



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 11-02623
)	
Applicant for Security Clearance)	

Appearances

For Government: Stephanie Hess, Esq., Department Counsel
For Applicant: *Pro se*

11/14/2012

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 12, 2010. On June 26, 2012, the Defense Office of Hearings and Appeals (DOHA) notified him that it was unable to find that it was clearly consistent with the national interest to grant him eligibility for access to classified information, and it recommended that his case be submitted to an administrative judge for a determination whether to grant or deny his application. DOHA set forth the basis for its action in a Statement of Reasons (SOR), citing security concerns under Guidelines J and E. 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 July 3, 2012; answered it on July 18, 2012; and requested a hearing before an administrative judge. DOHA received the request on July 23, 2012. Department Counsel was ready to proceed on September 17, 2012, and the case was assigned to me on September 20, 2012. DOHA issued a notice of hearing on October 2, 2012, scheduling it for October 25, 2012. I convened the hearing as scheduled. Government Exhibits (GX) 1 and 2 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through D, which were admitted without objection. DOHA received the transcript (Tr.) on November 5, 2012.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a-1.c and denied the allegation in SOR ¶ 2.a. He did not respond to SOR ¶ 2.b, which cross-alleges the conduct alleged in SOR ¶¶ 1.a-1.c. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 37-year-old security officer employed by a federal contractor since May 2010. He obtained his high school diploma equivalent from a community college in February 2009. He worked as a restaurant cook from March 2003 until he began his current employment. He has never held a security clearance.

Applicant married in August 2008. He and his wife have a three-year-old son. His wife has a nine-year-old daughter from a previous relationship.

Applicant began experimenting with marijuana in 1988. Between 1988 and 2001, he used marijuana, heroin, cocaine, psychedelic mushrooms, and lysergic acid diethylamide (LSD). His drug use grew to daily use of heroin and marijuana. (GX 2 at 60-61, 67.)

In November 1993, Applicant and a friend were charged with possession of two bags of marijuana and possession of drug paraphernalia. In April 1994, Applicant pleaded guilty to possession of marijuana. He was given a conditional discharge, fined \$600, and required to pay fees of about \$120. (GX 2 at 60.)

Applicant received counseling and methadone treatment for his heroin use in 1997-1998, but continued his drug use. (GX 2 at 70.) In April 2000, he and an ex-girlfriend bought heroin from a participant in a sting operation. They were arrested and charged with illegally purchasing a controlled substance and criminal conspiracy. Applicant decided to move to another state before his court appearance, scheduled for July 2000. When he failed to appear, a bench warrant was issued. (Tr. 46-47.) After he was interviewed by a security investigator in July 2010, he checked the court records and discovered the bench warrant. He contacted the court in August 2010, and he requested an Accelerated Rehabilitative Disposition (ARD). (GX 2 at 85.) His request was granted. He completed a substance abuse class in December 2010, and he completed the ARD in July 2011. (GX 2 at 83, 87.)

When Applicant moved to another state in the summer of 2000, he stopped using drugs, for fear of being arrested and returned to his previous state of residence. He had difficulty finding steady employment. He worked as a cook in a pizza restaurant from January 2002 to March 2003. From March 2003 until he began his current job as a security officer, he worked as a cook in a restaurant. (GX 1 at 16-18.) At the hearing, he testified that he last used an illegal drug on New Year's Day, 2001. (Tr. 35.)

From time to time, Applicant and other employees at the restaurant purchased food from the restaurant, with the approval of the kitchen manager. The usual practice was to defer determining the price and paying for the food until the restaurant received the invoice from the supplier. (Tr. 36-38.) Applicant continued to work intermittently at the restaurant after he began his job as a security officer. (Tr. 39.) In June 2011, Applicant obtained the approval of the kitchen manager to buy crab meat and prime rib worth about \$320 for a birthday party. The bar manager, who was not privy to the agreement with the kitchen manager, observed Applicant removing the food from the restaurant. He notified the police, who arrested Applicant and charged him with grand larceny. When the restaurant owner learned about the circumstances of Applicant's arrest, she asked the district attorney to withdraw the charges. The district attorney entered a *nolle prosequi* and the prosecution was terminated. (GX 81-82; Tr. 32-33.) The restaurant owner submitted a letter strongly supporting Applicant's application for a clearance, stating that he has always been very reliable, honest, and trustworthy. (AX A.)

Two of Applicant's supervisors at his job as a security officer submitted letters on his behalf. His shift supervisor, who has known him for several years, describes him as dedicated, hardworking, a person of good character, and a devoted family man. His immediate supervisor, who has known him for two years, considers him hardworking, honest, and trustworthy. Applicant received a cash award for "exemplary performance" during the second quarter of 2012. (AX B; AX C; AX D.)

When Applicant submitted his SCA in May 2010, he answered "No" to all the questions in Section 22: Police Record. The SCA includes the following instructions: "For questions a and b, respond for the timeframe of the last 7 years (if an SSBI go back 10 years). Exclude any fines of less than \$300 for traffic offenses that do not involve alcohol or drugs." Question 22e, asks, "Have you EVER been charged with any offense(s) related to alcohol or drugs?" (Capitalization in original.) Applicant answered "No" and he did not disclose his drug-related arrests in November 1993 and April 2000. At the hearing, he explained that he read the instructions for questions 22a and 22b and erroneously thought the seven-year scope also applied to 22e, notwithstanding the word "EVER" in that question. (Tr. 21-22.)

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 that Applicant was arrested in November 1993 for possession of marijuana and possession of drug paraphernalia, was given a conditional discharge, and was fined \$720 (SOR ¶ 1.a). It also alleges that he was arrested in April 2000 for purchase or receipt of a controlled substance, missed his court date, and left the state, after which a warrant was issued for his arrest (SOR ¶ 1.b). Finally, it alleges that he was arrested for stealing from his employer in June 2011 (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 “a single serious crime or multiple lesser offenses” and “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted.” AG ¶¶ 31(a) and (c). Applicant's admissions and the corroborating evidence submitted by Department Counsel establish AG ¶¶ 31(a) and (c).

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.* Twelve years have elapsed since Applicant's last drug-related arrest, and he has not been involved with drugs since January 1, 2001. I conclude that AG ¶ 32(a) is established for Applicant's drug-related criminal conduct alleged in SOR ¶¶ 1.a and 1.b.

Security concerns raised by an arrest or an allegation of criminal conduct may be mitigated by “evidence that the person did not commit the offense.” AG ¶ 32(c). This mitigating condition is established for the criminal conduct alleged in SOR ¶ 1.c, because Applicant's testimony and the restaurant owner's statement establish that Applicant did not steal from his employer.

Security concerns raised by criminal conduct also 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 been drug-free for 12 years. He expressed remorse at the hearing. He has been gainfully employed since 2002 and established a reputation for honesty and trustworthiness. He has become a responsible husband and father. I conclude that AG ¶ 32(d) is established for the Applicant's drug-related criminal conduct alleged in SOR ¶¶ 1.a and 1.b.

Guideline E, Personal Conduct

The SOR alleges that Applicant falsified his SCA by intentionally failing to disclose the conduct alleged in SOR ¶¶ 1.a and 1.b (SOR ¶ 2.a). It also cross-alleges the criminal conduct alleged in SOR 1.a-1.c under this guideline. 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 for the allegation that Applicant falsified his SCA 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 part of the entirety-of-the-record evaluation to determine whether a failure to disclose relevant information on a security clearance application was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

Applicant's explanation for omitting his drug-related arrests from his SCA was plausible. He had no previous experience with the security-clearance process, and had previously worked at menial, low-level jobs. When he was interviewed by a security investigator two months later, he candidly described his history of drug abuse in great detail. He was sincere, candid, remorseful, and credible at the hearing. I am satisfied that he did not intentionally falsify his SCA. Accordingly, I conclude that AG ¶ 16(a) is not established.

The evidence of Applicant's drug-related conduct, cross-alleged in SOR ¶ 2.b, establishes the following disqualifying conditions under this guideline:

AG ¶ 16(c): credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information; and

AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

The following mitigating conditions are relevant to Applicant's drug-related conduct:

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(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; and

AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

For the reasons set out in the above discussions of AG ¶¶ 32(a) and 32(d), I conclude that AG ¶¶ 17(c) and 17(d) are established. I further conclude that AG ¶ 17(e) is established by Applicant's full disclosure of his past misconduct, his actions to resolve the drug-related arrest in 2000, and his work record since moving out of his drug-centered environment.

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 made a break from his drug-centered past about 12 years ago. He obtained his high school equivalency diploma, married, became a father, and gained the trust and respect of the restaurant owner for whom he worked for eight years. Since beginning his current job in May 2010, he has earned a reputation for honesty, trustworthiness, and reliability.

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 and personal conduct. Accordingly, I conclude he has 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.c:	For Applicant
Paragraph 2, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraphs 2.a-2.b:	For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge