

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant failed to mitigate security concerns raised by (1) his criminal conduct in assaulting his son and (2) his personal conduct in deliberately falsifying his security clearance application by failing to list one of his arrests. Clearance is denied.

CASENO: 04-11190.h1

DATE: 03/06/2006

DATE: March 6, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-11190

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Ray T. Blank Jr., Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant failed to mitigate security concerns raised by (1) his criminal conduct in assaulting his son and (2) his personal conduct in deliberately falsifying his security clearance application by failing to list one of his arrests. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan. 2, 1992), as amended, DOHA issued a Statement of Reasons (SOR) on 27 July 2005, detailing the basis for its decision-security concerns raised under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on 18 August 2005 and elected to have the case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's written case on 5 December 2005. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant received the FORM on 12 December 2005 but did not respond within the allotted 30-day time period. The case was assigned to me on 3 February 2006.

FINDINGS OF FACT

Applicant is a 48-year-old supply technician for a defense contractor. He is married and has four children.

In April 1995, Applicant was arrested for writing a bad check for more than \$300. The check was written to a travel agent for a trip. When he did not receive all the amenities he thought he had paid for, Applicant stopped payment on the

check and refused to pay the travel agent. After his arrest, and on the day of trial, Applicant paid the travel agent and the case was placed on the stet docket. [\(1\)](#)

Applicant was working as the manager of a restaurant in December 1999. In preparation for the New Year's holiday business, he took a tin "bank" holding \$1,000 home so, in the morning, on his way to work, he could stop at a bank and get the currency changed to smaller denominations.

When he arrived at the restaurant on 31 December 1999, Applicant reported to his manager that the tin bank had been stolen out of his vehicle. He did not report it to the police for six days. He told police he hadn't reported it earlier because he was busy. He said he made three stops before arriving at the bank on the morning of the theft. When he exited his vehicle at the bank, he noticed damage to the trunk of his car. When he opened the trunk, he found the tin bank and his golf clubs were gone. As all of Applicant's stops that morning were in another county, the police transferred the case to the other county. The police in that county made several attempts to interview Applicant. They finally arranged to meet with him on 27 January 2000. Applicant failed to show. After the police threatened to charge him with making a false police report, Applicant did meet with them. Applicant resigned from his job at the restaurant.

The CEO of the restaurant had told police that Applicant had originally reported to him that the theft occurred on 18 December 1999. The police also interviewed the restaurant's human resources manager. She reported the restaurant banks with a local bank that was close to the restaurant. She also indicated she had questioned Applicant about the length of time it took him to report the theft to police. She claimed Applicant said the sheriff's son had stolen the money and he thought he could get it back. When confronted by police, Applicant "indicated it wasn't true." Item 7 at 8.

Applicant was arrested in April 2000 and charged with making "a false statement/report/complaint to [Officer X] kknowing the same to be false, with the intent to deceive and with the intent to cause an investigation or other action to be taken." It is not clear from the record which statement or report Applicant made was alleged to be false. The case was eventually nolle prossed.

In September 2003, Applicant was arrested for child abuse by a parent and second degree assault. Applicant and his 15-year-old son engaged in a "heated discussion" about the son's homework. The son became agitated and started to break a guitar in the presence of Applicant's youngest son, who is autistic. Applicant jumped on his son to try to subdue him so he would not injure anyone or damage any property. When police arrived, they noticed the son had a scratch on his chin, a bloody nose, and two red and swollen eyes. Applicant's son told police that Applicant had grabbed him by the neck and slammed him face first into the floor. The child abuse charge was dismissed and the assault charge was nolle prossed.

Applicant completed a security clearance application on 22 July 2003 in which he certified that his statements were "true, complete, and correct" to the best of his knowledge and belief, and acknowledged that a knowing and willful false

statement could be punished by imprisonment and/or a fine. Item 4 at 8. Question 6 asked Applicant to list his employment activities. Applicant failed to list his employment as the manager of the restaurant. Instead, he claimed he was employed as an assistant manager of a department store during that time period. Question 26 asked whether, in the previous seven years, Applicant had been "arrested for, charged with, or convicted of any offense not listed in other modules of the SCA. Item 4 at 6. Applicant was required to report information regardless of whether the record had been "sealed" or otherwise stricken from the court record. Applicant answered "no." He failed to list his April 2000 arrest for making a false statement to a police officer there or elsewhere in his SCA. In his Answer to the SOR, Applicant claimed his response to question 26 was based on his belief that "the situation" had been removed from his record.

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 personnel 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.

CONCLUSIONS

Guideline J-Criminal Conduct

In the SOR, DOHA alleged Applicant was arrested for and charged with writing bad checks for more than \$300 in 1995 (§ 1.a); was arrested and charged with making a false statement to a police officer in 2000 (§ 1.b); and was arrested and charged with child abuse and second-degree assault in September 2003 (§ 1.c). In his answer, Applicant admitted each of the allegations. A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive § E2.A10.1.1.

In the FORM, the Government asserts the evidence and Applicant's admissions established potentially disqualifying conditions under Guideline J: Allegations or admission of criminal conduct (DC E2.A10.1.2.1) and a single serious crime or multiple lesser offenses (DC E2.A10.1.2.2). The Government is correct in noting that Applicant's admissions and the evidence establish that Applicant was arrested on three occasions. But despite the wording of the disqualifying conditions, Guideline J applies only in those cases in which there is a history or pattern of criminal activity. A record of arrest, standing alone, is normally not sufficient to establish an applicant actually engaged in criminal conduct. There must be some evidence the applicant actually committed a crime.

The sole evidence in the FORM concerning Applicant's 1995 arrest is contained in Applicant's 11 February 2004 signed, sworn statement to an agent of the Defense Security Service (DSS). In it, Applicant describes how he stopped payment on a check paid to a travel agent when the promised amenities were not provided. No where in the FORM is the alleged "bad check" offense defined nor is there any evidence contradicting Applicant's rendition of the facts. So-called bad check offenses typically require an intent to defraud. There is no evidence Applicant had such an intent and none can be inferred from the information available. Therefore, I find for Applicant on § 1.a.

In § 1.b of the SOR, DOHA alleged Applicant was arrested for and "charged with False Statement to a Police Officer." Applicant admits he was so arrested and charged. But that does not establish he committed a criminal offense. Neither the SOR nor the charging document state which statement or report is false or how it is false. Thus, in the absence of a conviction, I am unable to determine Applicant actually committed the criminal offense alleged. I find for Applicant on § 1.b.

The evidence is sufficient to conclude the Government met its burden of establishing Applicant engaged in criminal conduct by assaulting his 15-year-old son. Applicant's son claimed Applicant grabbed him by the neck and slammed his face into the floor. The police observed physical injuries consistent with the son's statement. Although Applicant sees the evidence differently-he believes he was just trying to control his son-Applicant failed to convince me the evidence supports his version of the incident as opposed to that of his son. DC E2.A10.1.2.1 applies.

An applicant may mitigate criminal conduct by showing the criminal behavior was not recent (MC E2.A10.1.3.1), the crime was an isolated incident (MC E2.A10.1.3.2), he was pressured into committing the act and those pressures are no longer present (MC E2.A10.1.3.3), the factors leading to the violation are not likely to recur (MC E2.A10.1.3.4), and there is clear evidence of successful rehabilitation (MC E2.A10.1.3.6). The offense occurred less than three years ago. The crime is not an isolated incident-Applicant deliberately falsified his SCA. ⁽²⁾ See Discussion, Guideline E. Applicant presented no evidence from which I can determine the factors leading to the violation are not likely to recur or there is clear evidence of successful rehabilitation. I find against Applicant on § 1.c.

Guideline E-Personal Conduct

In the SOR, DOHA alleged Applicant deliberately falsified material facts on his SCA by failing to acknowledge he had been arrested for and charged with making a false statement to a police officer. ¶ 2.a. Applicant denied the allegation and provided an explanation. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate the applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

The deliberate omission of relevant and material facts from any SCA is a security concern and may be disqualifying. DC E2.A5.1.2.2. Information is material if it would affect a final agency decision or, if incorrect, would impede a thorough and complete investigation of an applicant's background. ISCR Case No. 01-06870, 2002 WL 32114535 (App. Bd. Sep. 13, 2002). An applicant's criminal history is a matter that could affect a final agency decision on whether to grant the applicant a clearance and his failure to disclose it would impede a thorough investigation of the applicant's background.

Applicant asserts he failed to indicate his arrest for making a false statement to a police officer because he thought it was no longer in his record and he did not read the question thoroughly. Answer; Item 9 at 2. After carefully reviewing all of the evidence, I conclude Applicant deliberately omitted his 2000 arrest from his SCA. It would be unreasonable to conclude that, when he completed the SCA, Applicant forgot both his employment with the restaurant and his arrest for making a false statement to a police officer during his employment at the restaurant. I carefully reviewed all the evidence and conclude none of the mitigating conditions apply. I find against Applicant on ¶ 2.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

James A. Young

Administrative Judge

1. A stet is a method of placing an indictment in a state of suspended animation. It may be brought out of that state by either the prosecution or the defense. It is neither an acquittal nor a dismissal.
2. I considered Applicant's deliberate omission from his SCA only in assessing the applicability of the mitigating conditions.