



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



In the matter of:

Applicant for Security Clearance

)
)
)
)
)
)

ISCR Case No. 10-09117

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: *Pro se*

06/07/2012

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated criminal conduct concerns, but has mitigated personal conduct concerns. Eligibility for access classified information is denied

Statement of the Case

On February 3, 2012, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether his clearance should be granted, continued, denied, or revoked. 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, 1962), as amended (Directive); and the

Adjudicative Guidelines (AGs) implemented by the Department of Defense on September 1, 2006.

Applicant responded to the SOR on February 16, 2012, and requested a hearing. The case was assigned to me on March 30, 2012, and was scheduled for hearing on May 9, 2012. At the hearing, the Government's case consisted of 11 exhibits (GEs 1-11); Applicant relied on one witness (himself) and no exhibits (AEs). The transcript (Tr.) was received on May 16, 2012.

Procedural Issues

Before the taking of evidence at the hearing, Applicant requested the record be kept open to afford him the opportunity to supplement the record with fitness evaluations and endorsements. There being no objections, and for good cause shown, Applicant was granted seven days to supplement the record. The Government was afforded one day to respond. Applicant did not provide any additional information.

Summary of Pleadings

Under Guideline J, Applicant is alleged to have been charged or arrested on multiple occasions (nine in all) between October 1987 and December 2000 for assorted charges (many drug-related offenses). Under Guideline E, Applicant is alleged to have falsified material facts in the security clearance application he completed in June 2010, by omitting all of his arrests, charges, and convictions.

In his response to the SOR, Applicant admitted the allegations covering his arrests, charges, and convictions. He denied any deliberate intent to falsify his security application. He claimed memory loss and misunderstanding of the questions.

Findings of Fact

Applicant is a 50-year-old fire watch for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Background

Applicant recently married for the first time. (Tr. 34) He has one child (age 21), who is enrolled in college. (Tr. 35) He enlisted in the Navy in December 1981, at the age of 18, and served four years. (GE 8) Appellant received an honorable discharge in December 1985. (GE 8; Tr. 35)

For the past 12 years, Applicant has worked for a local children's hospital. (Tr. 29-30, 36) Besides his full-time position with the hospital, he works as a part-time fire watch on ships. (Tr. 37) He needs a security clearance for this part-time employment. (Tr. 37)

Applicant has held security clearances while in the Navy and never had a reported security violation or reprimand for misconduct. (Tr. 38)

Applicant's arrest history

Between October 1987 and December 2000, Applicant was arrested, charged, and convicted of various offenses. Records document he was arrested in October 1987 for false representation of an officer. These charges were dismissed. (GE 9)

In December 1987, he was arrested and convicted of larceny of Government property and sentenced to one year probation. (GE 9) He was arrested in March 1989 for possession of a controlled substance (a felony) and under the influence of a controlled substance. (GE 1) He was ordered to enter and complete a drug diversion program. Both charges were dismissed after he completed a drug diversion program. (GE 1)

In July 1990, Applicant was arrested for possession for sale of cocaine base (a felony) and possession of a controlled substance. He was convicted of possession for sale of cocaine and sentenced to three years of supervised probation and 120 days in jail. (GE 2) Additionally, he was ordered to pay \$400 in fines and restitution. (GE 2) Part of the restitution (\$100) was stayed by the court. (GE 2). The second count (possession of a controlled substance) was dismissed.

Applicant was charged in September 1991 with sell/furnish a controlled narcotic substance (a felony). He pled guilty to the charge and was sentenced to three years confinement with credit for 153 days time served and ordered to pay a restitution fine of \$100. (GE 3) Applicant served one and one-half years of his sentence. (Tr. 46-47)

In April 1994, Applicant was arrested and charged with illegal possession of a narcotic (a felony). He pled guilty to this charge and was sentenced to two years confinement with credit for 16 months of confinement and credit for 20 days time served, to run concurrent with a prior parole violation. (GE 4) Additionally, he was ordered to pay a \$200 restitution fine. (GE 4) Appellant served nine months of his sentence.

Applicant was charged in January 1995 with possession of a firearm by a felon (a felony), pled guilty, and was sentenced to two years time served, to run consecutively with a prior offense. He was ordered to pay a fine of \$200. (GE 5) Applicant served nine months of his sentence. (Tr. 47)

In March 1996, Applicant was charged with sell/furnish a controlled narcotic substance (a felony), and possession for sale of cocaine base (a felony). He pled guilty to the first charge and was sentenced to seven years in state prison, with credit for 145 days served. Additionally, he was ordered to pay restitution in the combined amount of \$2,000, of which \$1,000 was suspended unless his parole was revoked. (GE 6) The separate possession for sale of cocaine base charge was dismissed. (GE 6) Applicant served three plus years of his sentence. (Tr. 41-42)

In December 2000, Applicant was arrested and charged with driving under the influence (DUI) and driving while having a measurable blood alcohol. (GE 7) He pled guilty to DUI and was sentenced to five years probation, 180 days custody (stayed), 90 days restricted driving, completion of a first diversion program (GE 7) Additionally, he was fined and ordered to pay restitution and an assessment fee. (GE 7)

Applicant's e-QIP omissions

Asked to complete a security clearance application (e-QIP) in June 2010, Applicant answered "no" to question 22 inquiries about felonies (sub-question c), firearms or explosives (sub-question d), and alcohol or drugs (sub-question e). These sub-parts inquired, respectively, whether he had ever been charged with a felony offense, a firearms offense, or an offense related to alcohol or drugs. (GE 10)

Citing memory problems and confusion, Applicant cited both memory loss and confusion over the scope of the question as the cause of his omissions. He claimed he misread the question and thought he did not need to list offenses over seven years old. (GE 10; Tr. 45, 48) He assured he did not mean to lie or deceive the Government about his arrest history. (Tr. 45)

Applicant was never clear as to what he forgot (i.e., his arrest history or whether the question contained a seven-year reporting limitation). Because the gravamen of his omission explanations is his confusion over whether he needed to list arrests, charges, and convictions over seven years old, his memory loss claim makes more practical sense if it is linked to his confusion over time reporting limitations, rather than to his recall of the underlying offenses. Case analysis will proceed on this assumption.

Although the questions posed to Applicant in his e-QIP are straight forward, clearly stated, and leave little objective room for confusion or misunderstanding, specific intent is an element of falsification in omission cases. Applicant impresses as honest and forthcoming about his business and personal affairs, and was responsive with the Office of Personnel Management (OPM) investigator when she came to interview him in July 2010. (GE 10) He told her, too, that he misread the question, did not list his arrests, and "thought only offenses within seven years should be listed." (GE 10; Tr. 49)

Department Counsel characterized Applicant's admissions to the OPM investigator who interviewed him as up-front acknowledgments of his arrest history without any evidence of prodding or inducements from the investigator. (Tr. 48-49) Any confrontation of Applicant by the investigator is not apparent from the OPM summary.

Considering Applicant's explanations for his omissions, Applicant's explanations are accepted. Inferences warrant that his omissions of his arrests, charges, and convictions were the result of his misreading of the question, and not because of any intent to falsify or deceive the Government.

Endorsements

Applicant offered no endorsements or fitness evaluations. The record reflects his military service and honorable discharge. In recognition of his service, he was awarded a Navy commendation medal. (Tr. 33)

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate security concerns." These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c)

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (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.

Viewing the issues raised and evidence as a whole, the following adjudication policy concerns are pertinent herein:

Criminal Conduct

The Concern: 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. AG, ¶ 30.

Personal Conduct

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, 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, ¶ 15.

Burden of Proof

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. *See Kungys v. United States*, 485 U.S. 759, 792-800 (1988). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. "[S]ecurity-clearance determinations should err, if they must, on the side of denials." *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Applicant is a part-time fire watch for his defense contractor who presents with a considerable history of assorted arrests and convictions (mostly drug-related) over 14-

year period. Many of his convictions resulted in substantial incarceration time for Applicant and are quite serious in nature. Principal security issues raised in this case center on Applicant's arrest history and his omissions of his arrests, charges, and convictions in the e-QIP he completed in June 2010.

Criminal arrest issues

Applicant's arrests, charges, and convictions are mostly drug-related and spread over a 14-year period spanning 1987 and 2000. Many resulted in felony convictions and significant incarceration time. Altogether, Applicant was arrested or charged on nine separation occasions between 1987 and 2000 and was convicted on seven of those occasions.

Applicable disqualifying conditions under the criminal conduct guideline include "a single serious crime or multiple lesser offenses," and DC ¶ 31(c), "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted." Applicant's offenses were serious ones for the most part and are covered by both disqualifying conditions. Because at least two of Applicant's convictions involved parole violations (subparagraphs 1.e and 1.f), DC ¶ 31(e), "violation of parole or probation, or failure to complete a court-mandated rehabilitation program," applies as well.

Before January 2008, certain types of conduct were subject to mandatory prohibitions against the granting of security clearances under the Smith Amendment (10 U.S.C. § 986), and could not be extenuated or mitigated. Conduct subject to the Smith Amendment's prohibition included convictions resulting in sentences of more than a year. Under the Smith Amendment, lengthy periods of imposed incarcerations like Applicant's warranted application of DC ¶ 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."

The Smith amendment 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 Sec. 3002 to 50 U.S.C. §435b (the Bond Amendment), which applies throughout the Federal government. Under the Bond Amendment, disqualification provisions pertaining to convictions of crimes and incarceration for not less than one year apply only to special access programs, restricted data, and sensitive compartmented information. As a result, automatic disqualification for an individual with a conviction and incarceration for not less than a year, who requires a secret or top secret security clearance, is no longer imposed. See ISCR Case No. 08-09904 (November 12, 2009).

Applicant is entitled to some mitigation credit based on the elapse of time since his last conviction in 2000, his honorable military service, and the growth he has shown with raising his 21-year old son. Partial application of MC ¶ 32(a), "so much time has elapsed since the criminal behavior happened, or it happened under unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment," is available to Applicant. However, due to

the severity of Applicant's prior offenses and their recurrence over a 14-year period, it is still too soon to accord Applicant full mitigation credit under this mitigating condition.

Based on his own rehabilitative efforts to date that include encouraging contributions to his full-time hospital employer and changes in his family environment, Applicant's personal development shows considerable promise. Applicant may take some advantage of MC ¶ 32(d) of the criminal conduct guideline, "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." More time is needed, though, to accord Applicant the full mitigation benefits of this mitigating condition. It is still too soon to make safe predictions that he is at no risk to recurrent behavior in the foreseeable future.

Because of the Bond Amendment's restrictions on the types of programs subject to automatic disqualification, waivers are no longer required or available to individuals seeking collateral clearances only. Accordingly, Applicant's criminal arrests, charges, and convictions covered by DC ¶ 31(f) may not be mitigated by a waiver granted in accordance with the provisions of MC ¶ 32(e).

Both from a consideration of the applicable guidelines, and from a whole-person perspective, Applicant demonstrates rehabilitative progress, but not enough at this time to facilitate safe predictions of recurrence avoidance. More is needed in demonstrated rehabilitation without recurrence.

While he merits considerable praise for his military service and the progress he has made in turning his life around, it is still too soon to credit him with meeting all of the minimum requirements under the criminal conduct guideline for continued eligibility to hold a security clearance. Taking into account all of the facts and circumstances developed in the record, unfavorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a through 1.i of the criminal conduct guideline.

Personal conduct concerns

Security concerns over Applicant's judgment, reliability and trustworthiness are raised under Guideline E as the result of his omissions of his arrests, charges, and convictions in the e-QIP he completed in June 2010. By omitting these offenses (regardless of disposition), Applicant failed to furnish potentially material background information about his arrest history that was needed for the Government to properly process and evaluate his security clearance application. DC ¶ 16(a), "deliberate omission, concealment, or falsification of relevant facts to 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," applies.

Because Applicant's arrest/conviction omissions in his completed e-QIP are considered to be the result of mistakes in reading and memory lapses, no acts of

falsification may be imputed to him. Summarized, Applicant's answers to questions posed by the OPM agent who interviewed him in 2010 were sufficiently reconcilable with his e-QIP answers to questions inquiring about his prior arrests and convictions to enable him to avoid any need to make prompt, good faith corrections. But to the extent prompt, good-faith corrections are necessary to mitigate his personal conduct, he satisfies the requirements of MC ¶ 17(a), "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts."

In evaluating all of the circumstances surrounding Applicant's e-QIP omissions, his explanations, and whole-person considerations, his disclosures are sufficient to enable him to convincingly refute or mitigate the deliberate falsification allegations. Questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, are each core policy concerns of the personal conduct guideline (AG ¶ 15). Overall, Applicant's explanations are persuasive enough to warrant conclusions that the falsification allegations relative to his completed 2010 e-QIP covering his past arrests, charges, and convictions (including numerous felony charges) are mitigated under Guideline E.

Formal Findings

In reviewing the allegations of the SOR in the context of the findings of fact, conclusions, and the factors and conditions listed above, I make the following separate formal findings with respect to Applicant's eligibility for a security clearance.

GUIDELINE J (CRIMINAL CONDUCT):	AGAINST APPLICANT
Subparas. 1.a through 1.i:	Against Applicant
GUIDELINE E (PERSONAL CONDUCT):	FOR APPLICANT
Subparas. 2.a through 2.c:	For Applicant

Conclusions

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 Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge

