



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**



|                                  |   |                        |
|----------------------------------|---|------------------------|
| In the matter of:                | ) |                        |
|                                  | ) |                        |
|                                  | ) | ISCR Case No. 07-05309 |
| SSN:                             | ) |                        |
|                                  | ) |                        |
| Applicant for Security Clearance | ) |                        |

**Appearances**

For Government: John B. Glendon, Esq., Department Counsel  
For Applicant: Steven D. Tibbets, Esq. and Jason Matechak, Esq.

February 27, 2008

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**Decision**

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LAZZARO, Henry, Administrative Judge

Applicant failed to mitigate the security concern caused by his deliberate falsification of a security clearance application he submitted in August 2006 and his failure to report adverse information concerning himself to his employer as required.

On September 21, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.<sup>1</sup> The SOR, which is in essence the administrative complaint, alleges security concerns under Guidelines J (criminal conduct) and E (personal conduct). Applicant submitted an undated response to the SOR which was received by DOHA on October 12, 2007. Applicant admitted the SOR allegation contained in subparagraph 1.a, denied the allegations contained in subparagraphs 1.b, 2.a, and 2.b, and requested a hearing.

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<sup>1</sup> This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

The case was assigned to another administrative judge on December 3, 2007, and reassigned to me on January 16, 2008, for administrative reasons. A notice of hearing was issued on January 3, 2008, scheduling the hearing for January 24, 2008. The hearing was conducted as scheduled. The government called one witness and submitted 16 documentary exhibits that were marked as Government Exhibits (GE) 1-16. GE 1-3 and GE 5-16 were admitted into the record without objection. GE 4 was admitted into the record without objection, excepting those portions of the document that are illegible. Applicant testified, called two witnesses to testify on his behalf, and submitted nine documentary exhibits that were marked as Applicant Exhibits (AE) 1-9. AE 1-4 and AE 6-8 were admitted into the record without objection. The Government's objections to AE 5 and AE 9 were overruled and they were admitted into the record. The transcript was received on February 1, 2008.

### **Findings of Fact**

Applicant's admission to the one allegation in the SOR is incorporated herein. In addition, after a thorough review of the pleadings, testimony and exhibits, I make the following findings of fact:

Applicant is 45 years old and has been employed by defense contractors, presently as a project manager, since in or about May 1985. He holds a bachelor in electrical engineering degree and a master in engineering management degree. He was awarded the master's degree in May 1990. Applicant has held a security clearance for approximately 20 years, including a top secret clearance since 2002. No prior adverse action has been taken to revoke or downgrade his security clearance eligibility.

Applicant has been married since July 1983. He and his wife have two children, ages 16 and 12. Applicant has volunteered for years as a youth volleyball coach. He is active in church activities, including service recently for several years as a deacon. He also contributes financially to local charitable causes. Applicant submitted the testimony and affidavits of numerous co-workers who uniformly attest to his outstanding reputation as a trustworthy, reliable, honest, and ethical individual. They consider him to be a conscientious employee whom they highly recommend be allowed access to classified information.

On March 5, 2006, Applicant was arrested and charged with Driving a Vehicle While Under the Influence (DUI), Driving a Vehicle While Impaired by Alcohol (DWI) and Failure to Obey a Properly Placed Traffic Control Device. The arrest occurred after Applicant had stopped for dinner and drinks with friends following a volleyball tournament in which he had participated. Applicant consumed several alcoholic beverages with his meal and had a 0.07 blood alcohol level at the time of his arrest. That level is below the level at which the state where he was arrested presumes a driver to be under the influence of alcohol.

Applicant appeared in court on July 31, 2006. The charge of DWI was reduced to the offense of Reckless Driving. Applicant entered a plea of guilty to the reduced charge on his attorney's advice and was sentenced to serve two years on probation before judgment, fined \$177.50, and assessed court costs in the amount of \$25.50. The other two charges were dismissed based on the state's motion to nolle prosequi the charges. On his

attorney's suggestion, Applicant also voluntarily attended an alcohol awareness class following his arrest.

Applicant executed and submitted a Questionnaire for National Security Positions (e-Quip) on August 24, 2006. In response to a question asking if he had "been arrested for, charged with, or convicted of any offense(s) . . . ? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.)" he failed to disclose the arrest for DWI and the conviction of Reckless Driving with the resulting probation before judgment and fine of \$177.50.

Applicant provided several reasons why he failed to disclose the arrest, charge, conviction and fine. First, he testified he did not associate "the traffic stop with the matter of being able to access and secure and protect classified data." (Tr. 63) He also went on to explain that his attorney told him that the sentence of probation before judgment meant it was like the offense never happened. (Tr. 69-70) Additionally, Applicant testified that although he was handcuffed, transported to a police station in a police car, and fingerprinted (Tr. 110), he didn't believe he had been arrested because he had not been read his Miranda rights and placed in a cell. (Tr. 111)

Applicant was questioned about his arrest and conviction by an investigator from the Office of Personnel Management (OPM) on October 6, 2006. She prepared a report of that interview in which she reported Applicant told her the arresting officer told Applicant "he was placing subject under arrest for DUI, DWI, and failing to obey a posted traffic device, after subject advised the officer that he did not want to take the field breathalyzer." (GE 2) A copy of the investigator's report containing this statement was provided to Applicant and on August 9, 2007, he swore or affirmed the contents thereof were accurate. Applicant testified he "missed this part . . . did not pay attention to this part . . . ." (Tr. 133) when asked about the apparent contradiction with his hearing testimony.

Applicant attended an annual security briefing provided by his employer on August 17, 2006. Included in that briefing were admonitions that the employer required employees to self-report "Fines Of \$150 Or More (Including Traffic Violations)" and "Traffic Citations That Are Alcohol Or Drug Related." (GE 6) Although Applicant told a co-worker about his arrest, he did not report the arrest, charges, and fine to his employer until almost a year after he had submitted the e-QIP, and was subsequently confronted by the OPM investigator about the omissions.

## **POLICIES**

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the disqualifying conditions and mitigating conditions for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guidelines J (criminal conduct) and

E (personal conduct), with their disqualifying and mitigating conditions, are most relevant in this case.

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>2</sup> The government has the burden of proving controverted facts.<sup>3</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence,<sup>4</sup> although the government is required to present substantial evidence to meet its burden of proof.<sup>5</sup> “Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.”<sup>6</sup> Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.<sup>7</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>8</sup>

No one has a right to a security clearance<sup>9</sup> and “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”<sup>10</sup> Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.<sup>11</sup>

## **Analysis**

### **Guideline J, Criminal Conduct**

Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules and regulations.

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<sup>2</sup> ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

<sup>3</sup> ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

<sup>4</sup> *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

<sup>5</sup> ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

<sup>6</sup> ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

<sup>7</sup> ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

<sup>8</sup> ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

<sup>9</sup> *Egan*, 484 U.S. at 528, 531.

<sup>10</sup> *Id* at 531.

<sup>11</sup> *Egan*, Executive Order 10865, and the Directive.

Applicant was arrested for and charged with DUI and DWI in March 2006. He pled guilty to the reduced charge of Reckless Driving in July 2006, and paid a fine and court costs totaling \$203. He was also sentenced to serve two years probation before judgment and remains on probation at present.

Applicant executed and submitted an e-QIP on August 24, 2006. In response to the applicable question, he failed to disclose the arrest, charge, conviction and/or fine as required. Considering his educational level, the lengthy period of time he has held a security clearance, the annual security clearance briefings he received, the proximity of the most recent briefing to the time of his submission of the e-QIP and the substance of the explanations he has provided for the omissions, his denial of deliberately falsifying the e-QIP is not credible.

I have considered the fact Applicant did discuss his arrest with a co-worker and her expressed opinion that she did not think it was an incident that needed to be reported. However, when weighed against the admitted facts that: 1) Applicant was briefed a mere week prior to submission of the e-QIP that not only the arrest and charges were matters that must be disclosed but that his fine and conviction also needed to be disclosed; 2) Applicant's statement to the OPM investigator that he had been told by the arresting officer he was being placed under arrest; and 3) the plain language of the question, it is clear Applicant was aware at the time he submitted the e-QIP that he was required to list the arrest, conviction and fine, and deliberately chose not to do so. His failure to disclose this information, as required, was a violation of 18 U.S.C. § 1001.

Disqualifying Conditions (DC): 31(a) *a single serious crime or multiple lesser offenses*; and 31(c): *allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted* apply.

The arrest, charges, and conviction that resulted from Applicant driving a vehicle after consuming alcohol are isolated incidents. There is no reason to believe they will ever recur. The only record evidence of prior involvement with the criminal justice system is that Applicant received a citation for a minor traffic offense many years ago. Additionally, following his arrest on this occasion he voluntarily attended and successfully completed an alcohol awareness program. As to those offenses, Mitigating Conditions 32(a): *so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment*; and 32(d): *there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse of restitution, job training or higher education, good employment record, or constructive community involvement* apply. Accordingly, I find Applicant has mitigated the criminal conduct concern that arose from his alcohol-related arrest.

As noted above, Applicant deliberately provided a false answer in the e-QIP in an effort to keep the Government from learning of his alcohol-related offense in violation of 18 U.S.C. § 1001. He compounded this offense by providing false testimony in his attempt to explain away the falsification. As noted earlier, it simply is not believable that an individual with Applicant's education and work experience who has held a security clearance as long as Applicant has and who received a security briefing a week before

submitting the e-QIP would not have been aware of the need to disclose that information. As such, I do not find any mitigating condition applies to this offense.

### **Guideline E, Personal Conduct**

Personal conduct is always a concern because conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any failure to cooperate with the security clearance process.

For the reasons explained above under Guideline J, I find Guideline E DC 16(a): *deliberate omission, concealment, or falsification of relevant 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.

Applicant was required by his employer to report the adverse information concerning his arrest, conviction, and fine to the employer independent of providing that information in the e-QIP. He did not do so when the incidents occurred nor after receiving a security briefing at which the reporting requirement was briefed. His obligation to self-report such information was recorded in attendance records maintained by his employer. DC 16(f): *violation of a written or recorded commitment made by the individual to employer as a condition of employment* applies.

Again, and as noted above under Guideline J, it simply is not believable that an individual with Applicant's education and work experience who has held a security clearance as long as Applicant has and who received a security briefing during which self-reporting requirements were discussed would not have been aware of the need to disclose the adverse information about his arrest, conviction and the resulting fine to his employer. Accordingly, I do not find any Guideline E mitigating condition applies.

The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying conditions, Applicant has failed to mitigate the security concerns caused by his criminal and personal conduct. He has failed to overcome the case against him in this regard or satisfy his ultimate burden of persuasion. Guidelines J and E are decided against Applicant. 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

    Subparagraphs 2.a & b:   Against Applicant

### **Conclusion**

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 Applicant. Clearance is denied.

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Henry Lazzaro  
Administrative Judge