

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant, a 60-year-old retired Army officer, has held a security clearance for about 40 years and has worked for a defense contractor since 1997. In arch 2003, he deliberately misrepresented material facts on a security clearance application by concealing his January 2003 arrest and the pending charges for simple assault on his wife. In a subsequent interview with a security investigator, Applicant again lied about his failure to report the matter on his application, and lied about his history of similar conduct. Applicant failed to mitigate the security concerns arising from his false statements and criminal conduct. Clearance is denied.

CASENO: 04-08535.h1

DATE: 02/23/2006

DATE: February 23, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-08535

**DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL J. BRESLIN**

**APPEARANCES**

**FOR GOVERNMENT**

Sabrina Redd, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant, a 60-year-old retired Army officer, has held a security clearance for about 40 years and has worked for a defense contractor since 1997. In March 2003, he deliberately misrepresented material facts on a security clearance application by concealing his January 2003 arrest and the pending charges for simple assault on his wife. In a subsequent interview with a security investigator, Applicant again lied about his failure to report the matter on his application, and lied about his history of similar conduct. Applicant failed to mitigate the security concerns arising from his false statements and criminal conduct. Clearance is denied.

**STATEMENT OF THE CASE**

On March 20, 2003, Applicant submitted a security clearance application. The Defense Office of Hearings and Appeals (DOHA) declined to grant a security clearance for Applicant under Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended (the "Directive"). On May 31, 2005, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. The SOR alleges security concerns raised under the Directive, specifically, Guideline E, Personal Conduct, and Guideline J, Criminal Conduct.

Applicant answered the SOR by letter dated July 10, 2005, and received at DOHA on July 15, 2005. He elected to have a decision without a hearing. On August 16, 2005, Department Counsel requested a hearing before an administrative judge.

The case was assigned to me on October 24, 2005. With the concurrence of Applicant and Department Counsel, I convened the hearing on November 16, 2005. The government called one witness and introduced Exhibits 1 through 8. Applicant presented Exhibits A through L, which were admitted. Applicant did not testify in his case-in-chief, but was called as a witness by Department Counsel. At the conclusion of the evidence, Department Counsel moved to amend the allegation in ¶ 1.b of the SOR by inserting after the word, "documents," the words, "but that you had forgotten to list the information." Department Counsel also moved to amend ¶ 1.c of the SOR to allege the date of the interview was "on or about" January 21, 2004. There being no objection, I granted the motions. DOHA received the final transcript of the hearing (Tr.) on December 1, 2005.

### **FINDINGS OF FACT**

Applicant denied all the allegations in the SOR, with explanations. (Applicant's Answer to SOR, dated July 10, 2005.) After a complete and thorough review of the evidence in the record, I make the following findings of fact.

Applicant was born in December 1945. (Ex. 1 at 1.) In 1965, he joined the U.S. Army, and later accepted a commission as an officer. (*Id.* at 4.) He applied for and received a security clearance. (Tr. at 64.) Applicant was granted a top secret clearance with access to sensitive compartmented information (SCI) in ay 1994. (Ex. 1 at 7.)

In July 1968, Applicant was married. (Ex. 1 at 2.) Two children were born to the marriage: a daughter in December 1968, and a son in February 1972. (*Id.* at 3.)

In 1969, while serving as a lieutenant, Applicant was convicted of driving while intoxicated (DWI) and assault on a police officer, both misdemeanor offenses. He was fined. (Tr. at 47-48.)

Applicant and his wife got into violent arguments on occasion. In about 1993, the couple engaged in a heated argument. Concerned about Applicant's possession of a rifle (which Applicant asserts was disassembled), his wife called the police. They never arrived. (Ex. 3 at 2.) In 1996, his wife called the police again during a domestic dispute, apparently in part because Applicant pulled out a pellet gun. The police arrived, but did not arrest or bring charges against either of them. (*Id.*) One two other occasions, Applicant struck his wife during arguments. (Ex. 3 at 3.)

In September 1997, Applicant retired from the Army and began working in his present position as a staff systems

engineer for a defense contractor. He completed an SF 86, Security Clearance Application at that time. (Tr. at 66.) That document was stored electronically by the defense contractor's security office. (*Id.*) He was granted a security clearance. (Tr. at 64.) According to Applicant, when he moved in 2001, he notified the security office of his new address so they could update the records. (Tr. at 69.)

On the evening of January 11, 2003, Applicant and his wife got into a heated argument at their home. (Ex. 3; Ex. 8 at 11, 12; Tr. at 59.) Applicant went into the kitchen where his wife was preparing dinner. He grabbed her, pushed her down, and sat on her. He then got up and returned to the den. His wife went upstairs, retrieved a .357 magnum handgun, went to the den, and shot Applicant in the upper left arm. Applicant fell to the floor, while his wife returned to the kitchen. Applicant called his son on the telephone and told him what happened; his son called the police and reported the incident. Shortly thereafter, Applicant's wife called "911" and reported the incident, despite Applicant's requests that she not place the call. Applicant got into his vehicle and drove to a spot down the street. The police arrived and took Applicant's wife into custody. She admitted shooting Applicant, but claimed she did it to prevent him from hurting her. The police investigators determined Applicant's wife had a blood-alcohol concentration of .13%. Applicant returned home, and was arrested by the police. The police transported him to the hospital for treatment and then took him to jail. (Tr. at 62.)

On January 12, 2003, authorities charged Applicant with simple battery for pushing his wife to the floor. (Ex. 4; Ex. 5.) They also charged his wife with aggravated assault for the shooting. Applicant appeared in court before a judge about one week after the incident. (Tr. at 63.)

Shortly after the shooting incident, Applicant informed his supervisor about what had happened. (Ex. K.) His supervisor informed a security officer for the defense contractor, and the next-level supervisor. (*Id.*)

On May 20, 2003, Applicant signed an SF 86, Security Clearance Application, to renew his security clearance. (Ex. 1 at 1.) Question 23 of the SF 86 asked, "Are there currently any charges pending against you for any criminal offense?" The answer on the SF 86 is "No." (Ex. 1 at 6.) Question 24 inquired whether Applicant had ever been convicted of an offense relating to alcohol or drugs. Applicant answered "No." (*Id.*) He did not report his previous conviction for DWI. (Tr. at 82.) Also, in response to Question 26, Applicant denied that he had been arrested for, charged with, or otherwise convicted of any other offense within the preceding seven years. (Ex. 1 at 6.)

On May 29, 2003, the state's attorney filed a criminal information against Applicant. (Ex. 6.) Rather than criminal prosecution, the couple entered a diversion program, and attended family counseling for about ten months. On November 21, 2003, a state judge approved the prosecution's entry of *nolle prosequi* of the charges against Applicant, based upon successful completion of the diversionary program and his wife's desire not to prosecute. (Ex. 7.)

Subsequently, a security investigator reviewed Applicant's SF 86. (Ex. 1; Tr. at 26.) The investigator also obtained a

copy of a FBI report of arrests, reflecting arrests in November 1969 (Assault on an Officer) and January 2003 (Simple Battery). (Ex. 2; Tr. at 26.) The investigator also obtained a copy of the police report for the January 2003 incident resulting in the charge of simple battery. (Ex. 8; Tr. at 27.)

On January 21, 2004, the investigator interviewed Applicant. (Tr. at 28.) The investigator went through each question on the SF 86 with Applicant, to determine if the previous answer was correct. (Tr. at 29.) The investigator asked Applicant about question 23, "Are there currently any charges pending against you for any criminal offense?" Applicant answered "No." (Tr. at 29-30.) The investigator asked Applicant whether he had been arrested for any criminal offenses within the preceding seven years, and Applicant answered, "No." (Tr. at 30.) After going over Applicant's answers to the SF 86, the investigator confronted Applicant, telling him he had a police report indicating he had been arrested. (*Id.*) Applicant responded that the arrest occurred after he completed the SF 86. (*Id.*; Tr. at 86.)

That day, the investigator reviewed Applicant's SF 86 at the security office of Applicant's employer. (Tr. at 31.) The next day, he confronted Applicant again, stating the arrest occurred in January 2003 and Applicant submitted the SF 86 in March 2003. Applicant told the investigator he had forgotten the incident. (Tr. at 31.) The investigator also asked Applicant whether there had been any other instances where he struck his wife. (Tr. at 34-35.) Applicant denied any prior incidents. (Tr. at 35.)

The investigator confronted Applicant again, and expressed his disbelief. (Tr. at 35; Tr. at 88.) Later, the investigator helped Applicant prepare a written statement (Ex. 3) discussing the incident in January 2003 and previous incidents of physical altercations with his wife. The statement (Ex. 3 at 3), signed by Applicant, included this last paragraph:

Initially, I denied any other police involvement or any physical abuse to my wife of any type but as the interview for my clearance progressed I decided to be more forthcoming. I also initially indicated this last incident, in Jan 03, occurred before I completed my security documents and then stated that I had probably forgotten to list the information. I didn't listed [*sic*] this information on my EPSQ because I wasn't sure what impact the information would have on me.

At the hearing, Applicant asserted his security office faxed him the SF 86, and asked him to sign and return only pages 9 and 11 which required signatures. (Tr. at 65.) Applicant testified he did not review the form, but signed it and faxed the two pages back to the security office. Applicant also claimed he gave the investigator a copy of the faxed request. The investigator denied any recollection of such a statement or having received any such document from Applicant. (Tr. at 44.)

## **POLICIES**

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." (*Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988)). In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch.

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. The adjudicative guidelines at issue in this case are:

**Guideline E, Personal Conduct:** Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the applicant may not properly safeguard classified information. (Directive, ¶ E2.A5.1.1.)

**Guideline J, Criminal Conduct:** A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. (Directive, ¶ E2.A10.1.1.)

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to these adjudicative guidelines, are set forth and discussed in the conclusions below.

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." Directive, ¶ E2.2.1. An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. (*Id.*) An administrative judge should consider the following factors: (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 voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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. (*Id.*)

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. (Directive, ¶ E3.1.14.) Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. (Directive, ¶ E3.1.15.) 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 (App. Bd. Dec. 19, 2002)). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." (Directive, ¶ E2.2.2.)

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. (Exec. Ord. 10865, § 7.) It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

## CONCLUSIONS

I considered carefully all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

### **Guideline E, Personal Conduct**

The Directive sets out various factors relevant to an applicant's personal conduct that may be potentially disqualifying. Under ¶ E2.A5.1.2.2 of the Directive, "[t]he deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire" may be disqualifying. Paragraph 1.a of the SOR alleges that in March 20, 2003, in response to questions 23 and 26 on his SF 86, Applicant deliberately failed to report his arrest and pending charges for simple assault arising from the incident with his wife in January 2003. Applicant first indicated he forgot the incident. Later, he contended he received the form already filled out, and that he signed it without reviewing it. Applicant's statements are not persuasive. Being shot by his wife and charged with a criminal offense, is not a matter one would forget within a few months. Indeed, at the time he signed the SF 86, his arm was still bandaged from the wound. Applicant's suggestion that he did not think to review the security clearance application is not credible. Applicant had held a security clearance for most of his adult life. He certainly appreciated the significance of the incident regarding his clearance. Applicant's contention that when he received his security clearance form for updating in March 2003, he simply neglected to check if the pending charges were reported, is not believable. I note Applicant made similar misrepresentations to the security investigator during his interviews until confronted with the truth. I find that, even if the SF 86 was already filled out, by submitting it without changes, Applicant deliberately provided false information in response to questions 23 and 26 of the security clearance application. I conclude this potentially disqualifying condition applies.

The Directive, ¶ E2.A5.1.2.3, provides that it is potentially disqualifying if an applicant deliberately provides false or misleading information concerning relevant and material matters to an investigator in connection with a personnel security determination. The available information indicates Applicant made false statements to the security investigator during his two interviews. He was untruthful several times: when he told the investigator that the shooting incident occurred after he completed his security clearance application; when he said he had forgotten the January 2003 incident; and when he asserted he had never had a previous physical altercation with his wife. I conclude this potentially

disqualifying condition applies.

Under the Directive, an applicant may mitigate the security concerns arising from questionable personal conduct. (Directive, ¶ E2.A5.1.3.) Under ¶ E2.A5.1.3.1, it may be mitigating where "[t]he information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability." The incidents about which Applicant was untruthful are substantiated by his later admissions. His record of criminal conduct reflects on his character and stability, and is pertinent to a determination of his judgment and reliability. I find this mitigating factor does not apply.

The potentially mitigating condition in ¶ E2.A5.1.3.2 of the Directive arises where "the falsification was an isolated incident, was not recent, and the individual subsequently provided correct information voluntarily." Applicant's falsifications were not isolated incidents, they were recent, and Applicant did not provide correct information until confronted by investigators. I conclude this potentially mitigating condition does not apply. I also considered carefully the other potentially mitigating conditions and conclude they do not apply.

I considered carefully all the facts and circumstances in this case in light of the "whole person" concept. I conclude Applicant has not mitigated the security concerns arising from his falsification of his security clearance application and his false statements to the security investigator.

### **Guideline J, Criminal Conduct**

Paragraph E2.A10.1.2.1 of the Directive provides an "admission of criminal conduct" may be disqualifying. Similarly, under ¶ E2.A10.1.2.2 of the Directive, it may be disqualifying where an applicant committed "a single serious crime or multiple lesser offenses." As discussed above, Applicant made several false statements on his Security Clearance Application, and lied to a security investigator about his criminal history. Applicant's conduct violated 18 U.S.C. § 1001, and constitutes a serious crime. I conclude these potentially disqualifying conditions apply.

Under the Directive, the security concerns arising from a history of criminal conduct may be mitigated in certain circumstances. I examined each of the potentially mitigating conditions, and conclude none apply.

I considered the potentially disqualifying and mitigating circumstances in light of the "whole person" concept. Applicant served the United States Army in positions of trust and successfully held a security clearance for many years. His supervisor, co-workers and friends praise his integrity and dedication. At the same time, he demonstrated poor judgment by his repeated involvement in domestic altercations, leading to discreditable involvement with civil authorities. Most importantly, he was repeatedly untruthful during the security clearance investigation process, which depends upon every

applicant's candor. Balancing all the circumstances, I conclude Applicant has not mitigated the security concerns arising from his personal and criminal conduct. Clearance is denied.

### **FORMAL FINDINGS**

My conclusions as to each allegation in the SOR are:

Paragraph 1, Guideline E: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Paragraph 2, Guideline J: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

### **DECISION**

In light of all of 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.

Michael J. Breslin  
Administrative Judge