

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant was convicted of misdemeanor theft in 1993, right after graduating from high school and shortly before serving honorably in the Army for four years. Since his discharge, he has performed classified work for a defense contractor, compiling an excellent record. In 2005, during his first six months of marriage, he committed a misdemeanor domestic assault during an argument. He successfully completed a rehabilitation and anger management program, has a very good relationship with his wife, and has had no further incidents. His omission of these matters from his security clearance application was not deliberate. Applicant mitigated security concerns arising from his criminal conduct, and his personal conduct. Clearance is granted.

CASENO: 06-26613.h1

DATE: 07/31/2007

DATE: July 31, 2007

In re:)	
)	
-----)	
SSN: -----)	ISCR Case No. 06-26613
)	
Applicant for Security Clearance)	

**DECISION OF ADMINISTRATIVE JUDGE
DAVID M. WHITE**

APPEARANCES

FOR GOVERNMENT

Jeff A. Nagel, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was convicted of misdemeanor theft in 1993, right after graduating from high school and shortly before serving honorably in the Army for four years. Since his discharge, he has performed classified work for a defense contractor, compiling an excellent record. In 2005, during his first six months of marriage, he committed a misdemeanor domestic assault during an argument. He successfully completed a rehabilitation and anger management program, has a very good relationship with his wife, and has had no further incidents. His omission of these matters from his security clearance application was not deliberate. Applicant mitigated security concerns arising from his criminal conduct, and his personal conduct. Clearance is granted.

STATEMENT OF THE CASE

Applicant reapplied for a security clearance on February 28, 2006, in conjunction with his employment by a defense contractor as a communications technician. On March 30, 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 9, 2007, 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 3 exhibits that were marked as Government Exhibits (GE) 1 through 3, and admitted without objection. Applicant testified, and offered 7 exhibits that were marked Applicant Exhibits (AE) A through G, and admitted without objection. DOHA received the hearing transcript (Tr) on July 6, 2007.

FINDINGS OF FACT

Applicant admitted the truth of some of the factual allegations set forth in SOR ¶¶ 1.a, and 1.b, pertaining to criminal conduct under AG J. Those admissions are incorporated herein as findings of fact. He admitted answering incorrectly, but denied intentionally falsifying material facts concerning his criminal history on his security clearance application as alleged in SOR ¶¶ 2.a and

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 a 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.

2.b. After a 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 32-year-old employee of a defense contractor seeking to renew a security clearance he has held since he served on active duty in the Army from 1994 to 1998.² On July 12, 1993, right after he graduated from high school and before entering the Army, he was arrested while trying to remove a suitcase full of ammunition from a school bus, on school grounds, that was being used for storage of excess school equipment. He explained that he was removing the ammunition because he thought it was being hidden there in connection with gang activity, and he wanted to prevent gang members from having access to it. He was charged with burglary and receiving known stolen property, both felonies. He pled guilty to, and was convicted of, misdemeanor charges of theft and tampering with a vehicle. He was sentenced to perform community service, which he completed, and to probation. The probation was dropped because he entered the Army.³

After serving honorably in the Army, where he earned an Army Commendation Medal, an Army Achievement Medal, and a Good Conduct Medal, Applicant was discharged and began his current employment. He maintained his security clearance and has had no security incidents or violations. His work performance has been outstanding.⁴

Applicant married his wife in October 2004. Her 13-year-old daughter and their 2-year-old son live with them.⁵ In March 2005, Applicant and his wife had an argument when he told her that he had looked at pornographic magazines in the past, but did not intend to do so in the future. She struck him in anger, but he did not immediately respond. After about a half hour, he confronted her about striking him, and in the ensuing argument he put his hands around her neck with sufficient force to cause bruising. He was arrested and convicted for inflicting corporal injury on a spouse or co-habitant. His sentence included ten days in jail and three years probation. He successfully completed a year-long Batterer's Intervention Program of weekly two-hour sessions. After that and a home visit, he was removed from supervised probation. He has been on unsupervised "court probation" ever since, without further incident. This will expire in May 2008. He described his current relationship with his wife as "very good." He reported the incident and resulting legal actions to his supervisor and employer immediately.⁶

When Applicant completed his security clearance application, he answered "No" to questions 23(a) ("Have you ever been charged with or convicted of any felony offense?") and 23 (f) ("In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in response to a, b, c, d, or e above? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.)"). At the time, he did not recall that the 1993 incident initially involved felony charges, and should have been listed in response to question 23(a). Since receiving the LOI,

²GE 1 (e-QIP security clearance questionnaire, dated Feb. 28, 2006) at 1, 18-19, 23-24; Tr at 23.

³GE 3 (FBI Identification Record dated Mar. 22, 2006) at 1; Tr at 37-40, 50-54.

⁴GE 2 (Applicant's DD-214); AE A, AE B (Reference letters dated Jun. 25 & 22, 2007); Tr at 23, 29-30, 40-42.

⁵GE 1 at 13, 16-17; Tr at 57-58.

⁶GE 3; Tr at 35-36, 42-49, 56-57.

he investigated and now realizes that he was originally charged with felony offenses before pleading guilty to, and being convicted of, the misdemeanors.⁷

Applicant began filling out GE 1 before his 2005 arrest for injuring his wife. At the time he checked “No” for question 23(f), that answer was true. By the time he and his company finally got around to completing the form and signing the certifications, he neglected to go back and change that answer, as he candidly acknowledged he should have. He had promptly reported the incident to his employer, and had no intention of deceiving the government about it. He freely disclosed the incident during the interview process. He did not intend to conceal his police record in either instance, he merely answered incorrectly by mistake.⁸ Applicant’s testimony in this regard was entirely credible.

Applicant presented testimony from his supervisor and mentor, as well as three letters of recommendation. All spoke highly of his character, work performance, reliability, trustworthiness and loyalty.⁹ He also presented a letter of appreciation and documentation concerning three performance awards he has earned at work.¹⁰

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,¹¹ 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

⁷See Applicant’s response to the LOI, dated Apr. 9, 2007; Tr at 19-23, 52-53, 58. Note that he also (properly) answered no to question 23(b) concerning firearms or explosive offenses since violation of no such laws were involved in the incident. Tr at 53-54.

⁸Tr at 37, 47-49, 54-56, 58-59.

⁹AEs A, B, C; Tr at 28-31.

¹⁰AEs D, E, F, G.

¹¹AG ¶ 2.

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.

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.¹² 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.

In the decision-making process, facts must be established by "substantial evidence."¹³ 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."¹⁴ "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."¹⁵ 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.¹⁶

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,

¹²*Id.*, at ¶¶ 2(b), 2(c).

¹³"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).

¹⁴Directive ¶ E3.1.14.

¹⁵Directive ¶ E3.1.15.

¹⁶ISCR 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).

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 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 Regulation, 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.”¹⁷ I have considered all the Guideline J Criminal Conduct Disqualifying Conditions (CCDCs) and find that only CCDC 31(a), (c), and (d) apply. There is no information that would cause any other CCDC to apply.

CCDC 31(a) (“a single serious crime or multiple lesser offenses”) applies because Applicant has been convicted of two crimes. His theft conviction started as a felony case, but was reduced to misdemeanor charges. His misdemeanor domestic violence conviction was serious enough to cause the court to impose ten days in jail and three years on probation. Whether either of these standing alone would constitute a single serious crime need not be determined, since there was a second conviction, and the facts of the offenses speak for themselves in terms of security clearance concerns. The 1993 offense demonstrated bad judgment by breaking and entering with the intention of confiscating contraband ammunition, when he should have involved law enforcement authorities in the confiscation. The 2005 offense demonstrated a lack of self-control. Each is of potential security concern.

CCDC 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 committing both offenses listed in the SOR. The security concerns raised are the same as those noted above.

CCDC 31(d) (“individual is currently on parole or probation”) also applies. Applicant’s three years of supervised probation have been reduced to only one year, after he successfully completed

¹⁷AG ¶ 30.

his rehabilitation program, but he will still technically be on unsupervised probation until May 2008. However, there is nothing about the circumstances of Applicant's probation that raises any security concerns independent of the underlying crime itself. It has served its purpose and been effective in preventing any recurrence.

Two of the Guideline J Criminal Conduct Mitigating Conditions (CCMCs) also apply. CCMC 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") applies to Applicant's offenses, both individually and collectively. The 1993 offense occurred 14 years ago, when he was very young and naive. This is no longer the case. The 2005 offense occurred during the first 6 months of marriage, with a new baby in the home, and before Applicant and his wife developed their communication and coping skills. Both have fully reconciled and their relationship now is very good. Applicant has developed his anger management and stress. There have been no further incidents over the past two years. This one incident of losing self control was out of character, and given the intervening time and changed circumstances, no longer casts doubt on his reliability, trustworthiness or good judgment. The two offenses were so different, and occurred so many years apart, that they do not reflect a pattern of criminality or disregard for following laws, rules and regulations.

CCMC 32(b) ("the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life"), and CCMC 32(c) ("evidence that the person did not commit the offense") do not apply. There was no pressure or coercion to cause him to commit either the theft offense or the assault, which was not in immediate response to his wife hitting him, but occurred a half hour later. Applicant admitted that he did commit the offenses.

Finally, CCMC 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") fully applies. He learned his lesson from the theft conviction, and has done nothing remotely similar since. He successfully completed the Batterer's Intervention Program, has found successful coping skills, and has a very good relationship with his wife. He was demonstrably remorseful about having assaulted her, and has an excellent employment record.

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."¹⁸

Applicant did not remember that his 1993 offense originally involved felony charges when he completed his security clearance application. He completed the question on which he should have listed his 2005 offense before that offense occurred. He did not update the answer before signing the form, but that was through oversight and not with any intent to deceive either his employer or the

¹⁸AG ¶ 15.

government. His employer was fully informed, and he freely discussed the incident during the interview process. The Regulation's personal conduct guideline requires deliberate omission, concealment or falsification of relevant and material facts to establish Personal Conduct Disqualifying Condition (PCDC) 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" (emphasis added)), or PCDC 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" (emphasis added)). Applicant's omission of information about his criminal history from his Security Clearance Application was not deliberate, but arose from misunderstanding and inattention.¹⁹ No other PCDC applies.

Whole Person Analysis

I have considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. He committed a misdemeanor theft offense, at which he was caught in the act, when he was just out of high school, some 14 years ago. Two years ago, he committed a misdemeanor domestic violence offense under stressful circumstances during the first six months of his marriage. He successfully completed a rehabilitation and anger management program, has not re-offended, and now has a very good relationship with his wife. These two incidents are sufficiently different in nature and motivation, and sufficiently separated in time, that they do not demonstrate a pattern of criminality, or show inability or unwillingness to follow laws, rules and regulations. His omission of these incidents from his security clearance application was not deliberately deceptive, and raises no security concerns. There is no potential for pressure, coercion, exploitation or duress, and recurrence is highly unlikely given his sincere remorse. Accordingly, I do find that Applicant has fully mitigated the security concerns raised by his criminal conduct. It is clearly in the interest of national security to grant or continue his access to classified material.

¹⁹The 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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

David M. White
Administrative Judge