

KEYWORD: Personal Conduct

DIGEST: Applicant has a history of alcohol-related arrests/convictions (two in all between 1978 and 2002) and grand theft felony arrest/conviction in 1974 that he failed to list in his separate security clearance applications between 1996 and 2004. These omissions are imputed to have been made deliberately out of concern his employer would find out and impact on his employment relationship. His arrests/convictions were not disclosed until confronted in a second DSS interview and are not mitigated. Besides these omissions, Applicant falsely induced and falsified a court filing in 2001 about his work and compensation status. Allegations that Applicant deliberately failed to disclose his wage garnishment between 1998 and were unsubstantiated. Clearance is denied.

CASENO: 06-25863.h1

DATE: 09/27/2007

DATE: September 27, 2007

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In re:)	
)	
-----)	ISCR Case No. 06-25863
SSN: -----)	
)	
Applicant for Security Clearance)	
_____)	

**DECISION OF ADMINISTRATIVE JUDGE
ROGER C. WESLEY**

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has a history of alcohol-related arrests/convictions (two in all between 1978 and 2002) and grand theft felony arrest/conviction in 1974 that he failed to list in his separate security clearance applications between 1996 and 2004. These omissions are imputed to have been made deliberately out of concern his employer would find out and impact on his employment relationship. His arrests/convictions were not disclosed until confronted in a second DSS interview and are not mitigated. Besides these omissions, Applicant falsely induced and falsified a court filing in 2001 about his work and compensation status. Allegations that Applicant deliberately failed to disclose his wage garnishment between 1998 and were unsubstantiated. Clearance is denied.

STATEMENT OF THE CASE

On February 28, 2007, 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 could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on May 5, 2007, and requested a hearing. The case was assigned to me on August 14, 2007, and was scheduled for hearing on September 12, 2007. A hearing was held on September 12, 2007, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At hearing, the Government's case consisted of 13 exhibits and a revised blank Questionnaire for national Security Positions (SF-86) which was received pursuant to the official notice provisions of the Rule 201(a) of the F.R.Evi. Applicant, in turn, relied on one witness (himself) and no exhibits. The transcript (R.T.) was received on September 20, 2007.

PROCEDURAL ISSUES

_____Prior to the commencement of the hearing, Department Counsel moved to amend the SOR to add a falsification allegation under Guideline E. Specifically, Department Counsel moved to add subparagraph 1.f to allege as follows:

“On or about October 19, 2007, you deliberately falsified material facts to an authorized investigator for the Department of Defense when you denied that you had ever been charged with or convicted of any offense related to alcohol, when in truth you had been charged with and convicted of Driving Under the Influence in 1978 and also While Ability Impaired in 2002.”

There being no objection from Applicant, and good cause being demonstrated, Department's motion to amend was granted. In responding to the amended subparagraph 1.f, Applicant denied the new allegation.

SUMMARY OF PLEADINGS

_____ Under Guideline E, Applicant is alleged to have falsified (a) his security clearance applications (SF-86) of June 2004, February 1998, and September 1996, by omitting his 2002 and 1978 alcohol-related offenses, his 1974 theft conviction, and his wage garnishments between 1998 and 2001 and (b) his filing a false statement in a local court about his claimed inactive work status and lack of compensation. For his answer to the SOR, Applicant admitted most of the allegations, but with qualifications. He claimed to be under the false assumption that his records covering his 2002 DuI charge and conviction were expunged and to be consistent he answered in the negative as to his earlier 1978 DuI charge/conviction, as well as his 1974 fraud charge/conviction. He provides no explanations of the underlying circumstances with respect to his admitted deliberate omission of his wage garnishment and claims to have had no proof of his employment status in connection with his admitted filing of a false statement about his inactive status and lack of compensation in court documents. Applicant affirmatively denied only the allegations in amended subparagraph 1.f that he deliberately denied in an October 2004 DSS interview to being charged and convicted of his 1978 and 2002.

FINDINGS OF FACT

_____ Applicant is a 54-year-old senior consultant of a defense contractor who has held a security clearance since 1977 and seeks to retain his clearance. The allegations covered in the SOR and admitted by Applicant are incorporated herein and adopted as relevant and material findings. Additional findings follow.

Applicant's SF-86 omissions of his DuI and felony fraud charges/convictions

In September 1996, Applicant was asked to complete an SF-86. Question 23d of the SF-86 asked if he had been charged or convicted of any offense(s) related to alcohol or drugs. In responding to the question, Applicant checked **no** (*see ex. 1 and official notice 1*). While not denying any intent to materially falsify the SF-86, he attributes his denial to his impression at the time that his 1978 DuI arrest and conviction had since been expunged, and, as such, he was not required to list it (R.T., at 35). In the same SF-86, Applicant answered **no** to question 21, which asked whether he had ever been charged and convicted of fraud. While Applicant does not deny any intent to materially falsify his SF-86, he attributes his denial of any felony fraud charge and conviction to his belief at the time that his fraud charge and conviction while attending college in 1974 had been resolved by expungement. Applicant claims no memory loss or confusion about the questions and cannot avoid drawn inferences he knowingly and willingly omitted the alcohol-related and fraud offenses out of concern disclosure could adversely impact his security clearance and employment.

In February 1998, Applicant was asked to complete another SF-86. He responded to the questions inquiring about his alcohol-related and theft offenses in the same way he answered the questions posed in his earlier 1996 SF-86. He answered **no** to each question and attributed both denials to his desire to maintain consistency with his previous answers and avoid embarrassment with his employer (R.T., at 48-50).

Six years later (in June 2004), Applicant was asked to complete a third updated security clearance. In this SF-86, he was asked in question 24 whether he had ever been charged with or convicted of any offenses related to alcohol or drugs. He answered **no** to this question. Asked in question 21 of the same SF-86 whether he had ever been charged with or convicted of any felony offense, he answered **no** to this question as well. When queried in question 34 of the same SF-86 whether in the last seven years he had ever had his wages garnished for any reason, again, he answered **no**. In his signed, sworn response to the SOR, Applicant admitted to deliberately omitting his alcohol-related and fraud offenses. These admissions have not been drawn and stand as official admissions.

Applicant attributes his negative responses to each of the questions inquiring about his prior alcohol and felony offenses to his belief that the underlying 2002 DuI charge/conviction had been expunged. He attributes his omissions of his 1978 DuI charge/conviction and his 1974 felony theft conviction to his desire to maintain consistency with the corresponding answers in each of his previous security clearance applications (*see* response and ex. 5; R.T., at 52-53). He claims no confusion or memory loss over any of the underlying offenses. Nor does he provide any documentation to corroborate his claims that the underlying convictions were expunged or subject to expungement.

Less amenable to reconciliation are Applicant's consistent omissions of his prior alcohol-related offenses of 1978 and 2002, respectively, and his 1974 felony fraud conviction. Each of these underlying offenses resulted in convictions. He never listed either of the alcohol-related offenses due primarily to his concern it could adversely affect his work relationships (*see* ex. 5). He did not want any of his supervisors or colleagues to find out about his fraud conviction either. Such concerns are attributable as well to his omissions of his 1974 grand theft arrest and conviction (*see* ex. 4). While Applicant insisted in his second DSS interview that he was not aware his 1974 arrest was a felony when he completed each of his SF-86s, the charge itself is serious enough to impute sufficient knowledge of the offense's felony status as to suggest a concerted effort on Applicant's part to employ conscious denial. Applicant's employment concerns, while understandable, are not enough to avert drawn inferences of knowing and wilful concealment of his alcohol-related and fraud offenses.

Applicant was first interviewed about his 2004 SF-86 by an DSS agent in October 2004. When asked about any prior alcohol-related and felony offenses by the agent, Applicant falsely denied ever being charged or convicted of any alcohol-related or felony offenses (*see* ex. 5). Not until pressed by the same agent in a follow-up interview a month later (in November 2004) did he provide detailed descriptions of the underlying circumstances and his ensuing alcohol-related arrests in December 1978 and October 2002, respectively, and his fraud arrest in April 1974. When pressed, he acknowledged that listing any of the alcohol-related offenses would be embarrassing to him and could impact his job relationship (*see* ex. 5; R.T., at 49). Concern about the effect disclosure might have on his job is a much more plausible motivational reason for his wanting to omit his prior alcohol-related and fraud offenses than his claimed understanding about the expungement of the convictions and his corresponding excuse from listing them for this reason. Inferences warrant that Applicant's omissions of his alcohol and fraud offenses were deliberately made to avert potential disclosure to his employer and possible adverse effects on his employment relationship.

Applicant's SF-86 wage garnishment omissions

When queried in question 34 of the same 2004 SF-86 whether in the last seven years he had ever had his wages garnished for any reason, he answered **no**. In his answer he admits to deliberately failing to disclose prior wage garnishments and claims only that financial arrangements with his ex-wife are resolved and this type of omission occurred under unique circumstances and will not recur. Applicant provided no explanations of whether or not the garnishment writs were actually levied or attached to his wages.

Both in his response to the SOR and in his signed, sworn statement of November 2004, Applicant admitted to having his wages garnished during the period 1998 to 2001. He attributed the issued garnishment writs to ongoing arguments over his former spouse's achieving court-approved permanent maintenance and ordered retroactive payments on any ordered maintenance (*see ex. 5*). Never informed by the court or his former spouse of her obtained judgments and garnishment orders (*see exs. 8 through 12*), he was asked by his company administrator how he wanted to handle the garnishments. Since the garnishments had not yet attached to any of Applicant's accounts, he agreed in October 2001 to make one lump sum payment of \$33,000.00 in full settlement of any and all of current and future maintenance obligations to his (*see exs. 5 and 6; R.T., at 54-60*). Question 34 asks about wage garnishment in the past tense and clearly references wages actually attached, not subject to attachment by dint of a court-approved garnishment writ. Absent any evidence persuasive to contradict Applicant's claimed pre-attachment settlement with his ex-wife, Applicant's settlement claims are entitled to acceptance.

Based on a fair reading of question 34 and Applicant's explanation that the court-entered judgments and issued garnishments never attached to his wages or bank accounts, Applicant's explanations of his answers in his signed, sworn statement and at hearing (*R.T., at 58-59*) are worthy of acceptance. Inferences warrant, accordingly, that Applicant did not deliberately omit his prior garnishments when responding to question 34 of his June 2004 SF-86.

Applicant's court filings regarding his work status

Both in his signed, sworn answer and in his November 2004 signed, sworn statement, Applicant acknowledged that he falsely filed a statement in a state court in 2001 that inaccurately stated he was in an inactive work status and not receiving compensation (*see response and ex. 5*). He admitted doing so to persuade his ex-wife and attorney to pursue a compromise arrangement with him regarding her maintenance payments. His answer is consistent with the statement he provided the DSS agent in his November 2004 interview. In this statement, he confirmed he called a company administrator and asked him "to send me a letter saying I was temporarily laid off in order to convince my former spouse and her attorney that I needed to compromise arrangement regarding the maintenance" (*ex. 5*). Then he states that "he was not really laid-off but was no longer working on long term projects" (*ex. 5*). Nowhere in the statement does he suggest he was actually fired or laid off, or received no compensation during this supposed lay-off period. Both by his response and his interview statements his exchange with his administrator represents a clear and consistent account of what transpired. While Applicant tried initially at hearing to claim he was actually fired by his employer in January 2001 and generated no significant income after that (*R.T., at 38-39*), he ultimately acknowledged to be available after that date for short term assignments in which he earned some income (*R.T., at 61-66*). Applicant's attempted corrections are not substantive enough to materially detract from his earlier acknowledgments.

While it is less than clear from Applicant's acknowledged exchange with his company administrator in 2001 whether the administrator actually wrote such a letter to him, Applicant does acknowledge filing a letter to this effect in the court presiding over his ex-wife's maintenance petition. While he does insist he took a substantial drop in income from his employer in 2001, he has never suggested he had no income at all during this 2001 time frame. Applicant's subsequent hearing claims that he experienced a substantial loss of income during this pertinent period in 2001 (R.T., at) does not alter the inferential effect of his admissions in both his response and November 2004 DSS statement (*see ex. 5*).

That Applicant was ultimately successful in working out a compromise maintenance settlement with his ex-wife (resulting in an agreed \$33,000.00 lump sum settlement payment to her) does not undue his acknowledged deceptive means he employed to produce such a settlement. Accordingly, inferences warrant of Applicant's filing a false statement in a pending court proceeding in 2001 indicating he was in an inactive work status and not receiving compensation. Further, inferences warrant that Applicant filed such a letter to attempt to persuade his ex-wife and her attorney that he did not have available compensatory funds from his work to satisfy her maintenance demands and cover the entered judgment and issued writs of garnishment and needed a compromise arrangement with her.

POLICIES

The revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (effective September 2006) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the Mitigating Conditions, if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

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

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.

Burden of Proof

By virtue of the precepts framed by the revised Adjudicative Guidelines, 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 common sense 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. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons 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 showing of material bearing, 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, consideration must take account of 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 burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

CONCLUSIONS

_____ Applicant is a senior consultant for a defense contractor who has held a security clearance for over 30 years and has raised security concerns over his alleged (a) omissions in the security clearance applications he completed between 1996 and 2004, (b) a false statement about his employment status he filed in a pending court that was presiding over his ex-wife's maintenance petition, and (c) false statements he made to a DSS investigator in October 2004 about his alcohol-related and felony fraud offenses.

Applicant's SF-86 and DSS interview omissions

Particularly serious and difficult to reconcile with the trust and reliability requirements for holding a security clearance are the timing and circumstances of Applicant's omissions of his two prior alcohol-related charges and convictions in 1978 and 2002, respectively, and his felony fraud charge/conviction in 1974, in the security clearance applications he completed in 1996, 1998 and 2004, and his withholding of information pertaining to these offenses until he was confronted in an ensuing DSS interview in November 2004. So much trust is imposed on persons cleared to see classified information that candor lapses must be scrupulously evaluated.

Applicable disqualifying conditions under the Adjudicative Guidelines for personal conduct are as follows: DC 16(a) (*the deliberate omission, concealment, falsification or misrepresentation of relevant and material 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) and 16(b) (*deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative*).

Applicant's manifest reasons for omitting his prior alcohol and fraud offenses (*i.e.*, embarrassment over disclosing any of his alcohol and fraud offenses that he had historically omitted in prior SF-86s, for fear of impact on his job) have never been considered sufficient by the Appeal Board to mitigate raised trust concerns associated with the omissions. Mitigation difficulty is compounded by his failure to promptly correct his SF-86 omissions before being confronted in his ensuing second DSS interview in November 2004. In the past, the Appeal Board has denied applicants availability of the predecessor mitigating condition of MC 17(a) (*the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts*) where the applicant has waited many months to timely correct a known omission. Compare ISCR Case No. 97-0289 (Appeal Bd. January 1998) with DISCR Case No. 93-1390 (Appeal Bd. January 1995).

By omitting his prior alcohol-related and fraud offenses in his security clearance applications and ensuing October 2004 DSS interview, Applicant concealed materially important background information needed for the government to properly process and evaluate his security updates. His attributed reasons for his omissions (fear of adverse impact on his job) are not sustainable grounds for averting inferences of falsification. Weighing all of the circumstances surrounding his omissions of his DuI/felony fraud charges and lack of any prompt, good faith corrections, Applicant's claims lack the necessary probative showing to avert drawn conclusions that he knowingly and deliberately withheld material background information about his prior alcohol-related and felony fraud convictions in both the security clearance applications he completed and the first DSS interview he submitted in October 2004. Accordingly, subparagraphs 1.a through 1.c and 1.f are concluded unfavorable to Applicant.

By contrast, favorable conclusions warrant with respect to SOR allegations that Applicant deliberately omitted the writs of wage garnishment issued against him between 1998 and 2001, but never attached to Applicant's wages or earnings. Applicant's proofs that the garnishment writs were never levied on his wages before he worked out a lump sum settlement with his ex-wife were accepted. Without proofs of actual attachments or levies on Applicant's wages, Applicant could truthfully claim that his wages were never garnished. Question 34 of his 2004 SF-86 looks to actual wage garnishments in the past tense and manifestly does not cover issued writs that were not served. Accordingly, the allegations covered in subparagraph 1.d are unsubstantiated.

Applicant's false court statement re: his employment status

Security significant, too, is Applicant's admitted statement he filed in 2001 with the court presiding over his ex-wife's maintenance claims. After enlisting his company administrator to send him a letter misstating the status of his employment, he then filed a statement with the court indicating he was in inactive work and not receiving compensation. Neither of these statements were true, for by his own accounts, Applicant was never actually laid off without pay. Applicant's hearing claims that he was never in an inactive work status are belied by his response admissions and the answers he provided the DSS agent in his second interview with Applicant in November 2004.

Applicable to Applicant's admitted deceptive actions is DC 16(d) (*credible adverse information that is not explicitly covered under any other guideline and may not be sufficient 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 protected 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) *disruptive, violent, or other inappropriate behavior in the workplace;*

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

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

Both Applicant's inducement of his company administrator to file a false statement concerning his employment and compensation status and his ensuing filing of a false statement in court regarding his employment status reflect material acts of deceit that are not mitigated under any of the potentially available mitigating conditions of the Guidelines for personal conduct.

Considering Applicant's deceitful actions with regards to his ex-wife's maintenance judgment and garnishment writs from the standpoint of both the guidelines and a whole-person assessment, Applicant's cannot be considered isolated, but rather reflect a pattern of dishonest conduct that reflect adversely on his judgment, reliability and trustworthiness. Consequently, the allegations covered by subparagraph 1.e must be concluded unfavorable to Applicant. Taking into account all of the evidence produced in this record and the available guidelines in the Directive (inclusive of the E2.2 factors), unfavorable conclusions warrant with respect to sub-paragraph 1.e of Guideline E.

In reaching my decision, I have considered the evidence as a whole, including each of the E2 2.2 factors enumerated in the Adjudicative Guidelines of the Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the FINDINGS OF FACT, CONCLUSIONS, CONDITIONS, and the factors listed above, I make the following FORMAL FINDINGS:

GUIDELINE E (PERSONAL CONDUCT):	AGAINST APPLICANT
Sub-para. 1.a:	AGAINST APPLICANT
Sub-para. 1.b	AGAINST APPLICANT
Sub-para. 1.c:	AGAINST APPLICANT
Sub-para. 1.d	FOR APPLICANT
Sub-para. 1.e	AGAINST APPLICANT
Sub-para. 1.f:	AGAINST APPLICANT

DECISION

 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