



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



In the matter of:)	
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SSN: -----)	ISCR Case No. 07-13618
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeffery Nagel, Esquire, Department Counsel
For Applicant: *Pro Se*

September 16, 2008

Decision

WESLEY, Roger C., Administrative Judge:

Statement of Case

On April 04, 2008, the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, and Department of Defense (DoD) Regulation 5200.2-R, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on April 29, 2008 and requested a hearing. The case was assigned to me on July 10, 2008, and was scheduled for hearing on July 30, 2008. A hearing was held on July 30, 2008, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, or deny, Applicant's application for a security clearance. At hearing, the Government's case consisted of four exhibits; Applicant relied on two witnesses (including himself) and seven exhibits. The transcript (R.T.) was received on August 7, 2008. Based upon a

review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural Rulings and Evidentiary Issues

Before the close of the hearing, Department Counsel moved to amend the SOR to add subparagraph 2.e that alleges Applicant omitted to list his domestic pled misdemeanor corporal injury offense when answering subparagraph 23.f of his e-QIs in October 2006, and December 2006. For good cause shown, Department Counsel's motion was granted. Applicant denied the amended incorporated allegation.

Summary of Pleadings

Under Guideline J, Applicant is alleged to have been arrested in October 1996 and charged with inflict corporal injury on spouse (a felony offense), (2) terrorist threats (a felony offense), and obstruct justice (a felony offense), to which he pled guilty to a lesser charge of spousal abuse and was sentenced to 18 months of probation and ordered to complete an anger management course, which he had not completed as of January 2008.

Under Guideline E, Applicant is alleged to have (i) falsified the security clearance application (e-QIP) he completed in October 2006 by failing to disclose his earlier felony arrest/charges in October 2006 arrest in multiple places on the form, (ii) reiterated his arrest/charges when completing an updated e-QIP in December 2006, and (iii) failed to disclose his 2006 arrest/charges until confronted by an investigator from the Office of Personnel Management (OPM) in March 2007.

For his answer to the SOR, Applicant admitted his criminal charges but denied falsifying his security clearance applications and misleading the OPM interviewer who came to interview Applicant in March 2007.

Findings of Fact

Applicant is a 45-year-old-computer integration specialist for a defense contractor who seeks to retain his security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein and adopted as relevant and material findings. Additional findings follow.

Applicant is married (for 24 years) and has no children. He served in the Air Force for 20 years (spanning March 1984 and March 2004) and has many earned service medals that commemorate his military service. He filled out security clearance applications in the Air Force, and has held a clearance while in the Air Force (R.T., at 71-74), and has held a clearance for most of his tenure with his current defense contractor, commencing in 1978 (R.T., at 83-84, 89-90).

Applicant and his wife (W) engaged in a domestic quarrel in October 2006 after he told W's sister that he was contemplating a divorce (see ex. 3; R.T., at 62). W learned of the disclosure and exploded with anger (R.T., at 62). When she returned home, she confronted Applicant. An argument ensued, and W slammed the door (putting a hole in the wall). She then hurled closed fists at Applicant, which he was able to block (ex. 3). Applicant, in turn, pushed W onto the couch to try and calm her down. When W first tried to call the police, Applicant knocked the phone out of her hand, breaking the phone (ex. 3). W then picked up another phone and called the police (R.T., at 63-64). When police responded to the call, they arrested Applicant, placed him in custody, and charged him with domestic assault (see ex. 3).

The police charged Applicant with felony domestic assault on the date of his arrest in October 2006 (R.T., at 64, 94-98, 101-02). In his first court appearance in November 2006, the court explained the newly amended misdemeanor charges filed on October 30, 2006 to him, and afforded him the opportunity to obtain an attorney (R.T., at 65, 85). The State's amended charge (see ex. G) replaced the felony assault charge with a reduced charge of corporal injury to spouse/co-habitant/child's parent (a misdemeanor offense).

When Applicant appeared in court for his second court appearance, he pleaded guilty to the amended lesser spousal abuse charge and was sentenced to 18 months of unsupervised probation and ordered to complete an anger management course by May 2008 (R.T., at 66-67). He was told that if he provided proof of completing the conditioned anger management course, the misdemeanor charge would be dropped (R.T., at 66-67, 85-86). The court also issued a restraining order on Applicant, which W subsequently had revoked.

By January 2008, Applicant had still not signed up for the course. He documents completing the course, however, in April 2008 and fulfilling his probation requirements (see ex. F; R.T., at 68-69). Appellant claims the misdemeanor charges have been dismissed, but provides no documented proof.

Applicant and W continue to live together for the benefit of their child who needs Applicant's medical insurance (see ex. 3). While neither Applicant nor W have filed for divorce, both contemplate legal separation based on incompatibility (ex. 3).

Applicant was asked to complete an e-QIP in early October 2006 (before his 2006 offense). Before he could electronically complete and return the form, the incident with his wife occurred. By the time he certified the e-QIP and returned it to his command for processing, the intervening incident with W had transpired (R.T., at 78). However, Applicant did not go back and list his omitted initial felony domestic assault charges (which had not yet been amended), when answering sub-sections a and c of question 23 (see ex. 2; R.T., at 78-82). He also omitted his same charges when answering question 23.e (ex. 2) of the same e-QIP. Applicant claimed he had completed his October 2006 e-QIP before learning that any actual charges had been filed or lodged against him (R.T., at 60). He assures he did not purposely omit his October 2006

domestic incident, and advised his supervisor of the 2006 arrest while filling out the initial e-QIP form on his computer (R.T., at 59). He attributes his omissions to haste and his claimed belief that the charges would be dismissed and would not be material thereafter (R.T., at 59-60). Police and court records reveal that police filed felony charges against him in connection with his arrest and initially pressed those charges. Applicant was unable to convincingly show otherwise.

In December 2006, Applicant's FSO asked him to complete an updated SF-86. In this updated application, Applicant repeated, without reviewing his answers, the same omissions he made about his domestic arrest/charges in his earlier e-QIP.(see ex. 2; R.T., at 86-87). He had no explanation, though, for his omission of the amended misdemeanor charges in this updated application. When considered together with his earlier omissions, his explanations have no credible thread of mistaken assumptions or consistency.

Considering all of the circumstances surrounding his domestic arrest and charges associated with his earlier October 2006 domestic violence arrest, the amendments, and Applicant's ensuing guilty plea, his explanations cannot be reconciled with the time-line of events that culminated with his guilty plea to the amended charges. Inferences warrant that his omissions were intentional and knowing under all the circumstances known at the time, and calculated to conceal his arrest and charges from OPM investigators reviewing his submitted e-QIPs. Not until confronted about his October 2006 arrest/charges in a March 2007 interview with an OPM investigator did Applicant disclose his same arrest/charges and disposition of the same (see exs. 2 and 3; R.T., at 89-90).

Applicant's site manager confirms he was kept informed of Applicant's October 2006 domestic incident through Applicant's chain of command (R.T., at 106-08). However, he indicated limited familiarity with the domestic charges brought against Applicant in October 2006 (R.T., at 111). Applicant told his FSO of the incident with W and his decision not to list any charges stemming from the incident based on his belief the charges would be dropped (R.T., at 105, 111). The FSO, in turn, relayed the information to his maintenance supervisor, who told the site manager (R.T., at 106-11).

Applicant's site manager credits Applicant with strong work performance (see ex. E). He finds Applicant to be honest and forthcoming about problems that might impact his work. Applicant's coworkers characterize applicant as well mannered technician who enjoys a good working relationship with the other members of his team (ex. E). Applicant's flight maintenance supervisor extols his technical and trainer skills, and described him as the "go to" technician for fixing tough problems and ensuring completion of his squadron's mission (see ex. E).

Policies

The revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (effective September 2006) list Guidelines to be considered by

judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Criminal Conduct

The Concern: 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. Adjudication Guidelines (AG) ¶ 18

Personal Conduct

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, 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 other failure to cooperate with the security clearance process. AG ¶ 18.

Burden of Proof

By virtue of the precepts framed by the revised Adjudicative Guidelines, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require

the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

Analysis

Applicant is a meritorious computer integration specialist who was involved in a single domestic violence arrest and charge but twice omitted the offense in his security clearance applications before being confronted by an OPM investigator in a follow-up interview. Security concerns are raised over Applicant's arrest and omissions.

Criminal conduct offense

Applicant's single domestic violence arrest warrants initial consideration of two disqualifying conditions of AG ¶ 18. DC ¶ 31(a), "a single serious crime or multiple lesser offenses," and DC ¶ 31(c), "allegation or admission of criminal conduct, regardless of whether the person was formally charged," has application. Applicant's lone domestic violence arrest was reduced to a misdemeanor charge to which Applicant guilty to spousal abuse. Applicant was, in turn, was sentenced to 18 months of probation and ordered to complete a management course (which he did). With the aid of the lessons he acquired in his anger management course, Applicant and W have been able to maintain their marriage and continue living together for the benefit of their young child. Most important, by his completing the anger management course, Applicant has been able to obtain the dismissal of the original misdemeanor charge.

Applicant may rely on MC ¶ 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." in mitigation of his spousal abuse conviction. This arrest/charge and conviction by itself is insufficient to warrant continuing security concerns about his judgment, reliability and trustworthiness. His FSO, site manager, and coworkers hold him in high esteem and value his team work and professionalism. These collective impressions of Applicant coupled with the demonstrated responsibility he has shown in maintaining his marriage in the face of the 2006 offense speak positively to Applicant's family commitments and fiducial responsibilities.

Based on a consideration of the applicable guidelines and a whole person assessment, Applicant mitigates the criminal conduct specifically associated with his spousal abuse incident. Taking into account all of the facts and circumstances

developed in the record, favorable conclusions warrant with respect to the allegations covered by subparagraph 1.a of the SOR.

Falsification issues

Potentially serious and difficult to reconcile with the trust and reliability requirements for holding a security clearance are the timing and circumstances of Applicant's multiple omissions of the domestic violence arrest and charges arising out of this incident in the security clearance application forms he completed in October 2006, and again in December 2006., and in his withholding of his arrest/charges until he was confronted in an ensuing OPM interview. So much trust is imposed on persons cleared to see classified information that deviation tolerances for candor lapses are gauged very narrowly.

Mitigation is difficult to credit Applicant with, since he failed to promptly correct his initial e-QIP omission in the follow-up e-QIP he was asked to complete, and before being confronted in his ensuing OPM interview. In the past, the Appeal Board has denied applicants availability of the predecessor mitigating condition of MC ¶ 27(a) (*the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts*) where the applicant has waited many months to timely correct a known omission. Compare ISCR Case No. 97-0289 (Appeal Bd. January 1998) with DISCR Case No. 93-1390 (Appeal Bd. January 1995).

By willfully and knowingly failing to disclose his October 2006 arrest and charges in two e-QIP applications, Applicant concealed materially important background information needed for the government to properly process and evaluate his security updates. His attributed reasons for his omitting his arrest/charges (belief that the charges would be dismissed) are not sustainable grounds for averting inferences of falsification. Weighing all of the circumstances surrounding his multiple e-QIP arrest/charge omissions and lack of any prompt, good faith corrections, Applicant's claims lack the necessary probative showing to avert drawn conclusions that he knowingly and deliberately withheld material background information about his prior arrest/charges.

Knowing and wilful falsification is also covered by the criminal conduct guidelines. Mitigation of the criminal features of his omissions falls along a little bit different fault line than is the case with personal conduct considerations. Here, Applicant's positive work record and demonstrated family commitments play a major role in mitigating criminal conduct coverage of his omissions. MC ¶ 32(d), "there is evidence of successful rehabilitation, including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement," has application. Employment of this guideline and the use of separate whole-person weighing of Applicant's actions and contributions to the military, his professional achievements, and his community support enable him to mitigate the criminal conduct coverage of his e-QIP omissions.

Considering all of the evidence produced in this record and the available guidelines in the Directive (inclusive of the E2.2 factors), unfavorable conclusions warrant with respect to subparagraphs 2.a through 2.e of Guideline E. Favorable conclusions warrant, however, with respect to subparagraph 1.b of Guideline J.

In reaching my decision, I have considered the evidence as a whole, including each of the E2 2.2 factors enumerated in the Adjudicative Guidelines of the Directive.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE J: (CRIMINAL CONDUCT):	FOR APPLICANT
Sub-para. 1.a:	FOR APPLICANT
Sub-para. 1.b:	FOR APPLICANT
GUIDELINE E: (PERSONAL CONDUCT):	AGAINST APPLICANT
Sub-para. 2.a::	AGAINST APPLICANT
Sub-para. 2.b::	AGAINST APPLICANT
Sub-para. 2.c::	AGAINST APPLICANT
Sub-para. 2.d::	AGAINST APPLICANT
Sub-para. 2.e::	AGAINST APPLICANT

Conclusions

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 Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge

