

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant was arrested a minimum of five times between December 1999 and June 2000 for domestic-related offenses involving a former girlfriend. In July 2000, he was involved in a physical altercation with another young male outside a nightclub. In July 2002, he was sentenced to three years in jail, suspended, for felony possession of a pistol in his vehicle in August 2001. There is little likelihood of recurrence of the domestic-related misconduct where Applicant is in a stable relationship with another woman, but conduct concerns persist because of his felony firearms offense. Personal conduct concerns exist where he falsified his security clearance application by failing to report any of his misdemeanor offenses. Clearance is denied.

CASENO: 04-01211.h1

DATE: 05/12/2006

DATE: May 12, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-01211

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was arrested a minimum of five times between December 1999 and June 2000 for domestic-related offenses involving a former girlfriend. In July 2000, he was involved in a physical altercation with another young male outside a nightclub. In July 2002, he was sentenced to three years in jail, suspended, for felony possession of a pistol in his vehicle in August 2001. There is little likelihood of recurrence of the domestic-related misconduct where Applicant is in a stable relationship with another woman, but conduct concerns persist because of his felony firearms offense. Personal conduct concerns exist where he falsified his security clearance application by failing to report any of his misdemeanor offenses. Clearance is denied.

STATEMENT OF THE CASE

On August 10, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the 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 the Applicant. [\(1\)](#) DOHA recommended referral to an administrative judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked. The SOR was based on criminal conduct (Guideline J), including statutory disqualification under 10 U.S.C. § 986, and personal conduct (Guideline E).

Applicant responded to the SOR on August 28, 2004, and requested a hearing before an administrative judge. On December 14, 2004, the Director, DOHA, placed a moratorium on all cases involving paragraph (1) or (4) of subsection (c) of 10 U.S.C. § 986, as that statute had been amended on October 28, 2004. The moratorium was lifted in August 2005, and the case was assigned to me on September 12, 2005. On September 30, 2005, I issued a notice scheduling the hearing for October 21, 2005. The notice was received by Applicant through his employer on October 11, 2005.

At the hearing convened on October 21, 2005, it was confirmed that Applicant had been separated from his defense contractor job on September 3, 2004, due solely to withdrawal of his interim security clearance. On assurances from Department Counsel that Applicant was subject to recall should his clearance be adjudicated favorably, I accepted

jurisdiction. Applicant waived the 15-day-notice requirement. Department Counsel submitted seven government exhibits, which were entered without objections, and conceded the inapplicability of 10 U.S.C. § 986, as amended, to Applicant's case. Applicant testified on his behalf, as reflected in a transcript received on November 4, 2005.

The record was held open until November 11, 2005, for Applicant to document that he had notified his employer of his criminal record. At Applicant's request, the deadline was extended to November 28, 2005. Applicant timely forwarded one page of his November 12, 2002, application for employment with the defense contractor. Department Counsel having filed no objection by the December 9, 2005, response date, the document was marked and admitted as Applicant Exhibit A.

FINDINGS OF FACT

Guideline J, criminal conduct, was alleged because of Applicant's arrests in December 1999, January 2000, and June 2000 for domestic assault and/or domestic disorderly conduct, in April 2000 and June 2000 for violating a no contact order, in July 2000 for disorderly conduct, and in August 2001 for felony firearms possession charges. Applicant was alleged under Guideline E, personal conduct, to have deliberately falsified his December 2002 security clearance application (SF 86) by failing to report his criminal record. Applicant admitted his arrest record as alleged but denied intentional falsification of his SF 86. Applicant's admissions are incorporated as findings of fact. After a thorough review of the evidence of record, I make the following additional findings:

Applicant is a 27-year-old painter who had been employed by a defense contractor from January 2003 until he was separated in February 2004 on the withdrawal of his interim secret clearance. Applicant is subject to recall should his clearance be adjudicated favorably.

From late 1999 through June 2000, Applicant was involved in an off-and-on cohabitant relationship with a female coworker who had a three-year-old daughter. Their relationship was marked by discord, including physical altercations between them that led to Applicant's arrest on several occasions.

After he had been out drinking in December 1999, Applicant and his now former girlfriend got into an argument. It escalated after he refused to leave the premises. She slapped him in the face and he grabbed her. She complained to the police and Applicant was arrested for domestic assault and domestic disorderly conduct. There is no evidence Applicant was convicted of the charges.

In mid-January 2000, the police were called to Applicant's residence on report from a neighbor of a domestic dispute involving Applicant and this girlfriend. When the police arrived, Applicant was restraining his girlfriend by the wrists. He was arrested and charged with domestic assault and failure to relinquish the telephone. Applicant pleaded nolo contendere and was sentenced to three months, suspended, and placed on one year probation.

In mid-April 2000, the girlfriend complained to the police that Applicant had come to her apartment in violation of a no-contact order issued in February 2000. While the police were in the building taking her statement, Applicant telephoned his girlfriend. He was arrested and charged with violation of a no-contact order. Disposition of the charges is not reflected in the record.

In June 2000, the police were called to the apartment Applicant again shared with this girlfriend on complaint of a domestic in progress. An argument between them escalated into mutual pushing after she threw a glass at him. As he attempted to leave the premises, she followed him outside, breaking the window in the door to the apartment and then the side view mirror on his vehicle. Applicant then exited his vehicle and broke her side view mirror. Applicant and his girlfriend were both arrested for domestic disorderly conduct, domestic assault, and domestic malicious damage. A charge of violating a no-contact order was also filed against Applicant.

Twelve days later, Applicant called his girlfriend at her work and asked her for his cousin's telephone number. After he confirmed to her that he knew he was violating a no-contact order, she filed a complaint with the police the following day. One week later, Applicant was arrested on an active warrant for violating a no-contact order.⁽²⁾ He pleaded nolo contendere and was sentenced to one month served, 11 months and 21 days suspended, and placed on probation for 11 months 21 days. Applicant and this girlfriend terminated their relationship after this offense and she moved to another state shortly thereafter. He was required by the court at some point to attend anger management classes, which he completed.⁽³⁾

In mid-July 2000, Applicant and a companion were out drinking at a nightclub when Applicant's companion was physically assaulted by another patron at the bar. Once outside the premises, Applicant reportedly struck his friend's assailant. Applicant was arrested for disorderly conduct, to which he pleaded nolo contendere and was sentenced to six months (suspended), six months probation, and 100 hours of community service.

In late August 2001, Applicant traded a paintball gun for a .22 caliber revolver because he wanted to get into a gun club. Applicant had been advised from the supplier of the weapon that he could legally transport the firearm in his vehicle as long as it had a trail lock on and was in his trunk, and the ammunition was in his glove box. Applicant did not go straight home but went to his brother's house located over the state line. Applicant was stopped by the police in that state for not wearing a seatbelt. When he went to retrieve his registration from the glove box, the officer saw the box of ammunition. Asked whether he had a gun, Applicant admitted he had a handgun in his trunk for which he had no permit. A check of his vehicle resulted in the seizure of the .22 caliber revolver. Applicant was arrested and charged with carrying a pistol without a permit, illegal possession of a weapon in a motor vehicle, and criminal possession of a pistol or revolver. Applicant was convicted in July 2002 of criminal possession of a revolver, a class D felony,⁽⁴⁾

and sentenced to three years in jail, suspended, and three years probation. The remaining charges were *nolle prossed*.

On November 12, 2002, Applicant submitted an application for employment with the defense contractor. In response to whether he had ever been convicted of a crime, Applicant listed his July 2002 firearms conviction. Final action for the offense was reported as "Probation 3 yrs-1 yrs? Susp. [illegible] will Provide-12-12-02 none since," followed by Applicant's signature.

Needing a security clearance for a job with the defense contractor, Applicant executed a security clearance application (SF 86) on December 20, 2002. Aware he had been convicted of a felony firearms offense, Applicant responded "No" to question 21 ("Have you ever been charged with or convicted of any felony offenses."). Yet he answered "Yes" to question 22 ("Have you ever been charged with or convicted of a firearms or explosives offense."), and disclosed a 2001 possession of firearms offense (mistakenly indicating July 2001 instead of August 2001), for which he was on three years probation. Applicant responded "No" to question 26 ("In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25.")

On December 17, 2003, Applicant was interviewed by a special agent of the Defense Security Service (DSS) about his criminal arrest record and his failure to disclose any of the domestic assault/disorderly conduct arrests on his SF 86. Applicant told the agent:

I don't know why I left the [state omitted] arrests off my security clearance application, but after I started work at [defense contractor omitted] I became worried that I may not have given them my complete arrest record, so I got a copy of my arrest record for [state omitted] at the [town and state omitted] police station. I thought it had all my arrests in [state omitted] and I gave it to some man at [defense contractor omitted] at the human resources office. He told me that whoever needed to get it would see it.

Applicant detailed the criminal offenses he could recall: the possession of firearms offense, which he acknowledged was a felony, his disorderly conduct in July 2000, and a "series of about five or six arrests" from late 1999 to mid-2000 that "involved a bad relationship" with his former girlfriend.

At his hearing, Applicant testified he had been told that if he failed to list all his offenses, and the company found that out, he would be fired. Concerned because he had not provided his full record, Applicant related he went to the local police who had arrested him for the domestic incidents and obtained a copy of his "rap sheet," which he then gave to his employer. He denied he had anything to hide ("I mean it's kind of silly on my behalf to lie, when it would be very easy to get my information from the police station."). (Tr. 41-42) Applicant was given an opportunity following the hearing to corroborate his claim that he had provided his arrest record to the defense contractor. On

November 25, 2005, Applicant submitted the page from his employment application on which he had listed his firearms conviction and indicated in part, "will provide."

In about Fall 2003, Applicant began a relationship with his current girlfriend, whom he had known since at least 1998. He moved in with her and her four-year-old son in late spring/early summer 2005. As of October 2005, Applicant was doing masonry work, but he intends to return to work for the defense contractor should he be granted his clearance.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, Safeguarding Classified Information within Industry § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Considering the evidence as a whole, the following adjudicative guideline is most pertinent to an evaluation of Applicant's security suitability:

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

Personal Conduct. 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.A5.1.1.)

CONCLUSIONS

Applicant's volatile personal relationship with his then girlfriend led to him being arrested for domestic assault, domestic disorderly conduct, and/or violation of a no contact order on several occasions between December 1999 and June 2000. His criminal conduct was not limited to that relationship, as he was involved in a physical altercation outside of a nightclub in July 2000 and was convicted in July 2002 of having an unregistered .22 caliber revolver in his possession in August 2001. Under Guideline J, disqualifying conditions E2.A10.1.2.1. *Allegations or admission of criminal conduct*, and E2.A10.1.2.2. *A single serious crime or multiple lesser offenses*, are pertinent to an evaluation of Applicant's security worthiness.

In mitigation, there has been no recurrence of the domestic assaults since he and this former girlfriend ceased their cohabitant relationship in 2000. Nor is there likely to be any future similar incidents. His former girlfriend left the area and Applicant is involved with another woman, whom he has known for at least seven years, dated for two years, and lived with for four or five months as of October 2005. There is no evidence of problems in their relationship, showing some maturity on his part and certainly a favorable change in his behavior. As for the disorderly conduct outside of the nightclub in July 2000, even assuming Applicant physically struck his friend's assailant, that behavior has not been repeated. After consideration of potentially mitigating conditions (E2.A10.1.3.1. *The criminal behavior was not recent*, E2.A10.1.3.4. . . . *the factors leading to the violation are not likely to recur*, and E2.A10.1.3.6. *There is clear evidence of successful rehabilitation*), favorable findings are warranted as to SOR ¶¶ 1.c., 1.d., 1.e., 1.f., 1.g., 1.h., and 1.i.

SOR ¶ 1.b. is resolved in his favor as well since 10 U.S.C. § 986, as amended, does not apply. Applicant was sentenced to up to three years for the felony firearms offense, but that sentence of imprisonment was suspended.

Applicant's felony possession of an unregistered firearm raises serious questions of Applicant's judgment, the suspension of his prison term notwithstanding. Although the record does not establish that he was still on probation for his June 2000 violation of the no-contact order, Applicant was apparently subject to several active domestic violence no-contact orders in his home state, and thus prohibited by law to possess a firearm in the state where he was arrested. Applicant testified credibly to intending to register the .22 caliber revolver that week, and to relying on the assurances of the person who provided him the gun that he could transport it home in his vehicle under certain conditions. Yet his decision to trade a paintball gun for a .22 caliber revolver, without first ensuring that he complied with the laws regarding acquisition, transport, and permitting, casts considerable doubt as to his willingness and ability to comply with security regulations. Applicant is credited with completing his three-year probation in July 2005, but it does not compel a favorable outcome. The security clearance decision must be an overall common sense decision based on all the available information of record.

In addition to the criminal conduct concerns that persist because of his felony firearms offense, Applicant's admitted failure to disclose on his SF 86 any of his domestic assault/violation of no-contact order offenses raises security significant personal conduct concerns. An inference of intentional concealment may reasonably be drawn in this case based on the evidence. Applicant was arrested at least five times between December 1999 and June 2000 on domestic-related charges. He was sentenced to six months probation for a July 2000 disorderly conduct offense. Yet he responded "No" to question 26 (any arrests within the last seven years). He did not provide a credible reason for the omission when interviewed by the DSS agent one year later ("I don't know why I left the [state omitted] arrests off my security clearance application."), but averred he had provided a copy of his arrest record to his employer ("I became worried that I may not have given them my complete arrest record, so I got a copy of my arrest record for [state omitted] at the [city and state omitted] police station."). Applicant expounded further at his hearing as to his rationale, "So I went and got them so they would have all my information. Because I wanted to be sure, like I was told if you don't list all of your offenses, they find out, that they would fire you." (Tr. 49) Applicant knew he had not been fully candid about his arrest record when he completed his SF 86. Under Guideline E, DC ¶ 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, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities, applies.*

Although it would not refute the intentional nature of the initial misrepresentation, a subsequent remedial effort to obtain his police record and provide it to his employer could mitigate the personal conduct concerns (*see* MC E2.A5.1.3.3. *The individual made prompt, good faith efforts to correct the falsification before being confronted with the facts*). Applicant was given an opportunity after his hearing to document his efforts in that regard. He submitted only the page from his employment application whereon he listed his felony firearms conviction. His Exhibit A does not corroborate a prompt rectification as to the misdemeanor offenses. Assuming Applicant has provided a record from the local police to human resources personnel, no reasonable inference can be drawn as to what it contained. His disorderly conduct arrest in July 2000 was not in the same jurisdiction as the domestic incidents. As for the prompt correction required under C E2.A5.1.3.3., Applicant testified he provided his record "early of when [he] had to do . . . all the paperwork." (Tr. 49) His employment application was completed on November 12, 2002, and apparently reviewed by him on December 12, 2002. The SF 86 containing the knowingly false answer to question 26 was signed by him on December 20, 2002. In his sworn statement (Exhibit 7), he admitted it was not until after he started work with the defense contractor that he became concerned about his failure to disclose his arrest record, and he started with the company on January 20, 2003. If Applicant made the effort to correct the record, it was more than a month after he completed his SF 86. Applicant, who continues to deny intentional concealment ("I mean it's kind of silly on my behalf to lie, when it would be very easy to get my information from the police station." Tr. 42), shows little appreciation for his obligation of full candor.

The government is correct in noting that Applicant responded "No" to question 21 (any felony offenses) on his SF 86 as well. Applicant understood that he had been convicted of the felony offense of criminal possession of a revolver. Without question, an affirmative response was required as to question 21. However, he clearly did not conceal the offense from the government. He reported his firearms conviction in response to question 22 (ever been charged with or convicted of a firearms or explosives offense) on the SF 86, and had already listed his felony firearms conviction on his application for employment with the defense contractor. Under the circumstances, the government has failed to meet its burden of proving knowing and willful falsification of question 21, and SOR ¶ 2.a. is resolved in his favor. In light of his deliberate falsification of question 26 on his SF 86, and his felony firearms conviction, I am unable to conclude that it is clearly consistent with the national interest to grant Applicant a clearance. SOR ¶¶ 1.a. and 2.b. are resolved against him.

FORMAL FINDINGS

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

Paragraph 1. Guideline J: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: For the Applicant

Subparagraph 1.e.: For the Applicant

Subparagraph 1.f.: For the Applicant

Subparagraph 1.g.: For the Applicant

Paragraph 2. Guideline E: AGAINST THE APPLICANT

Subparagraph 2.a.: For the Applicant

Subparagraph 2.b.: 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. Clearance is denied.

Elizabeth M. Matchinski

Administrative Judge

1. Applicant's first name was misspelled in the SOR. The SOR was issued under the authority of Executive Order 10865 (as amended by Executive Orders 10909, 11328, and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4).
2. The government alleged two separate arrests in mid to late June 2000 (SOR ¶¶ 1.d. and 1.e.). Neither the police nor the FBI record confirms that Applicant was arrested on the date alleged in ¶1.e. Instead, that appears to be the date on which Applicant violated the no-contact order leading to the warrant that was executed a week later (¶ 1.d.).
3. Under the pertinent state's domestic violence laws (§ 12-29-5), every person convicted of or placed on probation for a crime involving domestic violence or whose case is filed pursuant to § 12-10-12 where the defendant pleads nolo contendere, in addition to any other sentence imposed or counseling ordered, shall be ordered by the judge to attend, at his or her own expense, a batterer's intervention program appropriate to address his or her violent behavior.
4. The state statute Applicant was convicted of violating provides, in part:

A person is guilty of criminal possession of a pistol or revolver when such person possesses a pistol or revolver, as defined in section 29-27, and . . . (5) knows that such person is subject to a restraining or protective order of a court of this state or to a foreign order of protection, as defined in section 46b-15a, that has been issued against such person, after notice and an opportunity to be heard has been provided to such person, in a case involving the use, attempted use or threatened use of physical force against another person . . . For the purposes of this section, "convicted" means having a judgment of conviction entered by a court of competent jurisdiction.

(b) Criminal possession of a pistol or revolver is a class D felony.