

DATE: December 13, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-02717

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Kathryn A. Trowbridge, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

When completing his Security Clearance Application, the Applicant failed to indicate a 1999 arrest and failed to mention six debts. The Applicant failed to list his arrest because the case was dismissed. The Applicant's failure to list the six debts was not a deliberate omission, concealment, or falsification of relevant and material facts. Clearance is granted.

STATEMENT OF THE CASE

On March 30, 2001, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating DOHA could not make the preliminary affirmative finding [\(1\)](#) it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On May 14, 2001, the Applicant answered the SOR and elected to have his case decided on the written record, in lieu of a hearing.

The Applicant received a complete copy of the file of relevant material (FORM) dated September 12, 2001, and was given the opportunity to file objections and submit material in extenuation, mitigation, or refutation. The Department Counsel presented six exhibits (Items) in the FORM. The Applicant's response to the FORM was due on October 20, 2001. No response has been received. I was assigned the case on November 1, 2001. On December 5, 2001, the Applicant responded to the FORM which was admitted into evidence. Following the admission of the Applicant's response, the record in this case closed on December 5, 2001.

FINDINGS OF FACT

The SOR alleges falsification of a Security Clearance Application, Std. Form 86, under personal conduct, (Guideline E). The Applicant admits, with explanation, the allegations set forth in the SOR.

The Applicant is 41-years-old and has worked for a defense contractor since August 1998. He is seeking to obtain a

security clearance.

In January 1999, the Applicant was arrested for domestic assault. The Applicant was placed on supervision in the Community Diversion Program and ordered to participate in anger management classes and shared parenting class. The Applicant attended six or eight anger management sessions but the counselor determined further shared parenting classes would be unproductive since the Applicant's wife would not attend. In October 1999, the case was dismissed. In January 2000, the Applicant signed a Security Clearance Application, Std. Form 86. (Item 1) When asked in question 26 if, during the previous seven years, he had been arrested for, charged with, or convicted of any offense not previously listed, the Applicant answered "no." The Applicant answered no because the case had been dismissed. Additionally, when the Applicant was completing his Std. Form 86 he was simply updating his original package completed for his secret clearance and did not make "out a completely new form." (Item 5, page 4)

The Applicant was indebted to the telephone company (SOR subparagraph 1.b.(1)) for approximately \$261.00 incurred while he was a military member on a ship in the Pacific. His wife was supposed to handle the family's finances in the Applicant's absence, but failed to pay this bill. In September 1997, the account was referred for collection and satisfied in November 1997. The Applicant incurred another debt (SOR subparagraph 1.b.(2)) for approximately \$387.00 which was referred for collection in May 1988 and satisfied in July 1998. A third debt (SOR subparagraph 1.b.(3)) for approximately \$14.00 was referred for collection in July 1999 and satisfied in December 1999.

In 1997 or 1998 the Applicant purchased about \$2,100.00 of airline and train tickets (Item 5, page 2). The Applicant's credit report (Item 6), dated March 1999, listed this account (SOR subparagraph 1.b.(5)) for the purchases as "Pays as Agreed." The account became due around April 1999, when the Applicant and his wife separated.

In August 1998, the Applicant and his wife bought a house for \$53,000.00. In April 1999, the marriage ended in a legal separation in which the wife was granted the marital residence and was responsible for paying the mortgage. (Item 5, page 1) The legal separation required the Applicant to pay the credit union loan for his wife's automobile. In November 1999, the Applicant was notified his estranged wife was behind in the mortgage payments and had not made payment "for two or three months." (Item 5, page 1) The Applicant attempted to contact his estranged wife, through his attorney, to determine her intention concerning the house, but received no response. The Applicant attempted to get a loan to pay the arrearage, but the loan was refused because of the Applicant's debt to income ratio was too high. When the house went to foreclosure in mid-January 2000, the mortgage was approximately 4-6 months in arrears.

When the Applicant applied for the loan in an attempt to prevent the foreclosure, his only outstanding debt was a telephone bill. The telephone bill was different from the debt listed in SOR subparagraph 1.b.(1) and was not his debt.

Although the Applicant's March 1999 credit report (Item 6) listed a bad debt in the amount of \$1178.00 for a credit card account (SOR subparagraph 1.b.(6)) there is no evidence when the Applicant first saw this report. The account was charged off in September 1995. In May 2001, in his response to the SOR the Applicant admitted the allegation, but stated he had been unable to obtain any information on this account. In August 2000, the Applicant had an interview with a Defense Security Service (DSS) Special Agent which resulted in a signed, sworn statement (Item 5) addressing the Applicant's finances. The statement discussed the foreclosure and the Applicant's airline and train tickets account, but does not mention this credit card account or the three accounts (SOR subparagraph 1.b.(1), 1.b.(2) and 1.b.(3)) already satisfied by the Applicant.

When the Applicant responded to question 38, on Std. Form 86, which asked if the Applicant had been more than 180 days delinquent on any account during the prior seven years and in question 39, asked if he was "currently" 90 days delinquent on any debts, he answered "no" to both questions. The Applicant stated, in his response to the SOR, his failure to list his debts was an oversight and he had no intentions of deliberately falsifying his response or deceiving anyone on his security questionnaire.

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, Administrative Judges must

consider, access, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive as well. In that vein, the government not only has the burden of proving any controverted fact(s) alleged in the SOR, but must also demonstrate the facts proven have a nexus to an Applicant's lack of security worthiness.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

PERSONAL CONDUCT (Guideline E) The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying also include:

2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities. (E2.A5.1.2.2.)

Conditions that could mitigate security concerns include:

2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily. (E2.A5.1.3.2.)

BURDEN OF PROOF

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the Applicant who must remove that doubt and establish his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against the applicant.

CONCLUSIONS

Although the SOR lists six debts, the government is not concerned with the Applicant's finances but with his personal conduct and specifically with his judgment, trustworthiness, reliability, candor, honesty, and willingness to comply with rules and regulations because of his responses on his Std. Form 86.

The allegations under Guideline E, (Personal Conduct) are unfounded. The Government has shown Applicant's answers to question 26, 38, and 39 were false, but this does not prove the Applicant deliberately failed to disclose information about his 1999 arrest and his financial delinquencies. There is no showing the Applicant made a deliberate omission, concealment, or falsification of relevant and material facts on his personnel security questionnaire.

The Applicant admitted, with explanation, the allegations in the SOR. Although the Applicant admitted his 1999 arrest occurred and admitted six debts had been incurred, he did not admit he falsified his questionnaire. In his response to the SOR, he states he had no intention of deliberately falsifying his responses or deceiving anyone. The Applicant's statements about his intent or state of mind at the time he executed the Std. Form 86 are relevant and material, but not conclusive. An intent to deceive or mislead the government does not require direct evidence and can be inferred from circumstantial evidence, but this is not the case here.

In January 2000, when the Applicant completed his Std. Form 86 he updated an earlier security package and did not complete a new form. In response to question 26, concerning his police record he failed to list his 1999 domestic arrest. The Applicant should have listed the arrest for the question asks about any and all arrests regardless of the ultimate outcome of the arrest. Although the Applicant failed to disclose his arrest this failure does not, in itself, prove he did so in a deliberate effort to conceal those facts from the government. Not every failure to report is a deliberate omission, concealment, or falsification. Inaccuracy can also result from innocent mistake or misunderstanding.⁽²⁾ Section 6.3.4. of the Directive requires that this clearance decision be based on the "motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved."

The Applicant states he failed to list his arrest because the case was dismissed, which he interpreted to mean "no longer existed." His explanation is an understandable interpretation of someone not trained in the law. It appears his failure to list this arrest was not a deliberate omission, concealment, or falsification and, therefore, subparagraphs 1. b., and 1. b. (1) are resolved in favor of the Applicant.

When he completed his Std. Form 86 he did not list three debts⁽³⁾ all of which had all been satisfied, one more than two years before he completed the questionnaire. Therefore, none of these three debts were currently 90 days delinquent when he completed the form. Although the three debts had been referred for collection, there has been no showing in the FORM these debts had ever been 180 days delinquent. Therefore, the Applicant was not required to list these debts in response to question 38 or 39. There was no falsification, and subparagraphs 1.a.(1), 1.a (2), and 1.b (3) are found in favor of the Applicant.

The Applicant's legal separation allowed his wife to keep the marital home and required her to make the mortgage payments. In November 1999, the Applicant was notified his estranged wife was behind in the mortgage payments, and he tried unsuccessfully to get a loan to bring the payments current. Although the Applicant knew his wife had missed some payments, contact with his estranged wife was limited. His attempt to contact her to determine her intention concerning the house failed. There is no showing the Applicant knew, when he completed his questionnaire in January 2000, how many payments had been missed. It has not been proven the Applicant knew the house payments were "currently" 90 days delinquent or knew the payments had ever been 180 days delinquent. I find for the Applicant as to SOR subparagraph 1.b.(4).

A credit report (Item 6) was run in March 1999 which lists an airline and train fare account (SOR subparagraph 1.b.(5)) as "pays as agreed" and a credit card debt (SOR subparagraph 1.b.(6)) as a "bad debt." There is no indication when, if ever, the Applicant saw this report prior to receiving it as part of the FORM. There is no proof the Applicant saw this report before he completed his Std. Form 86 in January 2000. He did have knowledge of one outstanding debt prior to completing his Std. Form 86. Sometime between November 1999--when notified of the arrearage--and mid January 2000--when foreclosure occurred after the Std. Form 86 was signed--the Applicant attempted to get a loan. He was unsuccessful in getting the loan but, more important, his only "outstanding debt" at that time was a telephone account which was not his. When applying for the loan neither the airline and train fare account nor the credit card account were listed as "outstanding."

The Applicant knew he had missed payments in the past, but this does not prove he knew in January 2000 when he completed his questionnaire the two debts were "currently" 90 days past due or had ever been more than 180 days past due. There is no showing the Applicant falsified his questionnaire. A deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire has not been proven. I find for the Applicant as to SOR subparagraph 1.b.(5) and SOR subparagraph 1.b.(6).

In the alternative, if it is later determined the Government did satisfy its initial burden of proof under guideline E,

(Personal Conduct), I find itigating Condition 2-⁽⁴⁾

applies. If falsification occurred, it was isolated to a single questionnaire, the form was completed two years ago, and the Applicant provided correct information voluntarily (Item 5) in August 2000. Although two years ago is not a long period of time, I consider it not to be recent.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

FORMAL FINDINGS

Formal Findings as required by Section 3., Paragraph 7., of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline E (Personal Conduct): FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.a.(1): For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.b.(1): For the Applicant

Subparagraph 1.b (2): For the Applicant

Subparagraph 1.b.(3): For the Applicant

Subparagraph 1.b.(4): For the Applicant

Subparagraph 1.b.(5): For the Applicant

Subparagraph 1.b.(6): For the 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 the Applicant.

Claude R. Heiny

Administrative Judge

1. Required by Executive Order 10865, as amended and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 as amended.
2. ISCR Case No. 98-0442 (April 22, 1999) at page 3.
3. SOR subparagraphs 1.b.(1), 1.b (2), and 1.b (3).
4. MC 2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily. (E2.A5.1.3.2.)