a shoplifting incident in December 1987 that resulted in a conviction (SOR ¶ 1.c); a drug possession charge in July 1998 that was dismissed (SOR ¶ 1.d); a drug possession charge in January 1989 that resulted in a conviction and a sentence to imprisonment for 24 months and three years of supervised probation, which was later revoked, resulting in imprisonment for 18 months (SOR ¶ 1.e); a robbery charge in November 1990 that resulted in a conviction and a sentence to imprisonment for three to nine years (SOR ¶ 1.f); and a charge of distributing cocaine in June 1994, which was the basis for the revocation of supervised probation alleged in SOR ¶ 1.e.

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.” Applicant's long criminal record and time served in prison are established by his admissions and court records, and they establish the following disqualifying conditions under this guideline:

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;

AG ¶ 31(e): violation of parole or probation, or failure to complete a court-mandated rehabilitation program; and

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.

AG ¶ 31(f) originally was based on the Smith Amendment (10 U.S.C. § 986), which imposed a disqualification from holding a security clearance on anyone who was sentenced to and served imprisonment for at least one year. However, this section of the United States Code was repealed on January 28, 2008, when the President signed the National Defense Authorization Act for Fiscal Year 2008 into law. It was replaced by adding § 3002 to 50 U.S.C. § 435b (the Bond Amendment). This new provision continued the disqualification, absent a meritorious waiver, for persons who were sentenced to imprisonment for a term exceeding one year and were imprisoned as a result of that sentence for not less than one year. However, this disqualification only applies to clearances that would provide access to special access programs (SAP), Restricted Data (RD), or any other information commonly referred to as “special compartmented information” (SCI). Thus, Applicant is not disqualified from holding a clearance by the Bond Amendment, but he is disqualified from holding SAP, RD, and SCI clearances, unless he is granted a waiver. The DOHA Director has authority to grant a waiver.

Two mitigating conditions are potentially relevant:

AG ¶ 32(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

AG ¶ 32(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.

Both mitigating conditions are established. Almost 20 years have passed since Applicant's last criminal conduct. He has worked for his current employer since 1999 and enjoys an excellent reputation. He has earned a college degree. He is active in professional organizations at work and in an outreach program to attract high school students into careers in information technology.

Guideline E, Personal Conduct

The SOR alleges that Applicant falsified his SCA by intentionally failing to disclose several felony charges (SOR ¶ 2.a) and two firearms-related charges (SOR ¶ 2.b). The SOR did not allege that Applicant intentionally falsified his response to Question 22e, that he failed to disclose his October 1988 drug charges, or that he intentionally understated the length of time he was incarcerated. Conduct not alleged in the SOR may not be an independent basis for denying his application for a security clearance. However, conduct not alleged in the SOR may be considered to assess an applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered Applicant's negative answer to Question 22e, his failure to disclose his October 1988 drug charges, and his understatement of the time served in prison for these limited purposes.

The concern under this guideline 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.

The relevant disqualifying condition under this guideline is AG ¶ 16(a):

[D]eliberate 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.

When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). An applicant's level of education and business experience are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

An act of falsification has security significance independent of the underlying conduct. See ISCR Case No. 01-19278 at 7-8 (App. Bd. Apr. 22, 2003). The mitigation of the underlying conduct has little bearing on the security significance of the falsification, particularly where there are multiple falsifications. ISCR Case No. 08-11944 at 3 (App. Bd. Aug 15, 2011).

Applicant is a mature, well-educated adult. He has a reputation for high intelligence. He is familiar with the criminal justice system, and he admitted that he understands the difference between being charged and being convicted. He was able to describe his criminal record in great detail at the hearing. His explanation for answering "No" to Question 22e was plausible and credible, since he listed a drug-related offense on the next page of his SCA. However, his explanations for his failures to list the shoplifting charge, three of the four drug-related charges, and a firearms offense were not plausible or credible. He insisted at the hearing that he believed that the questions asked only about convictions. However, the instructions on the SCA clearly told him to list charges even if they were dismissed. His explanation also was inconsistent, in that he admitted in the SOR that he pleaded guilty to the shoplifting, but he testified that he did not disclose it because it was dismissed. His intentional understatement of the time he spent in prison, while not alleged in the SOR, indicates his intent to minimize the extent of his criminal conduct. I conclude that AG ¶ 16(a) is established.

The following mitigating conditions are potentially relevant:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

AG ¶ 17(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.

AG ¶ 17(a) is not established. Applicant did not disclose the full extent of his criminal record until he was confronted with the evidence during his PSI. He did not disclose the full duration of his time in prison until the hearing.

AG ¶ 17(c) is not established. His falsification of an SCA was not minor, because it undermined the integrity of the security-clearance process. It did not occur under unique circumstances, and it raises doubt about Applicant's reliability, trustworthiness, and good judgment.

Whole-Person Concept

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. In applying 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.

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 those guidelines, but some warrant additional comment.

Applicant was sincere and remorseful at the hearing. His transformation from a habitual criminal to a well-educated, hardworking, and highly respected professional is impressive. Unfortunately, his extreme embarrassment about his past and his desire to further his career affected his candor during the security clearance process, raising serious doubts about his current reliability, trustworthiness, and good judgment.

After weighing the disqualifying and mitigating conditions under Guidelines J and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on criminal conduct, but he has not mitigated the concerns raised by his lack of candor about his criminal record. 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:

Paragraph 1, Guideline J (Criminal Conduct): FOR APPLICANT

Subparagraphs 1.a-1.g: For Applicant

Paragraph 2, Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraphs 2.a-2.b: 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