

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant mitigated the security concern raised by a June 3, 2001, arrest for Child-Abuse, Disorderly Conduct and Assault since it was an isolated incident and not recent. A security concern remains based on his deliberate omission of this arrest on his August 15, 2003, security clearance application. Clearance is denied.

CASE NO: 04-11865.h1

DATE: 06/22/2006

DATE: June 22, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-11865

DECISION OF ADMINISTRATIVE JUDGE

ERIN C. HOGAN

APPEARANCES

FOR GOVERNMENT

John B. Glendon, Esq., Department Counsel

James B. Norman, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant mitigated the security concern raised by a June 3, 2001, arrest for Child-Abuse, Disorderly Conduct and Assault since it was an isolated incident and not recent. A security concern remains based on his deliberate omission of this arrest on his August 15, 2003, security clearance application. Clearance is denied.

STATEMENT OF CASE

On July 13, 2005, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance. This action was taken under Executive Order 10865, dated February 20, 1960, as amended and DoD Directive 5220.6, dated January 2, 1992, as amended. The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline J, Criminal Conduct, and Guideline E, Personal Conduct.

In a sworn statement received by DOHA on September 9, 2005, Applicant responded to the SOR allegations and requested a hearing. The case was assigned to me on February 2, 2006. A notice of hearing was issued on February 27, 2006, scheduling the hearing for April 6, 2006. The hearing was conducted on that date. The government submitted five exhibits that were marked as Government Exhibits (Gov. Ex.) 1-5 and admitted without objections. Administrative Notice was taken of Maryland Criminal Law Code § 3-601. Applicant testified on his own behalf and submitted three exhibits which were admitted as Applicant Exhibits (AE) A - C. The record was held open until April 20, 2006. Applicant submitted two additional documents which were admitted as AEs D - E without objections. DOHA received the hearing transcript (Tr.) on April 19, 2006.

FINDINGS OF FACT

In his SOR response, Applicant denies all of the allegations. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is a 55-year-old marketing director who is employed with a Department of Defense contractor and is applying for renewal of a security clearance. ⁽¹⁾ He is married and has two daughters, ages 26 and 23. ⁽²⁾ He has a bachelor of science in electrical engineering and a masters of business administration in finance. ⁽³⁾ He has worked for the same defense contractor since 1968 and has held a security clearance during that same time with no security violations. ⁽⁴⁾

On June 3, 2001, Applicant and his wife and younger daughter, who was then 16, were driving home. He and his daughter got into an argument over his daughter stealing things from other family members. He pulled into a gasoline station that was about two miles from their home. At one point, his daughter pointed her middle finger towards him and repeatedly called him an obscene name. In response, he struck his daughter in the back. His daughter ran into the store. He followed her into the store and the argument continued. At some point, he and his wife drove home. His daughter remained at the convenience store. ⁽⁵⁾

A police officer gave his daughter a ride home and arrested Applicant. He was taken to the police station and was charged with Child Abuse - Parent; Disorderly Conduct, and Assault, Second Degree. ⁽⁶⁾ He pled guilty to Disorderly Conduct. The other two charges were *nolle prossed*. He was sentenced to one year unsupervised probation before judgment, fined \$55, and was required to attend an anger management program. ⁽⁷⁾ He successfully completed all the terms of his sentence. ⁽⁸⁾ His daughter was subsequently diagnosed with bipolar disorder. ⁽⁹⁾

On August 15, 2003, Applicant submitted a security clearance application. ⁽¹⁰⁾ He answered "No" in response to question "26. Your Police Record - Other Offenses. 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? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug-related.) For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607."

In response to the SOR, Applicant denied knowingly falsifying material facts. He claims he had no historical knowledge of the SF 86 form and filled in the requested information in the context of a misdemeanor. ⁽¹¹⁾ He indicates he fully provided information about the arrest when he was interviewed during his background investigation in November 2003. He states he was thanked for being forthright and was assured that there would be no negative impact on the renewal of his security clearance. ⁽¹²⁾

At hearing, Applicant admitted to being untruthful when he answered question 26 on his security clearance application. ⁽¹³⁾ Although initially charged with three offenses, two of the charges were dropped by the State's Attorney's office. He answered the question in the context that two of the charges were dropped. ⁽¹⁴⁾ He takes exception to question 26 asking whether have you ever been "charged with" an offense. He testified, "... this is the United States of America, you're innocent until proven guilty. I didn't then, nor do I feel now that that's an inappropriate --- that wording is appropriate for this question." ⁽¹⁵⁾ He also took exception to the fact that he was initially charged with a felony. ⁽¹⁶⁾ Under cross-examination, he admitted that question 26 was not limited to felonies. ⁽¹⁷⁾

Applicant is highly regarded by his supervisors. A company vice-president enthusiastically attests to Applicant's solid character and loyalty. [\(18\)](#) Another company vice-president and his supervisor for the last two years describes Applicant as "...forthright, responsible, trustworthy, and a person who exhibits the highest values." Applicant has worked billion-dollar contracts dealing with advanced radar systems with the Marine Corps and the Army and he is a valued member of the team. [\(19\)](#)

The company's director of security supports the reinstatement of Applicant's security clearance. She indicates he has held a DoD clearance for close to 36 years with no security violations. He takes his security responsibilities seriously and was provided access to special programs because of his trustworthiness and ability to understand the importance of protecting and safeguarding classified programs. She supports Applicant's request to maintain his security clearance based on his outstanding record of protecting classified information. [\(20\)](#)

A retired two-star general has known Applicant personally and professionally over 20 years. He states Applicant's integrity, loyalty and regard for national security issues are without blemish. He indicates Applicant is the most trustworthy and honest person he has ever met and recommends him highly for a security clearance. [\(21\)](#)

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." [\(22\)](#) 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 J, Criminal Conduct: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. [\(23\)](#)

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 person may not properly safeguard classified information. [\(24\)](#)

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." [\(25\)](#) An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. [\(26\)](#) 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. [\(27\)](#)

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. [\(28\)](#) Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts admitted by the applicant or proven by Department Counsel. The applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision. [\(29\)](#) Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. [\(30\)](#)

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. It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a *prima facie* case for disqualification under Guideline J, Criminal Conduct, and Guideline E, Personal Conduct.

Criminal Conduct

The government established its case under Guideline J. Applicant was arrested in June 2001 and charged with Child Abuse, Parent, a felony; Disorderly Conduct; and Assault, Second Degree. He pled guilty to Disorderly Conduct, a misdemeanor. The other two charges were dropped. His deliberate falsification on his August 15, 2003, security clearance application violates Title 18 United States Code § 1001. Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1: (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged*) and CC DC E2.A10.1.2.2: (*A single serious crime or multiple lesser offenses*) are raised in Applicant's case.

The criminal conduct concern can be mitigated. Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1: (*The criminal behavior was not recent*) applies with respect to Applicant's June 2001 arrest. This was the only time Applicant has been arrested. He completed the sentence to include attending anger management classes. He regrets the incident. There is no evidence of similar incidents occurring during the five years since his arrest. Based on these facts, he has mitigated concern raised by SOR subparagraph 1.a.

The allegation in SOR subparagraph 1.b cannot be mitigated since the falsification occurred during Applicant's most recent background investigation. It is recent. It is not an isolated incident when Applicant's June 2001 arrest is considered. Although he is thought of highly by his friends and coworkers, it is too soon to apply CC DC E2.A10.1.3.6: (*There is clear evidence of successful rehabilitation*) due to the recency of the deliberate falsification. Applicant has not mitigated the criminal conduct concern with respect to his deliberate falsification of his security clearance application that violates Title 18 U.S.C. 1001.

Personal Conduct

Applicant deliberately did not list his June 3, 2001, arrest on his August 15, 2003, security clearance application in response to question 26. Therefore, Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.2: (*The deliberate omission, concealment, or falsification of relevant and material facts from any personal 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. He takes issue that he was originally charged with a felony, however, question 26 relates to misdemeanor offenses. He ultimately admitted that he should have listed the arrest in response to this question. His reasons for not listing the arrest were based on his own equivocations and justifications for not doing so rather than any confusion or misunderstanding about the plain language of question 26.

I find none of the Personal Conduct Mitigating Conditions (PC MC) apply to Applicant's case. PC MC E2.A5.1.3.1: (*The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability*) does not apply. Applicants are required to be truthful with the government at all times. A lack of candor raises questions as to whether the person is trustworthy enough to protect classified information.

Deliberate falsification can be mitigated under PC MC E2.A5.1.3.3: (*The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*). In this case, Applicant has failed to meet his burden that he made a prompt, good-faith effort to correct his falsification. He did not disclose the circumstances related to his June 2001 arrest until an interview with a DoD investigator in November 2003, approximately three months after he submitted his security clearance application. I do not find that his disclosure was prompt. Accordingly Guideline E, is concluded against Applicant.

In reaching my decision, I considered all the evidence provided and also considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. I find Applicant has failed to mitigate the concerns related to the falsification of his security clearance application. Applicant has had a long and distinguished career with his employer. But, his deliberate omission of his June 3, 2001, arrest raises doubt about his ability to protect classified information. Therefore, I am persuaded by the totality of the evidence in this case that it is not clearly consistent with the national interest to grant Applicant a security clearance.

FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: 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.

ERIN C. HOGAN

Administrative Judge

1. Tr. at 19, 48.
2. Tr. at 69-70.
3. Tr. at 33.
4. Gov Ex 1; Tr. at 6; AE D.
5. Gov Ex 3; Answer to SOR; Tr. at 42-45.
6. Gov Ex 5.
7. Gov Ex 4.
8. Tr. at 70-71.
9. Tr. at 45-46.
10. Gov Ex 1.
11. Answer to SOR at 2.
12. Tr. at 41, 68; Answer to SOR.

13. Tr. at 68.
14. Tr. at 40-41.
15. Tr. at 63.
16. Tr. at 64.
17. Tr. at 68.
18. AE A.
19. AE B.
20. AE D.
21. AE E.
22. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).
23. Directive, ¶ E2.A10.1.1.
24. Directive, ¶ E2.A5.1.1.
25. Directive, ¶ E2.2.1.
26. *Id.*
27. *Id.*
28. Directive, ¶ E3.1.14.
29. Directive, ¶ E3.1.15.
30. Directive, ¶ E.2.2.2.