

DATE: December 3, 2007

In Re:

SSN: -----

Applicant for Security Clearance

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) ISCR Case No. 07-01371
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**DECISION OF ADMINISTRATIVE JUDGE
MATTHEW E. MALONE**

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esquire, Department Counsel

FOR APPLICANT

Lenore M. Imhof, Esquire

SYNOPSIS

Security concerns raised by Applicant's arrests in 2001 and 2003 are mitigated. However, he was unable to mitigate the security concern about his deliberate omission of information about his arrests from a security clearance application he submitted in January 2006. Clearance is denied.

STATEMENT OF THE CASE

After reviewing the results of Applicant's most recent background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to give Applicant a security clearance. On May 25, 2007, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed in the Revised Adjudicative Guidelines under Guideline F (financial considerations).²

Applicant timely responded to the SOR and requested a decision without a hearing. However, the government timely requested a hearing and the case was assigned to a DOHA administrative judge on September 10, 2007, but transferred to me on September 24, 2007, due to workload considerations. I convened a hearing on November 6, 2007, at which the parties appeared as scheduled.³ I admitted five exhibits proffered by the government (Gx. 1- 5). Applicant testified and offered seven exhibits, which were admitted without objection as Applicant's Exhibits (Ax.) A - G. I also left the record open to receive additional information from Applicant. On November 11, 2007, DOHA received the transcript (Tr.). The record closed on November 30, 2007, when I received Applicant's post-hearing submissions, which are included in the record as Ax. H and I.

FINDINGS OF FACT

In response to the SOR, Applicant admitted he was arrested for and convicted of possession of a controlled dangerous substance in 2001 (SOR ¶ 1.a); and that he was arrested in August 2003 and charged with receiving stolen property, a charge that was later dismissed (SOR ¶ 1.b). He denied deliberately omitting his August 2003 arrest from his January 2006 Electronic Questionnaire for Investigations Processing (e-QIP) as alleged in SOR ¶ 2.a. His admissions are incorporated herein as facts. After a thorough review of the pleadings, transcript, and exhibits, I make the following additional findings of fact.

Applicant is 27 years old. Since receiving his bachelor's degree (with honors) in computer science in 2001, he has worked as a computer programmer. In 2003, he was hired by a company that provides systems development, testing, and installation services for private industry clients and to Department of Defense customers. He currently is assigned as a lead systems developer, and his company has sponsored his request for a security clearance for potential work on their government contracts.⁴

¹ Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

² Adjudication of this case is controlled by the Revised Adjudicative Guidelines, approved by the President on December 29, 2005, which were implemented by the Department of Defense on September 1, 2006. Pending official revision of the Directive, the Revised Adjudicative Guidelines supercede the guidelines listed in Enclosure 2 to the Directive, and they apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

³ This matter was originally set for hearing on October 11, but was continued three times due to a change in venue and schedule conflicts before and after Applicant retained legal counsel.

⁴ Gx. 1; Tr., 49.

In May 2001, as he was finishing college, Applicant was arrested for possession and distribution of 100 pills of the drug now known as ecstasy. On January 25, 2002, he pleaded guilty to possession of a controlled dangerous substance, for which he was placed on probation for five years, his driver's license was suspended for six months, he was assessed a \$3,205 fine, and he was ordered to perform 200 hours of community service. His guilty plea was entered in exchange for the dismissal of an additional charge of distribution of heroin or cocaine.⁵ Applicant completed all of the terms of his sentence in 2003 and testified he was released from his probation two years early.⁶

In August 2003, Applicant was riding with two friends in a car driven by one of the friends. When the police attempted to pull the car over for speeding, the driver initially sped up and refused to stop. When he did stop, the police arrested the occupants of the vehicle because the car was stolen. They were handcuffed, taken to the police station, and held for overnight. Applicant was released without bond. He subsequently received a letter in the mail advising him he had been charged with receiving stolen property and ordering him to appear in court on December 8, 2003. He appeared as ordered and was told the charges against him were dismissed. The driver of the car had given a written statement stating, inter alia, that Applicant did not know the car was stolen.⁷

On February 2, 2006, Applicant completed and electronically submitted an e-QIP. In response to question 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 [23]a, b, c, d, or e above?"), he answered "yes" and listed his May 2001 drug arrest. He did not list his August 2003 arrest.

In July 2006, Applicant was interviewed by a government investigator regarding the August 2003 arrest, which Applicant did not disclose on his e-QIP.⁸ In the interview, Applicant did not disclose this arrest until the investigating agent asked him about it.⁹ In October 2006, the agent again interviewed Applicant regarding adverse information about his finances, some of which Applicant did not disclose on his e-QIP.¹⁰

In response to SOR ¶ 2.a, which alleged Applicant deliberately failed to disclose his 2003 arrest on his e-QIP, Applicant averred he "did not remember [the arrest] since [he] never had to make a court appearance and the charge was dropped that it had even happened (sic) or I would have listed it as I did the more serious [May 2001] charge."¹¹ Applicant testified he was aware that disclosure

⁵ Gx. 1; Gx. 2.

⁶ Tr., 101.

⁷ Answer to SOR; Gx. 2; Gx. 4; Ax. I., Tr., 77.

⁸ Gx. 4.

⁹ Tr., 91 - 92, 106 - 107.

¹⁰ Gx. 3.

¹¹ Answer to SOR.

of his May 2001 arrest could disqualify him from receiving his clearance.¹² He explained his omission of the 2003 arrest happened because he was focusing on the details of the 2001 arrest, and that he forgot about the arrest.¹³ In addition to providing details about the disposition of the 2001 charges, Applicant stated “there is no record of trouble since then. Probation was completed 100% satisfactory (sic). All urine tests were clean, All (sic) fines were paid, All (sic) community service was completed.”¹⁴

When Applicant was arrested in May 2001, he was handcuffed, taken to a police station, fingerprinted, and photographed. He was released the following day. When he was arrested in August 2003, he was arrested, taken to a police station, and released the next day. He told the government investigator in July 2006 that he had received a summons and knew before he appeared in court that he had been charged with a crime. However, at hearing he testified that he was not aware he was charged with anything until he appeared in court.¹⁵

Applicant no longer associates with any of the people with whom he was involved during both of his arrests. He has established himself as a valuable employee and has been given increased responsibilities for new work in various locations around the country and abroad. He recently bought his own home as well as the house his grandmother owned until her death in 2006. The executive vice president of his company and a former high school teacher regard Applicant as hard working, reliable, and honest, although neither referenced any knowledge about the SOR allegations of falsification or criminal conduct.¹⁶

POLICIES AND BURDEN OF PROOF

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the Revised Adjudicative Guidelines.¹⁷ Decisions must also reflect consideration of the factors listed in the ¶ 2(a) of the new guidelines.¹⁸ The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against

¹² Tr., 62 - 63.

¹³ Tr., 67 - 68, 87 - 88.

¹⁴ Gx. 1, at page 28 of 32.

¹⁵ Tr., 79 - 80, 104.

¹⁶ Ax. A; Ax. B.

¹⁷ Directive, 6.3.

¹⁸ Commonly referred to as the “whole person” concept, these factor 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.

an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties at hearing require that Revised Adjudicative Guideline E (personal conduct) and Guideline J (criminal conduct) be applied.

_____ A security clearance decision is intended to resolve whether it is clearly consistent with the national interest¹⁹ for an applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.²⁰ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.²¹

CONCLUSIONS

Criminal Conduct. Under Guideline J, "[c]riminal 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."²² The government presented sufficient information to support the allegations that Applicant was arrested and convicted of a 2001 drug offense as alleged in SOR ¶ 1.a. Available information further supports the allegation that he was also arrested in 2003 as alleged in SOR ¶ 1.b. The record requires consideration Guideline J disqualifying condition (DC) 31(a)²³ and DC 31(c).²⁴ However, as to SOR ¶ 1.b, available information shows that Applicant did not engage in criminal conduct on that occasion. Nonetheless, his conduct that resulted in his May 2001 arrest and conviction is sufficient to disqualify him from holding a clearance.

¹⁹ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

²⁰ See *Egan*, 484 U.S. at 528, 531.

²¹ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

²² Revised Adjudicative Guidelines, ¶ 30.

²³ "a single serious crime or multiple lesser offenses;"

²⁴ "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;"

By contrast, the record also requires consideration of Guideline J mitigating conditions 32(a).²⁵ The offense occurred more than six years ago when Applicant was still in college. He adhered to the terms of his sentence and has been off probation for at least two years. His personal circumstances have changed for the better as he has been working in his field of expertise the past six years and no longer associates with the persons with whom he engaged in the criminal conduct. Available information suggests he is unlikely to repeat his involvement in the illegal drug trade. Applicant has mitigated the security concerns about his criminal conduct.

Personal Conduct. Under Guideline E, “[c]onduct 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.”²⁶ Available information is sufficient to support the government’s allegation (SOR ¶ 2.a) that Applicant’s omission of his 2003 arrest was deliberate. Despite his denial that he did not intentionally falsify his answer to e-QIP question 23.f, the totality of the information probative of this issue supports the government’s allegation. Applicant was aware of the potentially negative impact disclosure of his arrests might have on his suitability for a security clearance. To his credit he disclosed his 2001 arrest and conviction, but he has provided inconsistent explanations for his omission of the 2003 arrest. In his response to the SOR, he said he did not remember because he did not appear in court. At his hearing, he claimed he was so focused on the details of the 2001 arrest, he forgot about the 2003 arrest. Yet, in providing the details about the 2001 arrest in his e-QIP, he affirmatively stated he had not been involved since 2001 in any other adverse criminal conduct. Based on the foregoing, Guideline E disqualifying condition 16(a)²⁷ applies here.

Of the mitigating conditions under this guideline, only 17(a)²⁸ and 17(b)²⁹ are potentially applicable to these facts. I conclude neither applies. Because he did not disclose the arrest until confronted with the information in a July 2006 investigative interview, I cannot conclude Applicant made a prompt, good-faith effort to correct his omission. Nor does the record support a finding his answers resulted from improper advice.

²⁵ “so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment;”

²⁶ Revised Adjudicative Guidelines, ¶ 15.

²⁷ “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;”

²⁸ “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;”

²⁹ “the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;”

The Applicant's completion of a security questionnaire is the initial step in requesting a security clearance. Because false or incomplete information given in the questionnaire is capable of affecting the way in which Department of Defense personnel perform their official functions in obtaining complete and accurate information about an applicant, it is material. Moreover, a false answer is material even if there is no proof that it actually influenced an agency's investigatory functions. Concealment, misrepresentation, or omission of a material fact in a security clearance application is an act of great security significance. In addition to its interest in a proper security clearance decision, the Department of Defense has a significant interest in ensuring that false and misleading information does not interfere with its security clearance investigations. Applicant's omission of a more recent arrest may have affected the adjudicators' initial decision about Applicant's suitability, and he has not presented sufficient information to overcome negative implications of the available information about his personal conduct. The Guideline E security concerns are resolved against the Applicant.

Whole Person. I have evaluated the facts presented in this record and have applied the appropriate adjudicative factors, pro and con, under Guidelines E and J. I have also reviewed the record before me in the context of the whole person factors listed in section 2(a) of the Revised Adjudicative Guidelines.³⁰ It is uncontroverted that Applicant was an accomplished student in college³¹ and that he has been successful in his professional career to date. While his personal circumstances have changed sufficiently to resolve the concerns about his past criminal conduct, his failure to be completely candid about his background sustains the government's reasonable doubts about his suitability for access to classified information. Such doubts must be resolved in favor of the national security.³² A fair and commonsense assessment³³ of all available information before me shows that the Applicant has not yet overcome the government's reasonable doubts about his ability to protect classified information and to exercise the requisite good judgment and discretion expected of one who holds a security clearance.

FORMAL FINDINGS

Formal findings regarding each SOR allegation are as follows:

Paragraph 1, Guideline J (Criminal Conduct): Subparagraph 1.a - 1.b:	FOR THE APPLICANT For the Applicant
Paragraph 2, Guideline E (Personal Conduct): Subparagraph 2.a:	AGAINST THE APPLICANT Against the Applicant

³⁰ See footnote 18, *supra*.

³¹ Ax. I.

³² See footnote 21, *supra*.

³³ See footnote 17, *supra*.

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 the Applicant. Clearance is denied.

Matthew E. Malone
Administrative Judge