



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



In the matter of:

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ISCR Case No. 14-04034

Applicant for Security Clearance

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel

For Applicant: *Pro se*

08/09/2017

Decision

LYNCH, Noreen, A., Administrative Judge:

On January 14, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) alleging security concerns arising under Guideline J (Criminal Conduct), and Guideline E (Personal Conduct). 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, 1992), as amended (Directive); and the Adjudicative Guidelines (AG) implemented in September 2006. Revised Adjudicative Guidelines were issued on December 10, 2016, and became effective on June 8, 2017.

Applicant timely answered the SOR and elected to have his case decided on the record in lieu of a hearing. Department Counsel submitted the Government's written case on October 22, 2015. Applicant received a complete file of relevant material (FORM) on October 29, 2015, and was provided an opportunity to file objections and

submit material to refute, extenuate, or mitigate the Government's case.¹ Applicant submitted a response, which was marked as AX A and entered into the record without objection. The case was assigned to me on June 1, 2017. Based on a review of the case file, eligibility for access to classified information is denied.

Findings of Fact

In his answer to the SOR, Applicant admitted the SOR allegations under Guideline J (Criminal Conduct) with explanations. He denied the allegations under Guideline E (Personal Conduct). (Item 2)

Applicant is a 35-year-old employee of a defense contractor. He reported no military service. He is married and has one child and two stepchildren who live with him. He also has a minor son who does not live with him. Applicant has worked for his current employer since 2013. He has not held a security clearance. He completed his security clearance application in May 2013. (Item 3)

Criminal Conduct

The SOR alleges various arrests such as driving with a suspended license (2002); domestic simple assault (2012); driving after denial, suspension, or revocation; driving while in possession of a controlled substance, possession of marijuana and possession of a schedule I-IV controlled substance, a felony (2012); domestic-simple assault/battery (2012); failure to appear (FTA), a felony, (2013) in connection with above charges; and sentenced to 18 months supervised probation in 2013; required to pay court costs, of which a balance of \$693 is due. (Items 6-10)

Applicant stated that he was arrested but some charges were dismissed. He presented no further explanations. He stated that the arrest in 2013 for FTA was an error by the police department. He stated that he was paying his court costs. According to the official record there is a balance due and Applicant provided no evidence that he has made recent payments.

During his 2013 investigative interview, Applicant declared that he was charged with a felony and not a misdemeanor as he listed on his security clearance application, but he maintained correctly that the January 2012 charges of simple assault and battery as alleged in SOR 1.c were dismissed. (Items 4 and 8) Applicant's 2002 arrest for driving with a suspended license was dismissed in August 2002. (Item 8) He further explained that his first charge of possession of marijuana and cocaine was done as a favor to his cousin. Applicant does not take illegal drugs.

When Applicant was confronted with questions during the 2013 investigative interview concerning a charge of domestic simple assault and battery in 2012, he denied that he was charged. This was a deliberate falsification.

¹The Government submitted ten items, which were entered into the record without objection.

Applicant's response to the FORM provided different answers for the dates on which he was charged or arrested. These answers did not conform to the official FBI criminal history records or his answer to the SOR.

Personal Conduct

Applicant did not admit on his 2013 security clearance application under Section 22: Police Record, that he was charged in 2012 for domestic assault and battery, which occurred in 2010, as alleged in SOR 1.b. Applicant stated that he did not report the assault and battery charge because it was dismissed and he was given probation. (Item 2) He stated that "all that happened will not happen again."

Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." ² The burden of proof is something less than a preponderance of evidence. ³ The ultimate burden of persuasion is on the applicant. ⁴

A person seeking access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. This relationship

² See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

³ *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

⁴ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”⁵ “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁶ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.⁷ The decision to deny an individual a security clearance does not necessarily reflect badly on an applicant’s character. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

Analysis

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct, “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 ¶ 31 describes conditions that could raise a security concern and may be disqualifying:

- (a) a pattern of minor offenses, any of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual’s judgment, reliability, or trustworthiness;
- (b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted;
- (c) individual is currently on parole or probation;

⁵ See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information), and EO 10865 § 7.

⁶ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁷ *Id.*

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

(e) discharge or dismissal from the Armed Forces for reasons less than "Honorable."

Applicant's admissions and the evidence of arrests from 2002 to 2013 are sufficient to raise AG ¶¶ 31(a) and (b).

AG ¶ 32 provides four conditions that could mitigate security concerns:

(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;

(b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) no reliable evidence to support that the individual committed the offense; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

After reviewing the mitigating conditions, I find that none of them fully apply in this case, with the exception of the 2002 driving violation due to passage of time. AG ¶ 32(a). Applicant's behavior occurred between 2002 and 2013. He acknowledged that the last incident was in 2013. Although four years have elapsed, Applicant has not provided information establishing that he is rehabilitated. While it is true that some charges were dismissed, there exists a pattern of behavior for 11 years. There is no information in the record concerning completion of his probation or payment of court costs. I find that he has not mitigated the security concern under criminal conduct.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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 or sensitive information.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying:

(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; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative;

(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 classified or sensitive information;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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 classified or sensitive information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;

(2) any disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources.

(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, or (2) while in another

country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group;

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment; and

(g) association with persons involved in criminal activity.

Applicant's behavior concerning his criminal conduct shows lack of judgment, reliability and trustworthiness over a period of years. His conduct shows a pattern of poor judgment. He did not disclose his 2012 charge (which occurred in 2010) for simple domestic assault charges on his security clearance application. He knew he was arrested. He did not state that he misunderstood the question. When questioned during his investigative interview, he stated that he had only been arrested twice, which was not true. He also was confronted with the information that his admitted drug charge was a felony and not a misdemeanor. He did not provide an adequate explanation for his omission on his security clearance application. He falsified his security clearance application. AG ¶ 16 (a), (c), and (e) apply.

AG ¶ 17 provides conditions that could mitigate 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;

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

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant did not disclose the information concerning his felony drug charge nor did he list all his charges and arrests on his security clearance application. He gave no reason in mitigation, and his omission is concluded to be wilful and knowing. He has not provided any other information to persuade me that he has mitigated personal conduct concerns. I have doubts about his judgment and reliability. After considering the mitigating conditions outlined in AG ¶ 17, I conclude Applicant has not mitigated the security concerns under personal conduct or criminal conduct.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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.

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. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the whole-person factors. Applicant has a history of arrests and convictions that span almost eleven years. He presented no evidence of rehabilitation. His conduct was frequent, recent, did not happen under unusual circumstances, and is likely to recur. The choices he made over the years indicate lack of trustworthiness.

Applicant has not provided any information to show that he is a changed person or that he has taken action to satisfy his court costs and fines. At this point, I have doubts about his judgment and reliability. Any doubts must be resolved in favor of the

Government. Applicant has not met his burden in this case. He has not mitigated the security concerns under criminal conduct, and personal conduct. Clearance is denied.

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
Subparagraph 1.a:	For Applicant
Subparagraphs 1.b-1.e:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-2.b:	Against Applicant

Conclusion

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

NOREEN A. LYNCH.
Administrative Judge