



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



In the matter of: )  
 )  
 [Redacted] ) ISCR Case No. 15-01545  
 )  
 Applicant for Security Clearance )

**Appearances**

For Government: Rhett Petcher, Esq., Department Counsel  
For Applicant: Alan V. Edmunds, Esq.

05/31/2016

**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 denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on June 12, 2014. On October 15, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines J and E. The DOD CAF 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 the DOD on September 1, 2006.

Applicant answered the SOR on November 5, 2015, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on December 28, 2015, and the case was assigned to me on February 17, 2016. On

February 26, 2016, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for March 22, 2016. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 6 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through E, which were admitted without objection. DOHA received the transcript (Tr.) on March 30, 2016.

### **Findings of Fact**

In his answer to the SOR, Applicant admitted all the allegations. His explanations in his answer and at the hearing reflect that he admitted SOR ¶¶ 2.a-2.f because he answered questions on his SCA in the negative as alleged, but he denied intentional falsification of his SCA. I have treated his answers to SOR ¶¶ 2.a-2.f as denials. His admissions to SOR ¶¶ 1.a-1.c are incorporated in my findings of fact.

Applicant is a 42-year-old information-technology systems analyst and project manager engineer employed by a federal contractor since February 2015. He has worked for federal contractors since October 2010. He was self-employed, operating a janitorial service, from October 1999 to December 2009. He worked as a computer technician for a state government from December 2009 until October 2010. (GX 1 at 13-15; AX A.) He has never held a security clearance.

Applicant attended various community colleges, technical colleges, and universities from 1993 to 2016. (AX B.) He received an associate's degree in computer and information science in March 2006 and a bachelor's degree in computer and information science in October 2008. (AX C and D.) He began a master's degree program in June 2015. (AX E; Tr. 19.) He paid for his associate's and bachelor's degrees with student loans totaling about \$18,000, his income from the janitorial service, and a part-time job on an industrial assembly line. His student loan payments are about \$240 per month, and they are current. His employer is paying for his master's degree program. (GX 3 at 5; Tr. 24-25.)

Applicant has never married. He has resided with a cohabitant since October 2006. He has a 12-year-old daughter from another relationship, for whom he pays child support of \$196 per month. (GX 3 at 4-5.)

In November 1993, Applicant was charged with felony possession of a stolen firearm. During a personal subject interview (PSI) in December 2010, Applicant told the investigator that he drove his car to a convenience store, left the engine running while he went into the store, and was grabbed by two men with a pistol. He wrestled away from his assailants, ran away, and hid in some bushes, leaving his car at the store with the engine running. He later returned to the store, where the police stopped him and told them that a stolen pistol was found in his car. The store owner told the police that Applicant was a victim of an attempted robbery. Applicant was charged with possession of a stolen pistol and released on his own recognizance. In January 1994, he pleaded not guilty and the charge was dismissed. (GX 3 at 1.)

In July 1995, Applicant was charged with felony robbery by use of force. During the December 2010 PSI, he told the investigator that he returned to his home where he, his cohabitant, and her two children lived, and found another man in the children's bedroom. The man said he would not leave until Applicant's cohabitant returned to the home. They argued, went outside, and fought. The man threw the keys to the house on the ground and left. A short time later, the police arrived and charged Applicant with robbery. Applicant hired an attorney, and the charges were dismissed in September 1995. (GX 3 at 2.)

In April 2000, Applicant was charged with distribution of cocaine base, a felony, and possession of cocaine base with intent to distribute, a felony. He pleaded guilty to distribution of cocaine base, and the charge of possession with intent to distribute was dismissed. In September 2000, he was sentenced to imprisonment for 70 months followed by 5 years of supervised release. He was imprisoned from September 2000 to January 2002 and attended boot camp until June 2002, when he was released to a halfway house. He was released from the halfway house in January 2003 but remained on probation. (GX 3 at 4; Tr. 45-48.) He received counseling during boot camp. (Tr. 37.) In January 2008, he was discharged from supervision, and the proceedings in the case were terminated. (GX 5; GX 6.)

Applicant submitted an SCA in October 2010. He answered "No" to the question, "Have you EVER<sup>1</sup> been charged with any felony offense?" He did not disclose his three felony arrests. He answered "No" to the question, "Have you EVER been charged with a firearms or explosives offense?" He did not disclose the November 1993 charge. He answered "No" to the question, "Have you EVER been charged with any offense(s) related to alcohol or drugs?" He did not disclose the drug-related charges in April 2000 and his conviction and jail sentence in September 2000. (GX 1 at 29-30.)

The October 2010 SCA was Applicant's first experience with the security-clearance process, but he was 36 years old and well educated, having earned an associate's degree and a bachelor's degree. He had been operating a cleaning service franchise since his release from prison. In addition to omitting his criminal record, he omitted several other items from his SCA. He failed to list his daughter, his supervisor at his current job, his supervisor at a former job, and a job with a temporary service agency that he held while in school. He admitted these omissions during his December 2010 PSI, and he attributed them to being rushed to complete the SCA by his employer.

During the December 2010 PSI, the investigator questioned Applicant extensively about his arrests in 1993, 1995, and 2000, and Applicant provided detailed information about them, as indicated above. He told the investigator he had never possessed, used, sold, or distributed drugs. He told the investigator that he believed the evidence against him was seized in a "bad bust," but that his lawyer told him that the authorities would "mess" with his then cohabitant, who was a convicted felon on

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<sup>1</sup> "EVER" is capitalized in the SCA in each of the questions at issue in this case.

probation, if he did not plead guilty.<sup>2</sup> (GX 3 at 3-4.) The investigator did not specifically ask him why he failed to disclose his arrests and conviction in his October 2010 SCA. At the end of the PSI summary, the investigator commented, "All other information on the subject's case papers was reviewed and the subject had no further additions or corrections." (GX 3 at 6.)

When Applicant submitted his most recent SCA in June 2014, he again answered "No" to the same three questions related to felony charges, firearms or explosive charges, or drug-related charges. (GX 2 at 24.) He again did not disclose his previous arrests and the September 2000 conviction.

In a second PSI in October 2014, Applicant told the investigator he had difficulty with his second SCA because much of the information about previous residences and employments was already entered from his previous SCA and the computer would not accept his changes. He told the investigator that he tried to list his daughter, but the computer kept deleting the information. He told the investigator about the 1993 charges, the 1995 charges, and his conviction in 2000. He stated that he did not list his criminal record because he believed that he was not required to disclose arrests, charges, or convictions that were more than seven years old. (GX 4 at 2-3; Answer to SOR; Tr. 31.)

At the hearing, Applicant testified that he was not trying to conceal information or mislead security investigators. (Tr. 32.) He did not attribute his failure to disclose his criminal record to problems with the computer. Instead, he testified that he misread the questions. He admitted that when a word is written in capital letters, it means that the writer intends to "yell at you." (Tr. 49.) He testified that he could not remember if he copied his answers in the 2010 SCA into his 2014 SCA or if he completed his 2014 SCA "from scratch." (Tr. 53.) He testified that, when he completed his 2014 SCA, he believed that the Government already knew about his criminal record, but he adhered to his contention that he misread the questions. (Tr. 55.)

Applicant no longer associates with the persons who were involved in his criminal activity. He earns between \$71,500 and \$100,000 per year, depending on the amount of overtime he works. He has about \$20,000 in his checking account and investments of about \$50,000. He is current on his federal and state taxes. (Tr. 36-37.)

Applicant and his cohabitant were baptized in September 2013, and they regularly attend church. He is a pastor's aide and also provides security for the church's cameras and computers. (Tr. 29.) His pastor submitted a letter attesting to his character. He describes Applicant as a reliable, dedicated and hardworking individual. He states " [Applicant's] character is ground in allegiance and centered on respect for all individuals. [Applicant] understands the importance of allegiance, duty, and service." (AX A.)

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<sup>2</sup> At the hearing, Applicant did not repeat his exculpatory account of the arrest and conviction in 2000. Thus, no issue of collateral estoppel arose. See ISCR Case No. 11-00180 (App. Bd. Jun. 19, 2012); ISCR Case No. 04-05712 (App. Bd. Oct. 31, 2006); ISCR Case No. 95-0817 (App. Bd. Feb. 21, 1997).

## 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 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 record of arrests, felony conviction, and jail sentence establish three disqualifying conditions under this guideline: 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”) 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”).

The following 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;

AG ¶ 32(c): evidence that the person did not commit the offense; 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.

AG ¶ 32(e) provides that the disqualifying condition in AG ¶ 31(f) may not be mitigated unless, where meritorious circumstances exist, a waiver is granted by certain enumerated senior officials or their designees. AG ¶ 32(e) was based on the Smith Amendment (10 U.S.C. § 986). However, the Smith Amendment was replaced by the Bond Amendment in 2008 (50 U.S.C. § 435b, Sec. 3002). The Bond Amendment continued the disqualification and waiver provisions for persons who were sentenced to and served imprisonment for more than a year. However, AG ¶ 32(e) now applies only to eligibility for special access programs, restricted data, and sensitive compartmented information, which are not at issue in this case.

AG ¶ 32(a) is not established. Applicant's last criminal conviction was in September 2000, almost 16 years ago. However, his falsifications of his SCAs in 2010 and 2014 were recent. A deliberately false answer on a security clearance application is a felony under 10 U.S.C. § 1001 and a serious crime within the meaning of Guideline J. Although Applicant's falsifications were not alleged in the SOR as criminal conduct, 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 the criminal nature of Applicant's falsifications for these limited purposes.

AG ¶ 32(c) is established for the criminal conduct alleged in SOR ¶¶ 1.a and 1.b. Applicant denied committing these offenses. His descriptions of the two incidents are bizarre, but they not contradicted by any evidence of record, and his denials are corroborated by the dismissal of the charges in both cases.

AG ¶ 32(d) is not established. Applicant's felony conviction was 16 years ago. He has earned an associate's degree and a bachelor's degree, and he is currently in a master's degree program. He has been gainfully employed since his release from custody. He is in a committed relationship with his cohabitant and has been active in his church since September 2013. However, he falsified his SCAs in October 2010 and June 2014. In his December 2010 PSI, he tried to recant his guilty plea and blame it on bad legal advice. His lack of candor undermines the other evidence of rehabilitation.

### **Guideline E, Personal Conduct**

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 in this case is AG ¶ 16(a): "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . ." 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 experience and level of education 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).

AG ¶ 16(a) is established for both SCAs. When Applicant submitted his first SCA, he was a 36-year-old college graduate. He admitted at the hearing that the capitalization of “EVER” in each question “yells” at the reader. Even after being questioned at length about his criminal record in the December 2010 PSI, and understanding that his conduct raised serious security concerns, he again answered “No” to all the relevant questions about his criminal history in his June 2014 SCA, and he gave the same implausible excuse—that he had misread the questions.

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 made no effort to correct his omissions from his October 2010 SCA even after he was confronted with his criminal record. To the contrary, he attempted to explain away his September 2000 conviction, and he repeated the same omissions in his June 2014 SCA.

AG ¶ 17(c) is not established. Falsification of an SCA is not minor. It is a felony and “strikes at the heart of the security clearance process.” ISCR Case No. 09-01652 (App. Bd. Aug. 8, 2011.) Applicant’s falsifications were recent and did not occur under unique circumstances making them unlikely to recur.

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).

### **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 has made significant strides in turning his life around. He is now a well-educated, talented employee. He is devoted to his cohabitant and his daughter. He is an active and respected member of his church. However, he has not demonstrated the candor required of persons entrusted with classified information. His lack of candor undermines the substantial evidence of rehabilitation submitted at the hearing.

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 not mitigated the security concerns raised by his criminal conduct and personal conduct. 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): | AGAINST APPLICANT |
| Subparagraphs 1.a-1.b:                       | For Applicant     |
| Subparagraph 1.c:                            | Against Applicant |
| Paragraph 2, Guideline E (Personal Conduct): | AGAINST APPLICANT |
| Subparagraphs 2.a-2.f:                       | 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