

DATE: October 4, 2006

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 04-09624

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant engaged in multiple acts of criminal conduct between 1995 and 2003, including drug, alcohol, and weapons offenses, breach of the peace, and intentionally making several false statements to the government regarding information material to an assessment of his suitability to hold a clearance. He has failed to mitigate the security concerns arising from his conduct. Clearance is denied.

STATEMENT OF THE CASE

After reviewing the results of Applicant's background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding⁽¹⁾ that it is clearly consistent with the national interest to give Applicant a security clearance. On November 2, 2005, DOHA issued a Statement of Reasons (SOR) alleging facts in Applicant's background investigation that raise security concerns addressed in the Directive under Guideline E (personal conduct), and Guideline J (criminal conduct). Applicant timely responded to the SOR and requested a hearing.⁽²⁾

This case was originally assigned to another administrative judge on February 17, 2006, but transferred to me on March 1, 2006. I convened a hearing on April 26, 2006. The parties appeared as scheduled and the government presented 11 exhibits (Gx1 - 11). Applicant and one other witness testified. DOHA received the transcript of hearing on May 8, 2006.

FINDINGS OF FACT

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant is 33 years old and has been employed as an electrician since November 2003 by a defense contractor supporting construction, maintenance, and overhaul of U.S. Navy nuclear submarines. Applicant was married in October 1998, but divorced in 2000. Applicant now lives with his 10-year-old son and his elderly father. He graduated in 1993 from a vocational/technical school.

Applicant has been arrested four times. In 1995, Applicant was arrested and charged with conspiracy to commit first degree robbery, breach of peace, weapon in a vehicle, and possession of cocaine. Applicant had participated in a scheme to rob two people by luring them to a parking lot behind a business, where two other people laying in wait robbed the two at knife point. Police arrested Applicant, his girlfriend (and future wife) and the two robbers at the scene. The robbers were found hiding in Applicant's car, in which police found knives, drugs, firearms and ammunition. Applicant spent about a month in jail awaiting trial, and was found guilty of a lesser charge of hindering prosecution after he agreed to testify against his co-conspirators. He was sentenced to three years in jail less time already served. The jail sentence was suspended and he was placed on three years probation. [\(3\)](#)

In his statements to government investigators during his background investigation, [\(4\)](#) and in his DOHA hearing testimony, Applicant offered a version of events regarding the 1995 arrest which differs almost completely from the information contained in police reports generated at the time of those events. Having observed Applicant's demeanor during his testimony and weighed his claims against the government's information, I specifically find Applicant has been repeatedly evasive about his role in this crime and that the more reliable version of events is that which is contained in the police reports and other official documents produced by the government. [\(5\)](#)

Applicant was next arrested in 1999 and charged with driving under the influence (DUI) of alcohol. He had consumed at least three beers within a short period of time. His driver's license was suspended for three months and he was ordered to attend an alcohol safety awareness class. [\(6\)](#)

Applicant also was twice arrested and charged with breach of the peace. In 1999, he got into an argument with his ex-wife and a friend at a party. The argument escalated into a physical altercation and the police were called. [\(7\)](#) There is no information about the ultimate disposition of this charge. In 2002, Applicant got into a physical altercation with a co-worker for which he was arrested at his place of work, taken to a police station, photographed, and fingerprinted before being released. [\(8\)](#) He was later convicted of breach of the peace and fined \$50.

At his DOHA hearing, a union representative testified Applicant was involved in a dispute and confrontation at work in May 2005, which resulted in Applicant and the other party being suspended for three days. The union representative testified the other party felt threatened. [\(9\)](#)

Between 1998 and 2003, Applicant incurred several unpaid debts totaling about \$25,800. More specifically, seven of his debts were reduced to civil judgments by his creditors, one of whom was the lawyer who handled his divorce. Twelve other debts were either charged off as business losses or referred to collection agencies. Applicant never paid his debts or satisfied the judgments, but obtained a discharge of his obligations when he filed for Chapter 7 bankruptcy liquidation in 2005. [\(10\)](#)

On July 17, 2003, Applicant submitted a security clearance application (SF 86). In response to question 38, which asked him to list any debts during the prior seven years that were more than 180 days delinquent, and question 39, regarding debts more than 90 days past due at the time he completed the SF 86, he answered "yes," but listed only two debts - a delinquent medical bill for \$4,500 and a delinquent wireless phone bill for \$2,500. [\(11\)](#) Applicant knew he had more debts that fit these questions, but did not list them because he "was unsure of what the Defense Dept wanted me to tell them about my debts." [\(12\)](#) In response to question 37, which asked him to list any unpaid judgements for debts in the prior seven years, he answered "no," thereby omitting the seven unpaid judgments discussed, above. [\(13\)](#) At a minimum, Applicant was aware of some of the debts underlying these judgments. [\(14\)](#)

In response to question 24 of his SF 86, which asked him to list any alcohol or drug offenses he was ever charged with or convicted of, Applicant answered "no," thereby omitting from the form his arrest for cocaine possession in 1995 and his DUI in 1999. In response to question 26 of the SF 86, which asked Applicant to list any other criminal arrests, charges, or convictions (other than traffic violations resulting in fines less than \$150) in the prior seven years not addressed in other SF 86 questions about criminal conduct, he answered "no," thereby omitting his two arrests for breach of peace. [\(15\)](#)

During the background investigation subsequent to his SF 86, Applicant was interviewed by government investigators three times. In the first interview on February 11, 2004, he discussed his 2002 arrest for breach of the peace stemming from his altercation with a co-worker. Applicant denied he was arrested and charged with any offense, claiming instead he went to the police station to complain about his co-worker. During the same interview, Applicant denied any wrongdoing regarding his 1995 arrest and claimed he was unaware he had been charged with possession of cocaine, having a weapon in a vehicle, and conspiracy to commit robbery. [\(16\)](#)

Also during his first interview, Applicant asserted he was unaware of the judgments against him. In a second interview on February 18, 2004, Applicant again asserted he did not know about the judgments or that he had been originally charged with drug, weapon, and conspiracy offenses before his plea agreement in 1995. [\(17\)](#) A third interview was conducted on June 10, 2004, in which Applicant provided an accurate account of his 2002 breach of peace arrest. But Applicant again provided a version of his 1995 arrest and charges wherein he was innocent of any wrongdoing, and he again failed to acknowledge the original charges. [\(18\)](#) At hearing, Applicant admitted he appeared in court with counsel after his arrest and the original charges were read aloud in his presence. [\(19\)](#)

Applicant asserted he omitted his arrests for breach of peace and for DUI because he had forgotten about them. After each arrest, he was transported to a police station in handcuffs, photographed and fingerprinted. He also stated he did not think the DUI was relevant. [\(20\)](#)

POLICIES AND BURDEN OF PROOF

The Directive sets forth adjudicative guidelines [\(21\)](#) to be considered in evaluating an applicant's suitability for access to classified information. Security clearance decisions must reflect consideration of both disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Pursuant to Section 6.3 of the Directive, each decision must also reflect a fair and impartial common sense consideration of the factors collectively referred to as the "whole person concept" and listed in Section E2.2.1. [\(22\)](#) The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information.

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest [\(23\)](#) for an applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government does so, the burden then shifts to the applicant to refute, extenuate or mitigate the government's case. A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. Because the government has a compelling interest in ensuring each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own, no one has a right to a security clearance. [\(24\)](#) The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government. [\(25\)](#) Accordingly, applicants bear a heavy burden of persuasion in the face of disqualifying information.

DISCUSSION

Criminal Conduct. The government alleged the Applicant should be disqualified from holding a security clearance because he was arrested and charged with drug, weapon, and conspiracy charges in 1995, and later convicted of a lesser sentence (SOR ¶ 1.a); he was arrested, charged, and convicted of DUI in 1999 (SOR ¶ 1.b); he was charged with breach of peace in 1999 and 2002 (SOR ¶¶ 1.c and 1.d); and he deliberately made false statements in his 2003 SF 86, and in statements to government investigators in 2004, thereby violating federal criminal law as outlined in 18 U.S.C. § 1001 (SOR ¶ 1.e).

The record contains sufficient evidence to support these allegations. Except for SOR ¶ 1.e, Applicant admitted the SOR

allegations of criminal conduct. The government also provided the Applicant's written statements about his criminal conduct, as well as other information about his arrests in the form of police and court records. As to SOR ¶ 1.a, I did not find credible Applicant's claims he did nothing wrong. Indeed, his testimony was inconsistent with his prior statements to government investigators, and his accounts of what happened are themselves internally inconsistent and implausible. As to SOR ¶ 1.e, and as discussed more fully under Guideline E, below, Applicant deliberately omitted information about his finances and criminal conduct when he submitted his SF 86. He did so when he signed the form immediately beneath an advisement that 18 U.S.C. § 1001 made such conduct a criminal offense. He repeated the offense when he made false statements to government investigators in 2004. The written statements he reviewed and signed contained the same advisement that 18 U.S.C. § 1001 applies.

The facts established through SOR ¶¶ 1.a - 1.e establish a security concern addressed in the Directive through Guideline J; that is, a person who is willing to disregard the law and risk fines or incarceration may also be willing to disregard rules and regulations governing the protection of classified information. (26) The criminal activity at issue may consist of a single serious crime or multiple lesser offenses. Here, the government's information proves these allegations and requires consideration of Guideline J DC 1 and DC 2. (27) Applicant engaged in criminal conduct from 1995 until at least 2004. By contrast, Applicant has offered little information to support consideration of any of the Guideline J mitigating conditions that might apply to these facts. (28) I consider his criminal conduct to be recent, in that his multiple false statements occurred during his most recent background investigation. His conduct cannot be considered isolated because it has occurred several times since 1995. Further, the conduct at issue has not been the result of coercion or other undue pressure, and he was not acquitted of any of the charged offenses. Finally, nothing Applicant submitted in response to the government's case supports a conclusion he is rehabilitated and not likely to engage in future criminal conduct. To the contrary, his 2005 workplace dispute appears to be another instance of the conduct that led to two breach of the peace arrests, and his testimony about his criminal conduct in 1995 was evasive, to say the least. Applicant failed to mitigate the security concerns raised by the government's information about his criminal conduct.

Personal Conduct. The government alleged Applicant should be disqualified from holding a security clearance because he deliberately falsified answers to several questions on a security clearance application (SF 86) he signed as being true and accurate to the best of his knowledge on July 17, 2003. Specifically, the government alleged he intentionally omitted the fact he was arrested in 1995 and 1999 for drug/alcohol-related charges when he answered "no" to question 24 (SOR ¶ 2.a); he intentionally omitted the fact he was charged in 1999 and 2002 with breach of the peace when he answered "no" to question 26 (SOR ¶ 2.b); he intentionally omitted the fact he had several unpaid judgments against him for unpaid debts when he answered "no" to question 37 (SOR ¶ 2.c); he intentionally tried to mislead the government about the extent of his indebtedness when he answered "yes" to questions 38 and 39, but listed only two of the many debts he had (SOR ¶¶ 2.d and 2.e); and he intentionally provided false information about his 2002 breach of peace arrest and his 1995 arrest on drug, weapon, and conspiracy charges in a February 2004 statement to government investigators (SOR ¶¶ 2.f and 2.g).

The record contains sufficient information to support these allegations. The facts established through SOR ¶¶ 2.a - 2.g establish a security concern addressed in the Directive through Guideline E; that is, 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. (29) Applicant knew about his debts, and his arrests, and he deliberately tried to hide most of that information. When confronted by investigators, and during his DOHA testimony about his 1995 arrest, Applicant deliberately provided inconsistent statements about the details of his involvement in those crimes, and initially denied he had been charged with more serious crimes than the hindering prosecution offense of which he was ultimately convicted. His claim that he did not know about the original charges in 1995 directly contradicts his admission at hearing that the charges were read to him in open court after he was arrested. In response to the government's concerns about his SF 86 omissions of his 1999 and 2002 arrests, Applicant claimed he forgot about them. This position is not plausible in view of the fact he was taken into custody each time. With these falsifications in mind, I further conclude Applicant's partial disclosure of his debts in response to questions 38 and 39 shows he was attempting to mislead the government about his financial problems by minimizing the scope of his debt. It is clear from the totality of information about his debts that he knew he had at least 10 more debts than he listed and that he was probably aware of some of the judgments entered against him.

These facts require consideration of Guideline E DC 2, DC 3, and DC 5. ⁽³⁰⁾ By contrast, the record does not support any of the listed mitigating conditions that might be relevant to the information presented. ⁽³¹⁾ Available information about Applicant's lack of candor, including his own testimony, presents a picture of someone who has and will continue to lie to protect his own interests. Such conduct is directly at odds with the government's compelling interest in being able to trust cleared personnel to fulfill their fiduciary responsibilities. Accordingly, I conclude Applicant failed to mitigate the security concerns raised by the government's information.

Whole Person Concept. A fair and commonsense assessment ⁽³²⁾ of available information about Applicant's personal and criminal conduct, taken in the context of the record as a whole shows that reasonable doubts persist about Applicant's ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. Applicant was about 23 years old and beyond what is generally thought of as adolescent or immature when he was first arrested in 1995. Even if he was immature, his additional adverse criminal and personal conduct in the subsequent 10 years reinforces the government's concerns about his suitability. ⁽³³⁾ Applicant has failed to present more than minimal information to suggest he is in any way rehabilitated or that the conduct at issue will not recur. Indeed, his 2005 workplace dispute and the lack of credibility in his statements to the government and in his testimony suggest he will continue to exhibit poor judgment and lack of candor. ⁽³⁴⁾ Absent substantial information to mitigate these concerns, which Applicant failed to provide, I cannot conclude he has carried his burden of persuasion in response to the government's case.

FORMAL FINDINGS

Formal findings regarding each SOR allegation are as follows:

Paragraph 1, Guideline J (Criminal Conduct): AGAINST THE APPLICANT

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

Subparagraph 1.c: Against the Applicant

Subparagraph 1.d: Against the Applicant

Subparagraph 1.e: Against the Applicant

Paragraph 2, Guideline E (Personal Conduct): AGAINST THE APPLICANT

Subparagraph 2.a: Against the Applicant

Subparagraph 2.b: Against the Applicant

Subparagraph 2.c: Against the Applicant

Subparagraph 2.d: Against the Applicant

Subparagraph 2.e: Against the Applicant

Subparagraph 2.f: Against the Applicant

Subparagraph 2.g: 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 the Applicant. Clearance is denied.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. The SOR contained two typographical errors corrected at hearing (Tr., 13 - 15). SOR 2.d(1) is amended to read "That information as set forth in subparagraphs 2.c(1) through (4), above." The last sentence of SOR 2.e(1) is amended to read "...whereas in truth, you deliberately failed to disclose those additional accounts which were over 90 days delinquent, as set forth in subparagraphs 2.c (1) through (4) and 2.d (2) through (11), above."
3. Gx. 8; Gx. 9; Gx. 10; Gx. 11; Tr., 69 - 70.
4. Gx. 3; Gx 5.
5. Gx. 9; Gx; 10; Gx. 11.
6. Gx. 5; Tr., 79 - 81.
7. Gx. 5.
8. Tr., 36 - 38.
9. Tr., 86 - 87.
10. Gx. 6; Gx. 7.
11. Gx. 1.
12. Gx. 5.
13. Gx. 1.
14. Gx. 5.
15. Gx. 1.
16. Gx. 5.
17. Gx. 4.
18. Gx. 3.
19. Tr., 68 - 69.
20. Tr., 41.
21. Directive, Enclosure 2.
22. E2.2.1. "...Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. In evaluating the relevance of an individual's conduct, the adjudicator should consider the following factors:

E2.2.1.1. The nature, extent, and seriousness of the conduct;

- E2.2.1.2. The circumstances surrounding the conduct, to include knowledgeable participation;
- E2.2.1.3. The frequency and recency of the conduct;
- E2.2.1.4. The individual's age and maturity at the time of the conduct;
- E2.2.1.5. The voluntariness of participation;
- E2.2.1.6. The presence or absence of rehabilitation and other pertinent behavioral changes;
- E2.2.1.7. The motivation for the conduct;
- E2.2.1.8. The potential for pressure, coercion, exploitation, or duress; and
- E2.2.1.9. The likelihood of continuation or recurrence;"

23. See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

24. See *Egan*, 484 U.S. at 528, 531.

25. See *Egan*; Directive E2.2.2.

26. Directive, E2.A10.1.1.

27. Directive, E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged; E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

28. Directive, 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 person was pressured or coerced into committing the act and those pressures are no longer present in that person's life; E2.A10.1.3.4. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur; E2.A10.1.3.5. Acquittal; E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

29. Directive, E2.A5.1.1.

30. Directive, 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; E2.A5.1.2.3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination. E2.A5.1.2.5. A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency.

31. Directive, E2.A5.1.3.1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability; E2.A5.1.3.2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily; E2.A5.1.3.3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts.

32. Directive, E2.2.3.

33. Directive, E2.2.1.3. The frequency and recency of the conduct; and E2.2.1.4. The individual's age and maturity at the time of the conduct.

34. Directive, E2.2.1.6. The presence or absence of rehabilitation and other pertinent behavioral changes; and E2.2.1.9. The likelihood of continuation or recurrence.