KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant is a 46-year-old employee of a defense contractor who has been convicted of disturbing the peace, battering his wife, DWI, and violating a domestic violence protective order. He deliberately omitted another arrest for threatening his wife, for which charges were dropped, from his security clearance application. He did not mitigate security concerns raised by his criminal and personal conduct. Clearance is denied.

CASENO: 06-26006.h1

DATE: 08/03/2007

DATE: August 3, 2007

In re: -------------------- SSN: ------------ Applicant for Security Clearance	)	ISCR Case No. 06-26006

DECISION OF ADMINISTRATIVE JUDGE
DAVID M. WHITE

APPEARANCES

FOR GOVERNMENT
Jeff A. Nagel, Esq., Department Counsel

FOR APPLICANT
Pro Se

SYNOPSIS

Applicant is a 46-year-old employee of a defense contractor who has been convicted of disturbing the peace, battering his wife, DWI, and violating a domestic violence protective order. He deliberately omitted another arrest for threatening his wife, for which charges were dropped, from his security clearance application. He did not mitigate security concerns raised by his criminal and personal conduct. Clearance is denied.

STATEMENT OF THE CASE

Applicant applied for a security clearance on June 13, 2006, in conjunction with his employment by a defense contractor. On March 22, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended. The SOR detailed reasons, under Guideline J (Criminal Conduct), and Guideline E (Personal Conduct) of the revised Adjudicative Guidelines (AG),[1] why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant a security clearance for Applicant, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant responded to the SOR allegations in a notarized letter dated April 10, 2007, admitting the truth of some of the factual allegations, and elected to have a hearing before an administrative judge. On May 15, 2007, the case was assigned to another administrative judge. The case was reassigned to me on May 17, 2007. A notice of hearing was issued on June 6, 2007, and the hearing was held as scheduled on June 26, 2007. The Government offered two exhibits that were marked as Government Exhibits (GE) 1 and 2, and admitted without objection. Applicant testified, and offered one exhibit at the hearing, but withdrew it for later submission because it was his only copy. At his request, and without objection, the record was kept open to permit his submission of court documents and letters of reference. These were received by Department Counsel on July 24, 2007, forwarded for admission without objection, and received on July 30, 2007. These documents were marked Applicant Exhibits (AE) A through F, and admitted. AE A is a more complete version of the four pages of court documents originally tendered during the hearing. DOHA received the hearing transcript (Tr) on July 12, 2007.

FINDINGS OF FACT

[1] *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (August 2006)* as implemented by Under Secretary of Defense Memorandum of Aug. 30, 2006 for use in adjudication of all cases in which an SOR had not been issued by Sept 1, 2006. These revised AG replaced those found in enclosure 2 of the Directive, which is pending revision to incorporate them. Copies of the applicable AG were provided to Applicant with the SOR.

Applicant admitted the truth of the factual allegations set forth in SOR ¶¶ 1.a, 1.b, 1.c, 1.d, and 1.e, with some explanations, pertaining to criminal conduct under AG J. Those admissions are incorporated herein as findings of fact. He denied falsifying material facts concerning his criminal history on his security clearance application as alleged in SOR ¶ 2.a. After complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following findings of fact:

Applicant is a 46-year-old employee of a defense contractor. He was divorced from his first wife in December 1992, began living with his second wife in 1993, and married her in July 1998. After a series of domestic disputes and temporary separations, they finally separated in April 2005. Their divorce is still pending. Applicant was recently awarded physical custody of their nine-year-old son.[2] His second wife is now residing in Arizona with her two teenage daughters. Applicant has another son and daughter who are adults, living independently.

On May 3, 1992, in connection with his separation from his first wife, Applicant was arrested for contempt of court and disobeying a court order. He admitted the arrest, but said he cannot recall details of the incident. Due to the timing, he thinks this resulted from an altercation with his then-brother-in-law. He was convicted of misdemeanor disturbing the peace, and fined.[3] There is no evidence concerning the nature of the court order he was charged with disobeying, or why an altercation with his wife's brother would violate it.

On March 10, 1997, Applicant was arrested and charged with inflicting corporal injury on a spouse or cohabitant. He was convicted of the lesser offense of battery of a cohabitant, and sentenced to probation and a fine.[4] He successfully completed a one-year anger management class. In his response to the SOR, Applicant explained:

> I admit the arrest on 10 March 1997 charged with Inflict Corporal Injury on Spouse/Cohab. with explanation. During an argument, while unloading the dishwasher, my wife accidentally hit her head on a cabinet door. She used this accident to convince the authorities of abuse. Unfortunately, I did not have the resources to fight the charge. My wife rescinded the allegation, the District Attorney pressed charges. I did a year of weekends at an anger management course.

He described the incident somewhat differently during the hearing, as follows:

> This was an evening, I had just gotten home from work and had gone and took a shower. We were arguing, continuing arguing from the day before and I went and like I said I took a shower. Came out of the shower she was still arguing, still continuing this argument. She was unloading the dishwasher at the time, I happened to reach up in the cupboard to get a glass and as I turned to close the cabinet, she put glasses or

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[2]GE 1 (Questionnaire for Sensitive Positions (SF 86), dated Jun. 13, 2006) at 1, 4-5; AE A and B; Tr at 22, 45, 49-50.

[3]GE 2 (FBI Identification Record, dated Jun. 25, 2006) at 1; Applicant's Response (AR) to SOR at 2; Tr at 37-38, 48-50.

[4]GE 2 at 1; AR to SOR at 2; Tr at 35-37.

cups or plates, I can't remember what they were, but bowls and plates and something in the cupboard and I went to close it and it hit her on the side – on the side of her – and pushed her glasses. So anyway she called the police.

He went on to testify that he did not intend to hit her with the door and she suffered no injuries.[5]

On October 31, 1998, Applicant was arrested for driving while intoxicated. He had been out with friends and estimated he consumed about five drinks, comprising cocktails and beers. He could not remember his blood alcohol level. He was convicted, paid a $500 fine, and paid $1,500 for a year-long DUI school. After completing the school, he received a restricted Class B driver's license with a reduced, 0.04 alcohol limit, which he still holds.[6]

Applicant was arrested for violation of a domestic violence protective order on May 17, 2003. The case was not prosecuted by the district attorney. Applicant and his wife were separated at the time, and a domestic violence protective order was in effect. He was living with his parents, and she had moved into an apartment across the street. Applicant went out to dinner with his two older children, and his wife came into the restaurant where they were eating. When she left, she used her spare keys and took his Ford Expedition, which they discovered to be missing when they departed. Applicant reported the missing vehicle to the police, who found it at her apartment. Applicant recovered the vehicle, and later that evening saw his wife as their paths crossed when he was pulling into his parking space. She called the police and reported him for violating the protective order. After his arrest, he was held for a couple of hours then made bail. The charge was dismissed without prosecution during a subsequent court appearance. Applicant did not explain what prompted the protective order, but it evidently had to do with their ongoing separation at the time.[7]

A month or two after this arrest, Applicant's wife moved across the country with her daughters and their son. Three or four months after that, in late 2003, they moved back and the family "got back together." This lasted until the night of April 28, 2005, when he and his wife argued again. She called the police and told them he had threatened her. Applicant was arrested for threatening to commit a crime with intent to terrorize, and taken to jail. He said that a no-contact order was issued while he was in custody but without his knowledge. His subsequent conviction for violating a domestic violence protective order purportedly resulted from making a phone call to his home to speak to one of his older step-children about getting his parents to help him, not from the argument that led to his original arrest. He pled guilty, through counsel, to violating the order, was fined $300 and placed on three years unsupervised probation which he is still serving. The underlying threat charge was dismissed when he pled guilty to violating the order. He left the house after this incident, and has been separated from his wife ever since. He said he forgot to pay the fine, which resulted in a bench warrant being issued. When he found out about the warrant, he paid the fine in full and it was rescinded.[8]

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[5]Tr at 35-36.

[6]GE 1 at 9; AR to SOR at 2; Tr at 33-34.

[7]GE 2 at 1; AR to SOR at 2; Tr at 31-33, 45-48, 51-52.

[8]GE 2 at 1; AR to SOR at 1; Tr at 25-31, 45.

When Applicant completed the Police Record portion of his security clearance application, he listed his 1998 DWI conviction and sentence. He also listed his 2005 arrest for "domestic dispute with wife," but reported that the charges were dropped. He did not report his conviction and sentence for violating the protective order. This omission was not alleged in the SOR, however. He also did not list his 2003 arrest for violation of a protective order, after which the charge was dismissed. This omission forms the basis of the SOR allegation under AG E. He said he omitted this arrest inadvertently, believed all the charges were dropped, and forgot all about the incident. He denied intentionally omitting the information in order to deceive the government.[9]

Applicant submitted four letters of recommendation from friends and coworkers, in which they spoke highly of his integrity, trustworthiness and good work performance. Several also confirmed his frequent troubles in his turbulent second marriage, stating that he tried to make it work for the sake of the children and because he values family, but his wife continued causing problems.

POLICIES

The revised AG that replaced Enclosure 2 of the Directive set forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into disqualifying conditions (DC) that may raise security concerns, and mitigating conditions (MC) that may reduce or negate security concerns. Applicable DCs and MCs must be considered in deciding whether to grant, continue, deny or revoke an individual's eligibility for access to classified information. Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, are set forth and discussed in the conclusions section below.

An administrative judge need not view the adjudicative guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are intended to be applied in conjunction with the factors set forth in the Adjudicative Process provision of the Directive,[10] to assist the administrative judge in reaching fair and impartial, common sense decisions.

The entire decision-making process is a conscientious scrutiny of a number of variables known as the "whole person concept." All available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider, in addition to the applicable guidelines, are: (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.

[9]GE 2 at 8-9; AR to SOR at 2; Tr at 41-43.

[10]AG ¶ 2.

Protection of the national security is the paramount consideration, so the final decision in each case must be arrived at by applying the standard that issuance of a clearance must be clearly consistent with the interests of national security. Any doubt as to whether access to classified information is clearly consistent with national security must be resolved in favor of the national security.[11] In reaching this decision, only those conclusions that are reasonable, logical and based on the evidence contained in the record were drawn, and no inferences were grounded on mere speculation or conjecture.

In the decision-making process, facts must be established by "substantial evidence."[12] The burden of producing evidence initially falls on the government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. "Department Counsel is responsible for presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted."[13] "The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and [Applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision."[14] Once it has met its initial burden of production, the burden of persuasion (including any burden to disprove a mitigating condition) never shifts to the government.[15]

A person seeking access to classified information seeks to enter a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Section 7 of Executive Order 10865 specifically provides that any adverse industrial security clearance decision shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned," so the decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. It is merely an indication the applicant

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[11] *Id.*, at ¶¶ 2(b), 2(c).

[12] "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "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).

[13] Directive ¶ E3.1.14.

[14] Directive ¶ E3.1.15.

[15] ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005); "The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

As set forth in the Directive, every recommended personnel security decision must be a fair and impartial overall common sense decision based on all available evidence, both favorable and unfavorable. The decision must be arrived at by applying the standard that the grant or continuance of a security clearance or access to classified information is clearly consistent with the interests of national security.

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."[16] Three Criminal Conduct Disqualifying Conditions (CC DC) raise security concerns under the facts and circumstances established by the evidence in this case.

CC DC 31(a) ("a single serious crime or multiple lesser offenses") applies because Applicant has been convicted of DWI, two assaults related to domestic disputes, and violating a court protective order. These offenses spanned the period from 1992 to 2005. Each of these offenses reflected an absence of self-control, poor judgment, and inability to comply with laws, rules and regulations.

CC DC 31(c) ("allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted") applies as Applicant admitted to the forgoing convictions, and to being arrested for additional verbal fights with his wife for which the charges were dropped.

CC DC 31(d) ("individual is currently on parole or probation") also applies. Applicant's three years of unsupervised probation, imposed as part of the sentence for his 2005 conviction, runs through sometime in 2008. There is no information that would cause any other CC DC to apply.

Criminal Conduct Mitigating Condition (CC MC) 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") does not apply. Applicant's conduct casts significant doubt on his reliability and good judgment. He continued to fight with his wife despite multiple interventions by law enforcement, and after completing a court-ordered anger management class following his 1997 assault conviction. This most recent offense was just over two years ago, and he is still serving probation for it. Although their separation makes recurrence of domestic violence less likely, the multiple offenses, including a DWI, continue to cast doubt on his judgment and reliability.

[16] AG ¶ 30.

CC MC 32(b) ("the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life"), applies to partially mitigate some of Applicant's criminal conduct. His wife was at least equally culpable for their domestic disputes, and they have been separated, pending divorce, since 2005. However, his 1992 conviction arose out of a different marriage-related dispute, he is now a single parent of a soon-to-be teenager, and he will continue to face family pressures and concerns. There is no evidence that his relationship with his son is anything but good, but Applicant has not demonstrated that he has developed adequate coping skills when faced with family issues. Moreover, security concerns arising from his DWI conviction are not mitigated by this factor.

CC MC 32(c) ("evidence that the person did not commit the offense") applies in part as well, but cuts both ways. Applicant admitted that he did commit the DWI offense. He admits to arguing but says he did not commit the threat offenses for which he was arrested, but not convicted, in 2003 and 2005. He said he didn't know about the protective order he pled guilty to violating in 2005. He claims the spousal assault to which he pled no contest was accidental, and couldn't remember the circumstances of his 1992 conviction. His minimization of his own culpability and selective memory are not persuasive of his innocence, but instead reflect failure to take responsibility for his actions. This is not mitigating of criminal conduct security concerns.

Finally, CC MC 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") does not apply. He was arrested twice more in connection with domestic disputes after his court-ordered anger management class. Only two years has passed since his last conviction for violating a court order, and he offered no other evidence of rehabilitation.

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 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."[17]

Applicant omitted relevant facts concerning his 2003 arrest for violating a protective order from his security clearance application, but listed his 2005 arrest and his 1998 DWI conviction. Department Counsel submitted sufficient circumstantial evidence that the omission was deliberate to shift the burden of persuasion to Applicant. This evidence includes Applicant's internally contradictory explanation in his response to the SOR,[18]and his testimony that he was in jail for several hours after the arrest and had to make a separate court appearance at which the charges were dismissed. Applicant further demonstrated his understanding that an arrest should be disclosed even if charges are subsequently dismissed when he falsely reported "charges were dropped" as the action

[17]AG ¶ 15.

[18]"I inadvertently left out [SOR ¶] 1(b), the arrest in 2003. The District Attorney rejected the case as the facts did not substantiate the charge. I believed all charges were dropped an forgot all about the incident."

taken after his 2005 arrest.[19] After what he described as years of ongoing domestic disputes in which his wife regularly involved police authorities, he chose to disclose one offense described as "domestic dispute with wife," and "action taken: charges were dropped." His denial that the omission of the 2003 arrest was intentional is not persuasive. Personal Conduct Disqualifying Condition (PC DC) 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") is established by the evidence in this record.[20] No other PC DC applies. Applicant neither asserted, nor provided any evidence to support application of, any personal conduct mitigating conditions. None are applicable.

Whole Person Analysis

I have considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. His 15-year pattern of sporadic criminal behavior, including a DWI and battering his spouse, raises serious concerns about his judgment, self-control, and willingness and ability to follow laws, rules and regulations. He is mature and fully accountable for his choices.

The omission of one arrest from his security clearance application, in light of his false report concerning the outcome of his subsequent arrest for a similar offense, was deliberately deceptive. This raises serious security concerns, particularly in light of his ongoing minimization of culpability and failure to admit responsibility for his misconduct.

Security concerns in this case rest not so much on potential for pressure, coercion, exploitation or duress, but more on Applicant's reliability, judgment and ability to conform behavior to required norms. Accordingly, Applicant has not mitigated the security concerns raised by his criminal conduct or personal conduct, so it is not clearly in the interest of national security to grant him access to classified material.

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[19] GE 1 at 8. Note that he is still on probation from the resulting conviction.

[20] The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

> (a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

FORMAL FINDINGS

Formal Findings For or Against Applicant on the allegations set forth in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	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 a security clearance for Applicant. Clearance is denied.

David M. White
Administrative Judge