



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



In the matter of:)
)
-----) ISCR Case No. 06-21093
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: James F. Duffy, Esquire, Department Counsel
For Applicant: *Pro Se*

June 16, 2008

Decision

WESLEY, Roger C., Administrative Judge

Statement of the Case

On October 20, 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. DOHA recommended referral to an administrative judge to determine whether clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on December 4, 2007, and requested a hearing. The case was assigned to me on January 3, 2008, and was scheduled for hearing on March 5, 2008. A hearing was held on March 5, 2008, 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 the hearing, the Government's case consisted of nine exhibits; Applicant relied on one witness (himself) and one exhibit. The transcript (R.T.) was received on March 18, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility to access classified information is denied.

Summary of Pleadings

Under Guideline J, Applicant is alleged to have been arrested, charged, or indicted with four criminal offenses between 1994 and January 1999. Those four offenses are as follows: (1) in June 1994 for eluding/fleeing (on foot) and possession of a controlled substance prohibited (a felony), for which he pleaded guilty to both counts (judgment deferred on eluding/fleeing count), and later charged with failure to pay fines and found guilty to three charges in June 1996, (2) in August 1995 for petty larceny, for which he later found guilty in June 1996 (including failure to appear on two occasions) and served one day in jail, (3) in December 1997 for larceny (a felony) and receiving/disposing of stolen property (a felony, for which a bench warrant issued after his failure to appear for arraignment (still outstanding), and (4) in January 1999 for criminal trespass, for which he pleaded guilty and was fined.

Under Guideline E, Applicant is alleged to have (a) falsified his public trust application of March 2003 by omitting his 1997 larceny indictment and his January 1999 criminal trespass arrests, (b) misrepresenting his awareness of his 1997 larceny indictment in a follow-up January 2004 signed, sworn statement, (c) falsified his November 2005 security clearance application (SF-86) by omitting his 1997 felony larceny indictment, and (d) omitting his January 1999 criminal trespass arrest.

For his response to the SOR, Applicant admitted three of his four alleged offenses: He denied his alleged 1997 larceny indictment. Applicant also denied falsifying either of his trust applications and making any false misrepresentations to an investigator about his 1997 larceny indictment. In further explanation of his omission of his 1997 larceny indictment, Applicant claimed he was never charged or notified of any indicted offense and had no recollection of any such charged offense.

Findings of Fact

Applicant is a 31 year-old products support technician for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are incorporated herein by reference and adopted as relevant and material findings. Additional findings follow.

Applicant is married and has two children, both girls (see exs. 1 and 2; R.T., at 25). Applicant became attracted to drugs at an early age. His parents were heroin addicts and poor parents. His grandparents filled in for his parents and essentially raised him (R.T., at 28). After his grandmother expired in 1994, he lost his way. With his grandfather an alcoholic, he really had no one to provide guidance and structure in his life (R.T., at 28).

While still in high school (18 years of age), Applicant attended a party in June 1994 where marijuana was used, and was confronted by police upon leaving the party. Applicant fled the scene and was eventually run down by the police officer who gave chase (R.T., at 28-30). At this point, Applicant offered no resistance. He was arrested, fingerprinted, and charged with eluding/fleeing (on foot) and possession of a controlled substance prohibited (a felony). He was then assigned a court date, and released (R.T., at 32). When he did not appear for his scheduled court date, a bench warrant

was issued for his arrest (R.T., at 32-33). Months later, he was cited for a traffic citation and jailed over the weekend on both the citation and the outstanding bench warrant (R.T., at 34). After spending the weekend in jail, he was released to attend his court arraignment. When he appeared in court, he pleaded guilty to both the traffic offense and the eluding/failure to appear offenses. The court accepted his guilty plea, credited him for the two days he served in jail, and imposed a fine (R.T., at 34). At the time of his arrest, Applicant had dropped out of high school. Later, he returned to school and completed his high school educational requirements (R.T., at 35).

In August 1995, Applicant was charged with petty larceny (a misdemeanor under Sec. 30-16-1 of State Code), and later for twice failing to appear in court on the charge (see ex. 6: R.T., at 37-38). He had walked out of a store with a tea shirt he did not pay for and was arrested for shoplifting. In 1996, he was picked up by police for a traffic-related offense and jailed for a day (see ex. 3). In court on the charges, Applicant pleaded guilty to three charges (including the larceny charge) and was fined (R.T., at 38-39).

In December 1997, Applicant was indicted for larceny and receiving/disposing of stolen property, each charge a felony (see ex. 7). Applicant was never arrested for the covered offense, and indicated that he knew nothing about the indictment issuance when a government investigator inquired about it several years later (see exs. 3 and 7). Pressed to account for a reported stolen wedding ring by a woman he worked for back in December 1997, Applicant acknowledged taking the ring and later pawning it without the permission or knowledge of the owner (R.T., at 49-51). Applicant later apologized to the ring's owner for taking her ring (R.T., at 51-52). When he failed to appear for his scheduled arraignment in January 1998 on the pending charges, however, a bench warrant was issued. Applicant attributes his failure to appear to his lack of notice, which the case docket appears to corroborate. Until this year, the issued warrant associated with the 1997 charges remained outstanding (see ex. 9). In March 2008 (following the hearing), the presiding court dismissed the charges and cancelled the bench warrant (see ex. B).

Applicant was arrested in January 1999 for criminal trespass. He made a wrong u-turn into a store lot and received a trespassing ticket from police (R.T., at 39-40). Applicant assures that the other cars making similar u-turns into the store lot also received trespassing citations (R.T., at 40). While he denies any court appearance, the court docket covering the case reports he pleaded guilty to the charge in court and paid the imposed fine. The case docket also reports that the court deferred findings on the merits (see ex. 8; R.T., at 42, 59). Applicant's assurances he paid the issued ticket and made no court appearance cannot be reasonably reconciled with the case docket. The criminal trespass charge is listed as a misdemeanor offense and could reasonably be expected to require a court appearance absent an express waiver from the court. Any dispensing of a court appearance should have some reference in the case docket. It does not and cannot be presumed in this situation (see ex. 8)

Asked to complete a public trust application in March 2003, Applicant answered question 16 of the application (inquiring about his police record over the previous seven years) in the negative. In answering "no" to the question, he omitted both his 1997 larceny indictment and his 1999 criminal trespass arrest. Applicant attributes his 1997

larceny indictment omission to his lack of awareness of the indictment at the time he completed his 2003 application (R.T., at 55-58). He attributes his 2003 omission of his 1999 trespass arrest to memory lapse and a mistaken understanding of the scope of the question (R.T., at 54-55, 58-59). Since he was only cited (not arrested), it never occurred to him that the citation was potentially covered by question 16.

Applicant's assigned reasons for his omissions draw some contradictions from the record. The case docket covering the 1997 offense recites larceny/receiving stolen property charges filed against Applicant in December 1997 (ex. 7). The same case docket reports the issuance of a bench warrant in January 1998 and the return of an undelivered notice of arraignment in January 1998 (ex. 7). Neither the case docket nor any other documents in the case provide any clarifying clues on the issue of whether or not Applicant was notified of the scheduled arraignment or the issuance of a bench warrant to insure Applicant's availability at each of the scheduled proceedings.

By contrast, the case docket covering Applicant's 1999 criminal arrest reports a scheduled arraignment on the misdemeanor charge in January 1999, and Applicant's ensuing appearance, entry of a guilty plea, payment of a fine, the court's deferral of any findings on the charge, and the closing of the case in September 2006 (ex. 8). It is quite apparent from the docket entries on this 1999 charge that Applicant made a court appearance on the charge and was informed of the court's deferred finding in the case. If this was not the case, it became incumbent on Applicant to provide better explanations of the circumstances in which he entered his guilty plea.

When subsequently asked about his 1997 indictment and 1999 arrest in a signed, sworn statement he gave in January 2004, Applicant could remember no more about either event until asked about them specifically (see ex. 3; R.T., at 56-57). When confronted with the 1997 larceny charges, Applicant insisted he was "not aware of any 7/1997 larceny charge" (ex. 3). This may be true, since the 1997 case docket does not contain any notice information. At the same time, his statement implicitly acknowledges his being informed of a 1997 larceny charge. With this information, he was in a position to look into the status of the charge and any outstanding warrant before executing any future security clearance applications. In this same signed, sworn statement, Applicant also addressed his 1999 trespass citation, but provided no further details about any court appearance, guilty plea, and deferred finding referenced in the 1999 case docket.

Applicant submitted another security clearance application in 2005: specifically, an SF-86 he completed in November 2005. In this application, Applicant answered "no" to two questions: question 21, which inquired about felony offenses, and question 26, which asked him about other offenses in the past seven years. Applicant omitted anew both his 1997 larceny charge and his January 1999 trespass charge. He attributes his negative responses to the same reasons he supplied for his earlier 2003 omissions: unawareness, memory lapse, and a mistaken understanding of the scope of question 26 (R.T., at 58-59).

Applicant's assured lack of knowledge of his 1997 indictment and ensuing charge is plausible only so much. While clearly aware of the underlying facts based on his exchanges with the employer whose wedding ring he misappropriated, it is certainly plausible that he was not aware of any formal charges when he filled out his trust

application in 2003. Applicant could not plausibly rely on the lack of notice of the 1997 charges, though, when he completed his 2005 SF-86. For by this time, he had been made aware of the pending 1997 larceny charge by the OPM investigator who interviewed him and took his statement in 2004. Only by a wilful refusal to look into any pending 1997 charges could Applicant claim a continued lack of awareness of any pending charges.

Wilful avoidance of the truth is insufficient to enable Applicant to sustain his evidentiary claim to continued unawareness of the 1997 charge. Neither his signed, sworn statement nor the 1997 case docket corroborate Applicant's unawareness claims. So, while Applicant is able to credibly demonstrate that his omission of his 1997 larceny charge in his 2003 trust application was inadvertent, he cannot avert inferences of knowing and willful omission of the charge in his ensuing 2005 SF-86.

Credibility issues arise, too, with respect to Applicant's multiple omissions of his 1999 trespass charge. Omitting his 1999 trespass arrest on one clearance application might plausibly be attributable to memory lapse and mistaken apprehension. However, his omission of his confirmed guilty plea on two separate applications covering the 1999 offense strains plausibility limits, and cannot credibly be attributable to memory lapse and confusion under all off the circumstances extant at the time. Based on the case docket covering the 1999 offense, Applicant inferentially appeared in court to enter a guilty plea to the criminal trespass charges, was credited with the payment of a fine, and was privy to the court's deferring of any findings in the matter (ex. 8). Without any probative documentation of a waived court appearance, inferences must warrant that Applicant's omissions of his 1999 criminal trespass in both his 2003 and 2005 clearance applications were made knowingly and willfully.

Applicant is well regarded by his supervisor, coworkers and friends (see ex. A). They find him to be of good character and a reliable and trusted work provider and asset to his family and community.

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:

Criminal Conduct

"The Concern. "Criminal activity create 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" (Adjudicative Guidelines, ¶ 30).

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" (Adjudicative Guidelines, ¶ 15).

Burden of Proof

By virtue of the precepts framed by the Directive, 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.

Analysis

Applicant is a well regarded support technician with several criminal arrests and convictions over a five-year span between 1994 and 1999. Applicant's arrest/conviction history, while aged, raise initial security concerns over his eligibility to hold a security clearance. Additional security concerns are raised over Applicant's omissions of his two most recent incidents in his answers to a 2003 public trust application and an ensuing 2005 security clearance application.

Applicant's criminal history

Applicant's three arrests/citation and indictment over larceny warrant initial consideration of two disqualifying conditions of the Adjudicative Guidelines for criminal conduct: DC 31a, "a single serious crime or multiple lesser offenses, " and DC 31©), "allegation or admission of criminal conduct, regardless of whether the person was formally charged." While Applicant's arrests/citation all resulted in guilty pleas and convictions, his potentially more serious larceny offense for which he was indicted for in 1997 was dismissed by the court presiding over the case. Because Applicant admits to the underlying larceny charge of taking his employer's wedding ring and later pawning it, dismissal of the underlying charges does not moot the underlying conduct.

Applicant may find no mitigation comfort in MC 32©), "evidence that the person did not commit the offense" of the guidelines for criminal conduct. His convictions relative to all three of his arrests (*i.e.*, in 1995, 1996, and 1999) are each admitted. Applicant also admits his underlying conduct relative to his 1997 indictment. It is evident, too, however that the underlying conduct that pertains to each of his arrests are aged and bear less relevance to Applicant's current clearance worthiness. His first line supervisor, coworkers, and friends who are familiar with his work, home, and community commitments credit him with being conscientious, considerate, and helpful. These collective impressions are probative in enabling Applicant to mitigate the government's criminal conduct concerns. Taking into account all of the facts and circumstances developed in the record, favorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a through 1.d of the SOR.

Whole person assessment also favors Applicant's mitigation efforts. Applicant's arrests and underlying offenses all occurred during Applicant's high school years and in the four years that ensued. Since his last incident in 1999, Applicant has exhibited responsible work in his work, home, and community. His first line supervisor, coworkers, and friends who are familiar with his work, home, and community commitments speak positively of his reliability and trustworthiness. Their impressions warrant considerable weight to be accorded Applicant's exhibited conscientious behavior he has demonstrated in his work, home, and community over the past eight years

Considering the record as a whole, Applicant succeeds in making a convincing showing that he has both the maturity and seasoned resource support to avert any recurrent problems with judgment lapses related to his past confrontations with law enforcement. There is sufficient evidence to warrant safe assessments that he is no longer at risk of judgment impairment associated with his past criminally-related conduct. Favorable conclusions warrant with respect to subparagraphs 1.a through 1.d of the SOR.

Public Trust/SF-86 omissions

Potentially serious and difficult to reconcile with the trust and reliability requirements for holding a security clearance are the timing and circumstances of Applicant's failure to list all of his of his arrests/indictment/citation in his 2003 public trust application and 2005 SF-86. So much trust is imposed on persons cleared to see

classified information that the margins for excusing candor lapses are necessarily narrow.

By omitting his 1997 indictment and 1999 trespassing citation in each of his applications, Applicant failed to furnish materially important background information needed by the government to properly process and evaluate his security updates. His claims of unawareness and misapprehension of the questions draw mixed inferences. While his omission of his 1997 charges in his 2003 trust application is plausible and credible under all of the circumstances considered, his omission of his 1997 charge in his 2005 SF-86 and his omissions of his 1999 criminal trespass charge in both of his applications are not.

Applicant's ensuing omission of his 1997 larceny charge in his 2005 SF-86 followed his being confronted with the charge in his 2004 OPM interview and could not be plausibly omitted in his 2005 application without a determined disregard of the likely existence of the 1997 larceny charge. Based on his own account of his pawning his employer's wedding ring and his being confronted with a 1997 charge associated with the incident by the OPM investigator who interviewed him in 2004, he was possessed of enough personal information about the incident to confidently list the incident in his 2005 SF-86 or further acquaint himself with the details of the incident.

Applicant's assurances of forgetting about the 1999 offense and treating it as an administrative citation amenable to satisfactory disposition without a court appearance are undermined by the case docket covering the offense. A plain reading of the case docket makes quite clear that Applicant did appear for his arraignment in January 1999 and was privy to the court's crediting him with payment of the ordered fine and deferring of a finding in the matter. Under these circumstances, Applicant's claims of memory lapse and confusion cannot be reconciled with the actual reports of the 1999 proceeding in the case docket.

Applicant's omissions of his 1997 larceny charge and 1999 criminal trespass charges require application of a disqualifying condition (DC) for personal conduct of the Guidelines: 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."

Mitigation is difficult to credit Applicant with, because his omissions of his 1997 charge (in the SF-86 of 2005 only) and 1999 charges are neither isolated nor followed by prompt and good faith corrections of his omissions. Under these circumstances, he cannot claim the benefit of any of the potentially applicable mitigating conditions.

Addressing the availability of mitigating conditions to mitigate materials omissions in a security clearance application (and implicitly in any trust application), the Appeal Board has not only found the use of the predecessor to mitigating condition (MC) 17(c) (which is A5.1.3.2) of the Adjudicative Guidelines for personal conduct ("the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on

the individual's reliability, trustworthiness, or good judgment") to be unavailable to applicants seeking mitigation by treating the omission as isolated, but it has denied applicants availability of MC 17(a) and its predecessor mitigating condition ("the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts"). *Compare* ISCR Case No. 97-0289 (January 1998) *with* DISCR Case No. 93-1390 (January 1995).

Considering all of the evidence produced in this record and the available guidelines in the Directive (inclusive of the E2.2.2 factors), unfavorable conclusions warrant with respect to subparagraphs 2.a, 2/b, and 2.d of Guideline E. Favorable conclusions warrant as to sub-paragraph 2.c.

In reaching my decision, I have considered the evidence as a whole, including each of the E 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 J (CRIMINAL CONDUCT):	FOR APPLICANT
Sub-para. 1.a:	FOR APPLICANT
Sub-para. 1.b:	FOR APPLICANT
Sub-para. 1.c:	FOR APPLICANT
Sub-para. 1.d:	FOR APPLICANT
GUIDELINE E (PERSONAL CONDUCT):	AGAINST APPLICANT
Sub-para. 2a:	AGAINST APPLICANT
Sub-para. 2.b:	AGAINST APPLICANT
Sub-para. 2.c:	FOR APPLICANT
Sub-para. 2.d:	AGAINST APPLICANT

Conclusion

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