



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



In the matter of:)	
)	
)	ISCR Case No. 12-03855
)	
Applicant for Security Clearance)	

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

05/27/2014

Decision

RIVERA, Juan J., Administrative Judge:

Applicant has a long history of criminal conduct, which includes numerous convictions for drug-related offenses and parole violations. Moreover, he falsified numerous entries in his 2012 security clearance application (SCA) and made false statements to a government investigator. His lack of judgment and unwillingness to comply with the law raise questions about his reliability, trustworthiness, and ability to protect classified information. Clearance denied.

Statement of the Case

Applicant submitted an SCA on February 1, 2012. The Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline J (criminal conduct), Guideline E (personal conduct), and Guideline H (drug involvement) on February 6, 2014.¹ Applicant answered the SOR on February 24, 2014, and requested a hearing before an administrative judge. The case was assigned to me

¹ The 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* (Directive) (January 2, 1992), as amended; and the Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (AG), implemented by the DOD on September 1, 2006.

on April 3, 2014. The Defense Office of Hearings and Appeals (DOHA) issued the notice of hearing on April 10, 2014, scheduling a hearing for April 30, 2014.

At the hearing, the Government offered four exhibits (GE 1 through 4). Applicant testified, presented the testimony of one witness, and submitted 20 exhibits (AE 1 through 20). All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on May 8, 2014.

Procedural Issues

The file copy of Applicant's answer to the SOR was missing its third page. At the hearing, Department Counsel produced a complete copy of Applicant's answer to the SOR. Applicant authenticated his answer, I marked it Appellate Exhibit 1 and made it part of the record.

Findings of Fact

In his answer to the SOR, Applicant denied all the SOR allegations. At his hearing, Applicant admitted all the SOR factual allegations and provided comments in extenuation and mitigation. Applicant's admissions are hereby incorporated as findings of fact. After a thorough review of all the evidence, including his testimony and demeanor while testifying, I make the following additional findings of fact:

Applicant is a 37-year-old machinist employed by a defense contractor. He graduated from high school in 1993. He married his wife in October 2009, and they have a three-year-old son. Applicant was hired by a defense contractor in February 2012, and submitted an SCA that same month. Shortly thereafter, he was granted an interim security clearance at the secret level.

Section 22 (Police Record) of the February 2012 SCA asked Applicant whether in the last seven years, he had been on probation or parole. He answered "no" and deliberately failed to disclose that he was on probation in 2009. Section 22 also asked Applicant whether he had ever been: (1) convicted of a crime and sentenced to imprisonment for a term exceeding one year; (2) charged with a felony offense; (3) convicted of an offense involving a crime of violence; (4) charged with an offense involving firearms; or (5) charged with an offense involving drugs or alcohol. Applicant answered "no" to all the above questions.

Applicant falsified his 2012 SCA when he deliberately failed to disclose his extensive criminal record including:

1. His 1993 arrest and charges for carrying or wearing a handgun on person; narcotic possession with intent to manufacture or distribute; possession of a controlled dangerous substance (CDS), and distribution of CDS with firearm. Applicant was found guilty of carrying or wearing a handgun on person and was sentenced to three years in jail (all but 30 days suspended), and placed on five

years of supervised probation. He was also found guilty of possession of a CDS, and sentenced to four years in jail (all but 30 days suspended), and placed on five years of supervised probation. The remaining charges were *nolle prossed*.

2. His 1996 arrest and charges for CDS community nuisance: distribution of narcotics (cocaine), and possession of a CDS (3 counts). The charges were *nolle prossed*.

3. His 1997 arrest and charge for second degree assault - police. The charge was placed on a Stet docket.

4. His 1998 charges for CDS possession with intent to distribute-cocaine, CDS possession - not marijuana, and conspiracy. Applicant was found guilty of CDS possession with intent to distribute-cocaine and was sentenced to 18 months in jail.

5. His 1999 charges for violation of probation and second degree assault. The charge was *nolle prossed*.

6. His 2000 arrest for a probation violation (for the charges set forth in subparagraph 1, above. He was ordered to serve the remainder of his sentence.

7. His 2001 charge for technical parole violator - use of a handgun.

8. His 2002 charges for possession of a CDS with intent to distribute-heroin, CDS possession - not marijuana, and CDS nuisance: distribution of narcotics.

9. His 2004 charge for obstructing and hindering. The charge was *nolle prossed*.

10. His 2009 charge for probation violation.

After submitting his 2012 SCA, Applicant was interviewed by a government investigator in February 2012. During the interview, Applicant was confronted about his omitted criminal record. Applicant told the investigator that there was a mistake on the criminal records he had. Applicant claimed he was not responsible for the alleged criminal offenses, and that he had never been arrested. (GE 2) Applicant deliberately made a false statement to the government investigator.

At his hearing, Applicant explained that when he submitted his 2012 SCA, he did not know what he was getting into. He was just finishing school and was working a job that paid \$8 an hour. The government contractor job offered him a great opportunity, and it paid \$18 an hour. Applicant was ashamed of his criminal background. He believed that if he disclosed his criminal record in the 2012 SCA, he would not have been hired. At the time he was interviewed by the investigator, Applicant had quit his other job and needed the income to support his family. He believed that if he had disclosed his criminal record to the investigator, he would not have been able to work as long as he did. He acknowledged he made the wrong decision when he lied on his SCA

and to the investigator. But, he believed he had no choice because he needed to support his family.

Applicant grew up in a rough neighborhood. As a child, he believed that engaging in criminal conduct was acceptable since everybody else was doing it. After he was arrested and served time in jail, he realized his behavior was not acceptable, and he decided to change his lifestyle. He would like his wife to be proud of him and what he has accomplished. Applicant's father was never there for him as a father, mentor, or to set the example. His father was always in jail or using drugs. Applicant's goal is to be there for his son. He believes he now has something he can pass along to his son – he wants to teach his son his trade and get him educated.

Applicant has been turning his life around since 2009. He has not had any incidents involving law enforcement since 2009. He has not been involved in any drug-related incidents, or associated with his drug-trafficking friends since 2002. He testified that most of his drug-trafficking/using friends are in jail. He believes he is the only one from his old neighborhood that is making a living. Applicant testified that he never used drugs, he only sold them. He testified that the last time he sold drugs was in 2002.

At his hearing, Applicant presented the testimony of his mother. She testified about Applicant's love for his family and his job. She believes he is trying to do the right thing for his family. He has stayed away from bad influences since 2009. She is proud of what he has accomplished. He also presented three reference letters, certificates of achievement, and evidence of his training and accomplishments as a machinist. Applicant is considered to be an above-average machinist and a dedicated, hard-working employee.

Policies

Eligibility for access to classified information may be granted "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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person's suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

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 the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest 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. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Guideline J, Criminal Conduct

Under Guideline J, the Government's concern is that 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.

Applicant has a long-term history of repeated criminal behavior from 1993 to 2009. It includes numerous drug-related convictions and parole violations. Applicant's behavior raises security concerns under AG ¶ 31(a) "a single serious crime or multiple lesser offenses," and AG ¶ 31(c) "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted."

AG ¶ 32 lists two conditions that could mitigate the criminal conduct security concerns raised under AG ¶ 31:

- (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;

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

(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.

Considering the record as a whole, I find that none of the mitigating conditions fully apply. Applicant has a long-term history of frequent criminal behavior which includes numerous convictions and probation and parole violations. I considered that Applicant's most recent drug-related charge dates back to 2002, and that his most recent criminal offense (related to a parole violation) occurred in 2009. Since then, Applicant has been working hard on his rehabilitation. He changed his lifestyle and no longer associates with his drug-using friends. He is now dedicated to his family and work. He has established a reputation as a good machinist. Applicant's recent behavior shows that he is in the right path to rehabilitate himself.

Notwithstanding, Applicant's past criminal behavior is aggravated by his 2012 SCA falsification and false statement to an investigator, both of which are felony offenses in violation of 18 USC 1001. Applicant's failure to fully disclose his past criminal behavior together with his current falsification and false statement bring to the forefront his lack of judgment, reliability, and trustworthiness. It shows Appellant's lack of reform and rehabilitation and his unwillingness to comply with laws, rules, and regulations.

Guideline E, Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

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 personal conduct security concerns are based on the same facts alleged under the criminal conduct guideline, incorporated herein, and the fact that he falsified his 2012 SCA. Applicant admitted that he deliberately falsified his SCA because he believed it was the only way he would be considered for the job. He was also ashamed of his criminal record.

Applicant's criminal behavior and falsifications trigger the applicability of the following disqualifying conditions under AG ¶ 16:

(a) deliberate 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;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing.

AG ¶ 17 lists six conditions that could potentially mitigate the personal conduct security concerns:

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

(b) the refusal or failure to cooperate, 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. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

(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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

Considering the evidence as a whole, I find that none of the mitigating conditions apply. Applicant made no effort to correct his numerous omissions until he appeared at his hearing. Applicant receives credit for being honest and forthcoming at his hearing. Notwithstanding, his past criminal behavior and current falsifications raise serious

questions about his reliability, trustworthiness, judgment, and his ability to protect classified information. Not enough time has passed for Applicant to establish that he can obey the law, rules, and regulations.

Guideline H, Drug Involvement

AG ¶ 24 articulates the security concern for drug involvement:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

Between 1993 and 2002, Applicant sold illegal drugs. He has numerous drug-related convictions and parole violations.

AG ¶ 25 describes a condition related to drug involvement that could raise a security concern and may be disqualifying in this case:

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

AG ¶ 26 provides two potentially applicable drug involvement mitigating conditions:

(a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) a demonstrated intent not to abuse any drugs in the future, such as:

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used;

(3) an appropriate period of abstinence.

I find that the above Guideline H mitigating conditions apply. Applicant's most recent illegal drug-related behavior occurred in 2002. There is no evidence of any additional drug-related misconduct. As such, his illegal drug-related behavior is temporally remote. Applicant was truthful and forthcoming about his past illegal drug-related behavior at his hearing. He is ashamed of his past criminal behavior. He no longer associates with his drug-trafficking and using friends. He credibly testified that he changed his lifestyle and wants to be a role model for his son.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c).

Applicant is a 37-year-old machinist working for a government contractor since 2012. He is considered to be a valuable worker with good character. In his references' opinion, Applicant is dependable, reliable, and trustworthy.

Nevertheless, Applicant has a long history of criminal conduct that resulted in numerous convictions for drug-related offenses and probation and parole violations. Moreover, he falsified numerous entries in his 2012 SCA and made false statements to a government investigator. Considering the evidence as a whole, Applicant's lack of judgment and unwillingness to comply with the law raise questions about his reliability, trustworthiness, and ability to protect classified information.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	Against APPLICANT
Subparagraphs 1.a - 1.i:	Against Applicant
Paragraph 2, Guideline E:	Against APPLICANT
Subparagraphs 2.a - 2.d:	Against Applicant
Paragraph 3, Guideline H:	For APPLICANT
Subparagraph 3.a:	For 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 eligibility for a security clearance to Applicant. Clearance denied.

JUAN J. RIVERA
Administrative Judge