

DATE: December 29, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 06-17691

## **DECISION OF ADMINISTRATIVE JUDGE**

**JAMES A. YOUNG**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Robert E. Coacher, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant was arrested twice for domestic violence. In completing his security clearance application, he denied having been arrested in the previous seven years. He failed to mitigate criminal and personal conduct security concerns. 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 17 August 2006 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 5 September 2006 and elected to have a hearing before an administrative judge. The case was assigned to me on 19 October 2006. With the consent of the parties, I convened a hearing on 13 December 2006 to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on 21 December 2006.

### **FINDINGS OF FACT**

Applicant is a 38-year-old field engineer working on communications transport systems for a defense contractor. SDK, Applicant's supervisor and friend, reports Applicant is honest and trustworthy.

Applicant was married from 1989 until 2003. He has three children, all of whom live with his ex-wife. He served seven years (1990-1997) in the U.S. Air Force achieving the rank of senior airman (E-4). He has held a security clearance since at least 1997.

Applicant lived at his girlfriend's home from August 2002 until August 2003. Applicant measured 5'9" tall and 190 pounds. His girlfriend was 5'7" tall and weighed 125 pounds. On 11 November 2002, as a result of a 911 hang-up

telephone call, police were dispatched to that residence at 0315. When the police arrived they observed Applicant's girlfriend departing the residence. She told them she had gotten into an argument with Applicant and had tried to leave. After he grabbed her and slammed her against the wall, she hid in a crawl space in the basement. Applicant followed her and dragged her up the stairs by her neck and hair. She told the police officer that Applicant had intentionally forced her face into the staircase causing injuries to her nose and mouth. She admitted biting Applicant in order to get away from him. She asserted that Applicant had thrown her purse at her. He missed and it broke a bedroom window. She refused to sign a statement, claiming she didn't want to ruin his life, she just wanted out. Ex. 3 at 2. She was treated at a hospital for injuries, described by the treating physician as a fractured nasal bone, contusions to the nose and foot, abrasions to her arms and neck, and strangulation marks to her neck. *Id.* at 5.

Applicant told officers that his girlfriend sustained her injuries as a result of him trying to get her to stop biting him. He claimed the argument started over drugs in her purse. Applicant was arrested for assault in the third degree, harassment, false imprisonment, and criminal mischief. *Id.* at 4. Charges were eventually dropped in court on 17 March 2003. Ex. 2 at 2-3. Nevertheless, I find Applicant's girlfriend's version of the events more credible.

After he was released from jail, Applicant returned to his girlfriend's house, and they continued to live together. At approximately 2230 on 12 June 2003, police were dispatched to the same residence in response to a call from Applicant. He told police that he had an argument with his girlfriend about his ex-wife. When he tried to go to bed, she threw beer on him. When he got up, she shoved him, hit him in the head with an open hand and ripped his shirt off. He claims she then chased him out of the house with a kitchen knife and locked the door. When he observed her put the knife down on the counter, Applicant entered the house and put the knives on top of the refrigerator. When Applicant's girlfriend grabbed another knife, he fled the house and called police.

Applicant's girlfriend had a different story. She reported receiving a call that morning from Applicant's ex-wife expressing concern for the safety of her children when they visited their father because of the violent nature of the girlfriend's relationship with Applicant. Later, Applicant's girlfriend learned her father had three to six months to live due to his cancer. Applicant called her a liar and a dispute ensued. Applicant threw the beer, ripped his own shirt off, and threatened her with a knife. Police arrested both Applicant and his girlfriend. Charges were eventually dismissed. After considering all of the evidence, I find Applicant's girlfriend to be more credible. Applicant committed the offense.

On 18 February 2005, Applicant completed a security clearance application (SCA) by certifying that the information provided therein was true, complete, and correct to the best of his knowledge and belief. He acknowledged that a knowing and willful false statement could be punished by fine and/or imprisonment. Ex. 1 at 6. Question 26 of the SCA asked if, in the previous seven years, Applicant had been arrested for, charged with, or convicted of any offenses not listed elsewhere in the SCA. Applicant answered "no." *Id.* at 4-5. The document was returned to Applicant to complete certain omissions. Applicant did not correct his answer to question 26 before signing the SCA again on 4 April 2005.

Applicant married a different woman in September 2006.

## 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 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). Each security clearance decision "must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy." Directive ¶ 6.3. 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).

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 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 charged with domestic violence, harassment, criminal mischief under §100, kidnapping/false imprisonment, and 3d degree assault/recklessly causing injury (¶ 1.a); was arrested on 12 June 2003 and charged with harassment (¶ 1.b); and violated 18 U.S.C. § 1001 by failing to list his arrests under ¶¶ 1.a and 1.b on his SCA (¶ 1.c). In the Answer, Applicant denied the allegations in ¶¶ 1.a and 1.b and did not answer to the allegation in ¶ 1.c. As he denied the allegation in ¶ 2.a (personal conduct security concern raised by the same statement alleged in ¶ 1.c), I understood his silence as a denial.

In any matter within the jurisdiction of the executive of the United States Government, it is a criminal offense to knowingly and willfully make any materially false, fictitious, or fraudulent statement or writing, or conceal any material fact. 18 U.S.C. § 1001. Security clearances are within the jurisdiction of the executive branch of the Government of the United States. *See Egan*, 484 U.S. at 527. Information is material if it would affect a final agency decision or would impede a thorough and complete investigation of an applicant's background. *See* ISCR Case No. 01-06870, 2002 DOHA LEXIS 469 at \*\*13-14 (App. Bd. Sep. 13, 2002). An applicant's failure to fully list his arrests on his SCA would impede a thorough security investigation and could affect a final agency decision. A violation of 18 U.S.C. § 1001 is a serious offense-it carries a maximum sentence that includes confinement for up to five years. After carefully considering all of the evidence, including Applicant's credibility, I find he knowingly and willfully failed to list his arrests on his SCA.

A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1. It is potentially disqualifying for an applicant to have allegations of criminal conduct raised against him (DC E2.A10.1.2.1) or to engage in a single serious crime or multiple lesser offenses (DC E2.A10.1.2.2). The Government established the allegations of domestic violence and the serious crime of deliberately falsifying his SCA in violation of 18 U.S.C. § 1001. These criminal offenses raise concerns about Applicant's judgment, reliability, and trustworthiness.

Applicant has the burden of mitigating the security concerns raised by his criminal conduct. An applicant may mitigate criminal conduct security concerns by demonstrating his criminal behavior was not recent (MC E2.A10.1.3.1); the crime was an isolated incident (MC E2.A10.1.3.2); the applicant was pressured into committing the act and those pressures are no longer present (MC E2.A10.1.3.3); the applicant did not voluntarily commit the act and/or factors leading to the violation are not likely to recur (MC E2.A10.1.3.4); acquittal (MC E2.A10.1.3.5); and there is clear evidence of successful rehabilitation (MC E2.A10.1.3.6).

Applicant's criminal conduct was recent. Although the assaults occurred three and four years ago, he violated 18 U.S.C. § 1001 in April 2005 by deliberately lying about those arrests on his SCA. The factors leading to the assaults may not be likely to recur because he is no longer associated with his ex-girlfriend. But as he is unwilling to admit any of his criminal conduct, I am unable to conclude that he would not lie again to further his own goals. There is no evidence he has been rehabilitated.

### **Guideline E--Personal Conduct**

In the SOR, DOHA alleged Applicant falsified his answer to question 26 on his SCA by denying he had been arrested for, charged with, or convicted of any offenses not listed elsewhere on his SCA. In the Answer, Applicant denies deliberately falsifying his SCA. He asserts he misread the question, believing the items were conjunctive rather than disjunctive.

If an administrative judge finds applicant actually believed he answered the questions correctly, and that question 26 asked for instances in which he had been arrested, charged, *and* convicted," the judge may find for Applicant. After carefully considering all of the evidence, including Applicant's demeanor and testimony, I find Applicant deliberately

falsified his SCA.

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 falsification or 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 would impede a thorough and complete investigation of an applicant's background. *See* ISCR Case No. 01-06870, 2002 DOHA LEXIS 469 at \*\*13-14 (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.

An applicant may mitigate personal conduct security concerns by establishing the information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability (MC E2.A5.1.3.1); the falsification was an isolated incident, was not recent, and the applicant has subsequently provided correct information voluntarily (MC E2.A5.1.3.2); the applicant made prompt, good-faith efforts to correct the falsification before being confronted with the facts (MC E2.A5.1.3.3); the omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided (MC E2.A5.1.3.4); the individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress (MC E2.A5.1.3.5); the refusal to cooperate was based on advice from legal counsel or other officials that the individual was not required to comply with security processing requirements and, upon being made aware of the requirement, fully and truthfully provided the requested information (MC E2.A5.1.3.6); association with persons involved in criminal activities has ceased (MC E2.A5.1.3.7).

I conclude Applicant failed to establish any of the mitigating conditions. The deliberate falsification of an SCA goes to the very heart of the security process which is focused on determining an applicant's judgment, reliability, and trustworthiness. The fact that he now admits he was arrested on two different occasions after being confronted with police reports of his arrest do little to improve his credibility or mitigate the security concern.

### **Whole Person Analysis**

"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. . . . The adjudicative process is the careful weighing of a number of variables known as the whole person concept," including (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. Directive ¶ E2.2.1.

Applicant is 38 years old and, over the past five years, has engaged in several criminal offenses, at least one of which--the falsification of his SCA--was serious. He has not accepted responsibility for any of the offenses. His conduct creates doubts about his judgment, reliability, and trustworthiness which he failed to mitigate.

### **FORMAL FINDINGS**

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

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against 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