



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-01524
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Robert E. Coacher, Esquire, Department Counsel
For Applicant: *Pro Se*

September 30, 2008

Decision

WESLEY, Roger C., Administrative Judge:

History of Case

On April 30, 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 June 4, 2008, and elected to have his case decided on the basis of the written record. Applicant received the File of Relevant Material (FORM) on July 1, 2008. Applicant did not submit any information in response to the FORM. The case was assigned to me September 15, 2008.

Summary of Pleadings

Under Guideline J, Applicant is alleged to have been arrested (a) on four different occasions between June 2003 and January 2007 on various charges related to domestic violence, (b) once in February 2004 for no insurance (followed by the issuance of a warrant for failure to appear) and (c) once for possession of alcohol by a minor in May 2006.

Under both Guidelines E and J, Applicant is alleged to have falsified his public trust application (SF-85P) of April 2007 and his security clearance application (SF-86) of July 2007, by omitting the arrests covered in the SOR.

For his answer to the SOR, Applicant admitted most of the allegations pertaining to his arrests and associated charges with explanations. He denied that a warrant was issued in connection with his 2004 arrest. He claimed three of the charges were either dismissed or dropped (*viz.*, subparagraphs 1.c, 1.d and 1.f). He never admitted nor denied the allegations concerning his omissions of his arrests. He did, however, claim that he was told (source not identified) that all of the alleged charges would be dismissed and not show up on his record, and for this reason, he did not list them in his SF-86. Applicant's explanations essentially deny any intentional omission, and will be treated as pleading denials.

Findings of Fact

Applicant is a 22-year-old lawn seasonal maintenance worker for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted to by Applicant are adopted as relevant and material findings. Additional findings follow.

Applicant was arrested on a number of occasions between June 2003 and January 2007 for assorted offenses. Records show that he was arrested in June 2003 and charged with simple assault/family violence and criminal trespassing. He was placed on pre-trial diversion and the charges were *nolle prosequi* in February 2006. He was arrested for no insurance in February 2004. When he did not appear as scheduled, a bench warrant reportedly was issued. When Applicant appeared for his hearing, he was issued a warning.

Between May 2005 and January 2007, he was arrested on three occasions for domestic violence offenses and charged with battery/family violence. Charges were dismissed relative to both of his May 2005 domestic violence arrests. He was found guilty of battery/family violence relative to his January 2007 charges and fined approximately \$400.00. He claims the charges were dismissed following his completion of an anger management course, but provides no documentation of the same.

Applicant's other arrest was alcohol-related. Records show that in May 2006, he was cited and charged with possession of alcohol by a minor. He was found guilty and

fined approximately \$480.00. Applicant claims he does not drink anymore, but provides no witness or documentary support for his claims.

When interviewed by an investigator from the Office of Personnel Management (OPM) in September 2007, Applicant described the covered domestic violence incidents as essentially quarrels that ended in some pushing and physical damage of his girlfriend's apartment (see Item 6). With respect to his May 2006 arrest, he recalled spending a night in jail and completing in some cases and completing the work required by the court (item 6). Applicant provides no further details of any of the covered incidents in the SOR.

Asked to complete an SF-85P in April 2007, and an SF-86 in July 2007, Applicant omitted all of his arrests covered by subparagraphs 1.a through 1.f. He attributed his omissions of his 2003 and 2004 arrests to his claimed belief that he did not have to list arrests that occurred when he was a minor. He attributed his alcohol-related arrest to memory lapse. And he attributed his omissions of his 2005 and 2007 domestic violence arrests to his belief that the charges stemming from these arrests were either dropped or dismissed, and hence did not need to be listed (see Answer and Item 6). Applicant's explanations do not provide a very credible explanation in their entirety. His explanations at the very least require more detail to be plausible.

Considering all of the circumstances of Applicant's omissions, his claims of misunderstanding and inadvertent omission cannot be accepted as plausible and credible explanations. Inferences warrant that Applicant's omissions were made deliberately with the intent to mislead the Government.

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 nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations. Adjudication Guidelines (AG) ¶ 30.

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 in this case was arrested and/or cited on six different occasions over a four-year period spanning 2003 and 2007 for assorted offenses ranging from driving without proof of insurance and failing to appear, possessing alcohol as a minor, and domestic violence offenses (four in all). He is also alleged to have committed criminal conduct in omitting his arrest/charges from both the SF-85P and SF-86 he completed in 2007. Applicant's arrests/charges and omissions are probative based on the information presented in this record raise initial security concerns.

Appellant's admitted charges (some later dropped or dismissed) warrant consideration under the criminal conduct guideline (§ 30) of the AGs. 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," have application.

While some of the covered charges may have been dropped or dismissed, they entail admitted criminal conduct that is neither aged nor isolated. His conduct is too recent and frequent to warrant application of any of the mitigating conditions of the criminal conduct guideline. He provides no documentation either of character endorsements, work evaluations, or demonstrated work in the community that might aid in making a positive whole person assessment.

Use of a whole person assessment that takes into account all of the facts and circumstances surrounding Applicant's arrest history is insufficient to enable him to surmount security concerns independent of the express disqualifying conditions covered by AG § 18. Without proof of acquired maturity and a demonstrated change of direction in his life, it is difficult to draw convincing conclusions about his overall trustworthiness based on factors not covered in the mitigation conditions of the guideline for financial considerations.

Based on a consideration of the applicable guidelines and a limited whole person assessment from the few details furnished by Applicant, unfavorable conclusions warrant with respect to the allegations covered by the criminal conduct guideline.

Potentially serious, too, and difficult to reconcile with the trust and reliability requirements for holding a security clearance are the timing and circumstances of Applicant's assorted arrests/charges in the SF-85P and SF-86 he completed in April and July 2007, respectively, and withholding the information until he was confronted in his 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 SF-86 understatements 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 17(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 omitting his arrests/charges in both his SF-85P and SF-86, Applicant concealed materially important background information needed for the government to properly process and evaluate his security clearance application. His attributed reasons for his omissions (minor status, memory lapse, and impression that dropped or dismissed charges need no be listed) are not sustainable grounds for averting inferences of falsification. Weighing all of the circumstances surrounding his SF-86 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 use of illegal substances. Unfavorable conclusions warrant with respect to the allegations covered by subparagraphs 2.a and 2.b. Because Applicant's omissions are isolated and were followed by corrections when interviewed two months later, criminal conduct associated with them are mitigated.

In reaching my decision, I have considered the evidence as a whole, including each of the E2.2 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):	AGAINST APPLICANT
Sub-paras. 1.a through 1.f:	AGAINST APPLICANT
Sub-para. 1.g:	FOR APPLICANT
GUIDELINE E (PERSONAL CONDUCT):	AGAINST APPLICANT
Sub-paras. 2.a and 2.b:	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

