

DATE: October 30, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-10796

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Security concerns about an allegation of inappropriate sexual contact with his daughter, and related criminal and personal conduct concerns were not established. The financial concerns are mitigated because Applicant settled his largest debt before the Statement of Reasons was issued, and the others were incurred by his ex-wife. However, he failed to overcome criminal and personal conduct concerns presented by his deliberate omission from his security clearance application (SF 86) of information about his arrest record and a car repossession. 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 August 9, 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 D (sexual behavior), Guideline E (personal conduct), Guideline F (financial considerations), and Guideline J (criminal conduct). Applicant timely responded to the SOR and requested a hearing.

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 27, 2006. The parties appeared as scheduled and the government presented 16 exhibits and one witness (Gx.1 - 16). Applicant testified and presented four exhibits (Ax. A- D). DOHA received the transcript of hearing on May 9, 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 outside mechanic since March 2003 by a defense contractor

supporting construction, maintenance, and overhaul of U.S. Navy nuclear submarines. He served as an Engineman Third Class Petty Officer (EN3; paygrade E-4) in the U.S. Navy from 1993 until 2003. Applicant married his first wife in June 1993. They separated in January 2000 and divorced in October 2001. They had two children, a boy and a girl, now ages 12 and 10, respectively. Applicant remarried in July 2002, and lives with his wife and stepdaughter. He held a security clearance when he was in the Navy, but submitted a security clearance application (SF 86) on March 14, 2003.

In September 1999, Applicant and his first wife obtained a new vehicle. His wife negotiated the deal, which Applicant thought at the time was a purchase financed through the dealer. Applicant signed the paperwork for this transaction at the dealer. He now asserts it was actually a lease. When they separated in early 2000, Applicant's wife took the vehicle, but returned it to him in 2001. Applicant claims he never missed a payment, but the finance company took the vehicle from him in August 2002. Applicant claims the vehicle was not repossessed in the traditional sense, but was actually an end-of-lease return. The dealer subsequently notified him he owed more than \$12,000, which Applicant believes was for excess mileage. After receiving collection notices in April and May, 2004, Applicant tried to negotiate a payment plan he could afford. He settled this debt in June 2004 for about \$3,250.

After they separated and he moved out, Applicant's first wife failed to pay bills for their internet service and their satellite television service. The two bills total \$461 and one was placed for collection in August 2001. She also opened a clothing store account in his name and there is an unpaid collection account for \$201 attributable to Applicant.⁽²⁾ He has challenged the clothing store debt as fraudulent, and he does not intend to pay this debt. Applicant was not aware of any of these delinquencies until he was interviewed during his background investigation in January 2004.⁽³⁾

Following his separation, Applicant usually saw his children when his estranged wife needed a babysitter. On June 16, 2000, she and her boyfriend went away for the weekend while Applicant stayed with the children at his wife's home (formerly the marital residence). She returned on June 18. On June 20, she called the police and alleged Applicant had sexually abused his then five-year-old daughter by touching the girl's "private parts," by putting his finger in her rectum, and by inserting the end of a small plastic toy into her rectum.

The police investigation included a statement from Applicant, in which he denied any wrongdoing, his ex-wife's statement about what she believed happened based on conversations with their children and with Applicant, the results of an interview of Applicant's daughter by a child welfare caseworker, the results of a hospital physical examination of the child, and the results of laboratory analyses of the child's underwear and the toy allegedly used by Applicant. The lab results and physical examination were inconclusive as to whether any abuse had occurred. During the police investigation into this matter, Applicant's visitation rights were first suspended, then limited to supervised visits only.

Applicant was interviewed by the police on June 27, 2000. He denied any wrongdoing during the weekend in question. Applicant was not under arrest and did not respond to requests by the police for additional interviews. Because he was still on active duty with the Navy, the police sent their reports and findings to the Naval Criminal Investigative Service (NCIS) at Applicant's duty station and asked NCIS to assist in the investigation by interviewing the Applicant. On March 1, 2001, an NCIS agent took a statement from Applicant in which he again denied doing anything wrong or inappropriate with his daughter.⁽⁴⁾

On March 20, 2001, Applicant met with an NCIS polygraph examiner. Before this interview, the NCIS examiner had reviewed Applicant's March 1 statement and the local police investigation records.⁽⁵⁾ The interview began at 3 p.m. and ended around 9 p.m., when Applicant gave a written statement in which he acknowledged he may have accidentally touched his daughter in an inappropriate way when he, his daughter, and his son were wrestling and playing during the weekend in question.⁽⁶⁾ Applicant was optimistic the matter would be resolved favorably and agreed to return the next day for another interview.

When Applicant appeared for his interview on March 21, the NCIS agent accused Applicant of having lied the day before. The agent drafted a statement containing most of the information found in the civilian police reports. Applicant signed the statement because he thought it was the only way he would get to see his children again.⁽⁷⁾ The NCIS statements were then sent to the civilian authorities who arrested Applicant on May 15, 2001, and charged him with one count each of 1st degree child sexual assault and risk of injury to a minor, both felonies.

Applicant subsequently obtained legal counsel with whom he worked closely in preparing a defense.⁽⁸⁾ On February 19, 2003, after several continuances, the local prosecutor had the charges dismissed when Applicant's ex-wife refused to cooperate and make her daughter available as a witness.⁽⁹⁾

On March 14, 2003, around the time he began working for his current employer, Applicant submitted a security clearance application (SF 86). In response to question 21, which required him to disclose if he had ever been charged with or convicted of a felony, Applicant answered "no." In response to question 35, which required Applicant to disclose if he had any property repossessed for any reason in the prior seven years, he answered "no." 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 answered "no."

Aside from the unpaid debts discussed, above, Applicant does not have any financial problems. He also has not had any other adverse contact with law enforcement, and there is no indication in the record that his military service was anything other than satisfactory. Finally, there is no information to suggest he has had any disciplinary problems at work.

POLICIES AND BURDEN OF PROOF

The Directive sets forth adjudicative guidelines⁽¹⁰⁾ 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.⁽¹¹⁾ 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⁽¹²⁾ 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 judgment, 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.⁽¹³⁾ 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.⁽¹⁴⁾ Accordingly, applicants bear a heavy burden of persuasion in the face of disqualifying information.

DISCUSSION

Sexual Behavior. The government alleged Applicant should be disqualified from holding a security clearance because he had inappropriate sexual contact with his then five-year-old daughter in June 2000 (SOR ¶ 1.a); and, in May 2001, he was arrested and charged with two felonies - first degree sexual assault and risk of injury to a minor - which were dismissed nearly two years later because Applicant's ex-wife refused to cooperate with prosecutors (SOR ¶ 1.b). As to SOR ¶ 1.b, the government presented sufficient information to show Applicant was charged as alleged and that the charges were later dismissed. Regarding SOR ¶ 1.a, the government's information does not show Applicant acted inappropriately with his daughter. In support of this allegation, the government presented, in part, documents⁽¹⁵⁾ containing hearsay that are admissible in DOHA proceedings because they fall within exceptions to the rules against hearsay in the Federal Rules of Evidence (FRE).⁽¹⁶⁾ Notwithstanding the fact these documents are admissible, they contain only summaries of findings and interviews by police investigators and no firsthand observations by the reporting official. The lab and medical examination results therein are inconclusive. The documents contain hearsay in the form of

a statement by the child's mother, and hearsay within hearsay in the form of a caseworker's summary of her interview with the child. As such, I do not assign these documents much weight in deciding if Applicant acted as alleged.

The government relies also on Applicant's statements to NCIS. ⁽¹⁷⁾ These statements also lack persuasive value. The first two do not show any inappropriate conduct by Applicant and the third was drafted by the NCIS agent for Applicant's signature based on the civilian police information the NCIS agent reviewed in preparation for his interviews with Applicant. It is not surprising, under the circumstances, that Applicant agreed to sign it rather than continue with the interviews. It is also not surprising that the civilian prosecutor decided he needed the victim's testimony in addition to Applicant's March 21 statement to proceed with a case against Applicant. While the absence of a conviction does not preclude the government from presenting information to try to show the conduct occurred as alleged, the fact Applicant was arrested, without more, does not equate to proof he engaged in the conduct alleged. ⁽¹⁸⁾ Based on all of the foregoing, I conclude the government failed to show Applicant sexually assaulted or "had intentional inappropriate Sexual (sic) contact" with his daughter. Even were I to find otherwise, such conduct would be easily mitigated in that it was isolated, occurred several years ago, there is no indication of similar conduct since then, and it cannot serve as a basis for pressure, blackmail, or coercion. I conclude Guideline D for the Applicant.

Personal Conduct. The government alleged Applicant should be disqualified from holding a security clearance because he deliberately falsified his statement to NCIS on March 1, 2001, in which he denied sexually assaulting or physically abusing his daughter in June 2000 (SOR ¶ 2.a); he deliberately falsified his statement to NCIS on March 20, 2001, when he stated any inappropriate sexual contact with his daughter in June 2000 was accidental (SOR ¶ 2.b); he deliberately falsified his March 2003 SF 86 by failing to disclose the fact he had been arrested and charged with a felony in connection with the alleged misconduct with his daughter (SOR ¶ 2.c); he deliberately falsified his March 2003 SF 86 by failing to disclose the fact his car was repossessed in August 2002 (SOR ¶ 2.d); he deliberately falsified his March 2003 SF 86 by failing to list three debts more as than 180 days past due (SOR ¶ 2.e) or as 90 days past due (SOR ¶ 2.f); and he deliberately falsified his February 2004 statement to a government investigator during his background investigation when he again denied sexually assaulting his daughter in June 2000 (SOR ¶ 2.g).

As discussed above under Guideline D, the record does not support the allegations that Applicant had inappropriate sexual contact with his daughter as alleged in SOR ¶ 1. Accordingly, there is no basis to find he intentionally lied about that conduct as alleged in SOR ¶¶ 2.a, 2.b, and 2.g. As to the omission of his debts alleged in SOR ¶¶ 2.e and 2.f, Applicant did not know of all the alleged delinquencies when he completed the SF 86.

As for the allegations Applicant deliberately withheld relevant information from his SF 86, the totality of information available on these issues shows Applicant acted with the intent required for his omissions of the felony charges and automobile repossession to be disqualifying. Regarding SOR ¶ 2.c, Applicant was aware at all times of the nature of the charges which resulted from his wife's accusations. He had worked closely with an attorney after he was arrested, and there is no indication he thought the charges were misdemeanors rather than felonies. Applicant claims he failed to list the charges on his SF 86 because he rushed through the form and mistakenly thought he only to list the charge if he was convicted of it. Yet the charges were dismissed less than a month before Applicant filled out the SF 86. It is untenable Applicant did not think the government would expect him to disclose this matter.

In response to the SOR ¶ 2.d allegation he deliberately omitted a repossession in August 2002, Applicant alternately claimed (1) he did not list it because at the time he submitted the SF 86, he was in negotiation with the finance company to settle the debt, ⁽¹⁹⁾ and (2) the finance company's action was not a repossession; rather, it was an end-of-lease turn in. ⁽²⁰⁾ Neither claim is plausible: the former implicitly acknowledges the repossession and Applicant's awareness of it, while the latter apparently occurred to Applicant at hearing. Further undermining Applicant's claim is the fact the creditor is an automotive finance company and not a leasing company.

These facts raise a security concern about Applicant's candor and trustworthiness addressed in the Directive under Guideline E. Specifically, 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. ⁽²¹⁾ These facts also require consideration of Guideline E disqualifying condition (DC) 2. ⁽²²⁾ The only reasonable conclusion to draw from the available information on this issue is that Applicant deliberately

omitted the information about his repossession and his arrest. By contrast, Applicant has not presented any information to support consideration of any of the applicable mitigating conditions under this guideline.

Criminal Conduct. The government alleged the Applicant should be disqualified from holding a security clearance because of the sexual assault and risk of injury charges specified in SOR ¶ 1.b (SOR ¶ 3.a); and because he deliberately made false statements to government investigators and NCIS agents, and through his answers to questions in his SF 86, thereby violating federal criminal law as expressed in 18 U.S.C. § 1001 (SOR ¶ 3.b). As to the allegation of criminal sexual conduct, as discussed under Guideline D, above, I conclude the record does not support this allegation and SOR ¶ 3.a is resolved for the Applicant. Likewise, the allegation in SOR ¶ 3.b that he made false statements about the alleged conduct with his daughter is not supported by the government's information.

However, as to the allegation of criminal conduct through deliberate falsifications of his answers in the SF 86, I conclude the government presented sufficient information to support SOR ¶ 3.b. As noted under Guideline E, above, Applicant knew he had been charged with two felonies, information he was required to disclose regardless of the ultimate legal outcome. He also knew his car had been repossessed and that he was required to disclose that fact when he completed his SF 86. Applicant signed his SF 86 directly under an advisement that knowingly making a false statement to the government was a violation of criminal law under 18 U.S.C. § 1001.

These facts raise 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.⁽²³⁾ 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.⁽²⁴⁾ By contrast, Applicant has offered little information to support consideration of any of the Guideline J mitigating conditions that might apply to these facts. His criminal conduct is recent and not isolated, in that it consists of multiple false answers submitted during his most recent background investigation.

Financial Considerations. The government alleged Applicant should be disqualified from holding a security clearance because he owed over \$12,000 after his car was repossessed in 2002, and he owed about \$660 for three other unpaid debts (SOR ¶ 4.a). The government presented sufficient information to support this allegation, thus raising a security concern about Applicant's finances. An applicant who is financially overextended through delinquent debt and poor personal financial management may be at risk of engaging in illegal acts to generate funds to resolve their fiscal difficulties.⁽²⁵⁾ These facts further require consideration of Guideline F disqualifying condition (DC) 1 and DC 3.⁽²⁶⁾

However, the circumstances surrounding the debts also require consideration of Guideline F mitigating condition MC 1 and MC 3,⁽²⁷⁾ because the remaining debts may be attributable not to Applicant but to his ex-wife as a result of their divorce. Also, these debts were incurred several years ago and there is no indication Applicant's finances are a continuing problem. Further, Applicant is entitled to consideration through MC 6,⁽²⁸⁾ in that he settled the repossession debt in 2004. Applicant has mitigated the government's security concerns about his finances.

Whole Person Concept. A fair and commonsense assessment⁽²⁹⁾ 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 decided to withhold from the government information needed to fully and accurately assess his suitability to hold a clearance. He was not an immature adult or adolescent when he made that decision, and there is no indication he was unable to read and digest the questions put to him in the questionnaire. Available information raised reasonable doubts about Applicant's trustworthiness and candor in this regard. 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 D (Sexual Behavior): FOR THE APPLICANT

Subparagraph 1.a: For the Applicant

Subparagraph 1.b: For the Applicant

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

Subparagraph 2.a: For the Applicant

Subparagraph 2.b: For the Applicant

Subparagraph 2.c: Against the Applicant

Subparagraph 2.d: Against the Applicant

Subparagraph 2.e: For the Applicant

Subparagraph 2.f: For the Applicant

Subparagraph 2.g: For the Applicant

Paragraph 3, Guideline J (Criminal Conduct): AGAINST THE APPLICANT

Subparagraph 3.a: For the Applicant

Subparagraph 3.b: Against the Applicant

Paragraph 4, Guideline F (Financial): FOR THE APPLICANT

Subparagraph 4.a: For 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. Gx. 14 and Gx. 15.
3. Gx. 3.
4. Gx. 9.
5. Tr., 41.
6. Gx. 10.
7. Tr., 76 - 80, 104 - 106.
8. Tr., 80, 107, 110 - 112.

9. The whereabouts of Applicant's ex-wife and his children is unknown since late 2002.

10. Directive, Enclosure 2.

11. 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;"

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

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

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

15. Gx.7, Gx.8, Gx.12, Gx.13.

16. FRE 803(6); FRE 803(8)(B) and (C). *See*, Appeal Board Decision, ISCR Case No. 96-0575 (July 22, 1997) (Police reports are admissible in civil proceedings as evidence of matters personally observed by the reporting police officer, as well as factual findings resulting from an investigation made pursuant to lawful authority.)

17. Gx.9, Gx.10, Gx.11.

18. DOHA Appeal Board Decision, Case No. 99-0119 (September 13, 1999), citing DOHA Appeal Board Decision, Case No. 98-0424 (July 16, 1999).

19. Gx.3.

20. Tr., 91 - 94.

21. Directive, E2.A5.1.1.

22. 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.

23. Directive, E2.A10.1.1.

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

25. Directive, E2.A6.1.1.

26. Directive, E2.A6.1.2.1. A history of not meeting financial obligations; E2.A6.1.2.3. Inability or unwillingness to

satisfy debts;

27. Directive, E2.A6.1.3.1. The behavior was not recent; and E2.A6.1.3.3. The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation).

28. Directive, E2.A6.1.3.6. The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

29. Directive, E2.2.3.