

DATE: April 25, 2003

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 01-25847

**DECISION OF ADMINISTRATIVE JUDGE**

**JOHN G. METZ, JR**

**APPEARANCES**

**FOR GOVERNMENT**

Kathryn D. MacKinnon, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant's multiple falsifications of his security clearance application suggests he can not be relied upon to reveal the truth if the truth presented potential adverse consequences for his personal interests. Applicant's two arrests on domestic violence charges in April and May 1996 cast further doubt on his fitness for access to classified information, but are mitigated by their remoteness in time without recurrence. Clearance denied.

**STATEMENT OF THE CASE**

On 26 August 2002, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding<sup>(1)</sup> that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On 19 November 2002, Applicant answered the SOR and requested an administrative determination on the record. On 23 February 2003, Applicant responded to the government's File of Relevant Material (FORM)--mailed 29 January 2003. The record closed on 25 March 2003, the day Department Counsel indicated no objection to Applicant's response. The case was assigned to me on 31 March 2003, and received by me the next day, to determine whether Applicant's clearance should be granted, continued, denied or revoked.

**FINDINGS OF FACT**

Applicant admitted the criminal allegations of the SOR, but denied falsifying his clearance application; accordingly, I incorporate his admissions as findings of fact.

Applicant--a forty-eight year old employee of a defense contractor--purportedly seeks access to classified information for the first time.<sup>(2)</sup> He is a retired Army E-8 (Master Sergeant/First Sergeant.

On 3 November 2000, Applicant falsified his Security Clearance Application (SCA)(SF 86)(Item 4)<sup>(3)</sup> when he failed

to disclose pertinent information required to perform his background investigation, including his recent criminal record. In response to question 4, **Where You Have Lived**, he disclosed two addresses since 1995, but failed to disclose a residence where he lived for a year in approximately 1996--an address with security significance because that's where he lived when he was arrested on domestic violation charges in April and May 1996. In response to question 6, **Your Employment Activities**, he claimed to have been unemployed between November 1993 (when he retired from the Army) and June 1996, when in fact he had been employed (albeit on a temporary basis) by two different employers.<sup>(4)</sup> In response to question 8, **Your Spouse: What is your current marital status?**, Applicant responded "Never married." when he had been married from June 1976 to 1994 or 1995, and remarried in July 1997. In response to question 9, **Your Relatives and Associates**, he failed to disclose his daughter.<sup>(5)</sup>

He responded "no" to question 21, **Your Police Record-Felony Offenses: Have you ever been charged with or convicted of any felony offense? (Include those under the Uniform Code of Military Justice.) For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 944 or 18 U.S.C. 3607** when he had been charged with felony criminal mischief and intimidation of a witness or victim in May 1996.<sup>(6)</sup> He also responded "no" to question 22, **Your Police Record-Other Offenses: In the last seven years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25 (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 944 or 18 U.S.C. 3607** when he had been charged with misdemeanor prohibited use of a weapon (possession while intoxicated) in April 1996 and harassment/stalking in May 1996.

Applicant has offered conflicting explanations for his falsifications. In his July 2001 sworn statement (Item 5), he denies any intent to mislead the government, attributing his omissions to oversight. In his Answer to the SOR, he asserted that he had originally entered the information into the electronic application, but could not get the original application to print and some information was not requested the second time he completed the application. However, he does not provide corroborating evidence of this claim or produce evidence to overcome the fact that he physically signed an application containing the alleged omissions and misrepresentations. Finally, in his response to the FORM he attributes his falsifications to failing to read the application carefully the second time and a mistaken belief that he did not have to report the criminal offenses because the charges had been dropped.<sup>(7)</sup>

Applicant was arrested in April 1996 and charged with possession of a firearm while intoxicated. He later pleaded guilty and was fined. In May 1996, he was charged with harassment/stalking, criminal mischief, and intimidation of a witness/victim. The charges were later dismissed when the complainant withdrew the charges. Both offenses were essentially domestic violence offenses that occurred when Applicant and his girlfriend (now his wife) were going through a rocky stage in their relationship. The police reports and court records (Items 6, 7, 8, and 9) establish that the incidents were more serious than described by Applicant in his sworn statement (Item 5). Nevertheless, there has been no recurrence of the misconduct since May 1996.

The record contains no evidence of Applicant's employment record or character.

## POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Each adjudicative decision must also assess the factors listed in Section 6.3. and in Enclosure (2) of the Directive. 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, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*

Considering the evidence as a whole, the following adjudication policy factors are most pertinent to this case:

## **PERSONAL CONDUCT (GUIDELINE E)**

E2.A5.1.1. 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. . .

E2. A5.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A5.1.2.2. 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, . . . [or] determine security clearance eligibility or trustworthiness. . . ;

E2.A5.1.2.3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, . . . in connection with a personnel security or trustworthiness determination;

E2.A5.1.3. Conditions that could mitigate security concerns include:

None.

## **CRIMINAL CONDUCT (GUIDELINE J)**

E2.A10.1.1. A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

E2.A10.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;

E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

E2.A10.1.3. Conditions that could mitigate security concerns include:

E2.A10.1.3.1. The criminal behavior was not recent;

E2.A10.1.3.2. The crime was an isolated incident;

E2.A10.1.3.3. . . . the factors leading to the violation are not likely to recur;

E2.A10.1.3.6. There is clear evidence of rehabilitation.

### **Burden of Proof**

Initially, the government must prove controverted facts alleged in the SOR. If the government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation, or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. Where 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 that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the 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."

## **CONCLUSIONS**

The government has established its case under Guideline J; however, I conclude that the conduct is mitigated. Although the domestic violence incidents in April and May 1996 were more serious than described by Applicant, there has been no recurrence of the misconduct in nearly seven years. While they were not, strictly speaking, isolated, they were confined to a distinct period of time in Applicant's life when his relationship with his current wife was going through a rocky stage. Although his subsequent marriage does not conclusively establish that the factors leading to the violations are unlikely to recur, it does make recurrence somewhat less likely. Nevertheless, I conclude that the misconduct is sufficiently remote to lack current security significance. I resolve Guideline J for Applicant.

The government has established its case under Guideline E. The information sought by the government on the clearance application was relevant and material to the government's investigation of the Applicant's fitness for access to classified information, and the Applicant knowingly and wilfully falsified that information. I resolve guideline E against the Applicant.

### **FORMAL FINDINGS**

Paragraph 1. Guideline J: FOR THE APPLICANT

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Paragraph 2. Guideline E: AGAINST THE APPLICANT

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Subparagraph d: For the Applicant

Subparagraph e: Against the Applicant

Subparagraph f: Against the 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.

**John G. Metz, Jr.**

**Administrative Judge**

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992--and amended by Change 3 dated 16 February 1996, and by Change 4 dated 20 April 1999 (Directive).
2. Or alternatively, seeks reinstatement as a contractor of a clearance he held while in the Army. Applicant responded "no" to question 31 on his clearance application which required him to disclose if he had ever been the subject of a security clearance background investigation or been granted a clearance. I consider that answer unlikely to be true given Applicant's 20 years in the Army and his advancement to senior enlisted status (E-8). Indeed, Applicant's Response to the FORM asserts that he had a Top Secret clearance while in the Army. Because this omission was not alleged in the SOR, I do not consider it on the merits of this case. However, I do consider it on the issue of Applicant's credibility in general, and as evidence of his inattention to detail while completing his clearance application.

3. The SOR and FORM incorrectly refer to this document as a Questionnaire for National Security Position--albeit the same Standard Form number--a title superceded in later revisions of the form.
4. He is also alleged to have falsified his employment history by claiming employment with one employer for approximately 15 months from 1999 to 2000 when in fact he had been employed only about three months in 2000. While the time discrepancy is significant, I do not consider it to have security significance, in large part because Applicant truthfully disclosed the employment (which permitted the government to check his employment history there) and there is no indication that the shortness of employment was related to any adverse information about Applicant.
5. Although the allegation does not establish any security significance to this omission.
6. The charges were later dismissed for insufficient evidence when the victim withdrew the domestic violence complaint against the recommendation of the social worker (Item 8).
7. I find the latter explanation particularly unbelievable. Neither question suggests that an otherwise affirmative answer may be omitted because charges were later dropped. Further, the police records from the April 1996 arrest (Item 6) and the court records (Item 9) establish that Applicant was found guilty of this offense--in accordance with his plea--and fined. Consequently, even under this explanation, he had at least one offense that he was required to report.