



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



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 09-00333

**Appearances**

For Government: Daniel Crowley, Esquire, Department Counsel  
For Applicant: *Pro se*

January 24, 2011

**Decision**

WESLEY, Roger C., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access classified information is denied,

**Statement of the Case**

On May 17, 2010, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether his clearance should be granted, continued, denied, or revoked.

Applicant responded to the SOR (undated), and requested a hearing. The case was assigned to me on September 27, 2010, and was scheduled for hearing on October 27, 2010. A hearing was held on the scheduled date for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny,

or revoke Applicant's security clearance. At the hearing, the Government's case consisted of seven exhibits (GEs 1 through 7); Applicant relied on one witness (himself) and two exhibits (AEs A-B). The transcript (Tr.) was received on November 12, 2010.

### **Summary of Pleadings**

Under Guideline J, Applicant is alleged to have been arrested and charged on multiple occasions between January 2000 and July 2005 for assorted traffic-related offenses, including recurrent incidents of driving on a suspended license and failure to appear in noticed court hearings.

Under Guideline E, Applicant is alleged to have falsified material facts in a November 20, 2007 security clearance application (SF-86) by omitting his arrest, charge, and conviction history when asked to reply to question 23 (police record) of the application.

In his response to the SOR, Applicant admitted the allegations covering his alleged arrests and his SF-86 omissions. He provided an explanation for each of his answers.

### **Findings of Fact**

Applicant is a 29-year-old electronic technician for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

#### **Background**

Applicant experienced a difficult childhood. He admits to having a "wise mouth" when he was younger, and to hanging around with "a rough crowd." (GE 4) He has post-high school college education credits. He attended an accredited technical institute between September 2002 and September 2004 and earned an Associate's degree. (see GE 1)

Applicant is unmarried and has one child (age 4) from his current relationship. (GE 1) He has never served in the military service of the United States.

#### **Applicant's arrest history**

While in high school, Applicant was often stopped by police and questioned. (GE 1) Between July 2001 and July 2005 he was arrested on numerous occasions (13 in all) for assorted traffic and alcohol-related offenses. Police and court records document Applicant's being charged in January 2000 for letting an unlicensed minor drive. (GE 6) Police transported him to a juvenile detention center, where they processed him and released him. (GE 6; Tr. 24). The following year (2001) he was twice arrested for traffic-related violations. In his July 2001 arrest, police charged him with concealing identity,

failure to obey a notice to appear, driving on a suspended license, failure to obey notices to appear, and speeding. He pleaded to concealing his identity, and the remaining counts were dismissed. Three months later (in September 2001), he was arrested again, this time for a false report for citation, driving on a suspended license, license carry and exhibit on demand, and headlamps for motor vehicles (GEs 4 and 7). Applicant pleaded guilty to driving on a suspended license, and the other counts were dismissed. (GE 7)

Applicant was twice arrested in 2002 as well. In March 2002, he was charged with concealing identity, driving on a suspended license, improper use of evidence of registration, a temporary registration violation, and failure to appear. Applicant pled guilty to driving on a suspended license, temporary registration not visible, and failure to appear. (GE 7) In June 2002, he was charged with open container and was fined. (GE 7)

In February 2003, Applicant was charged with criminal trespass. (GE 7) The charge was dismissed. In April of 2003, he was charged with driving on a revoked license and a temporary registration visible left rear window violation. Both of these charges were dismissed. (GE 7)

Records document that Applicant was separately charged on three occasions in 2004. In June 2004, he was charged with an open container violation and paid a fine. (GE 7) Two months later (in August 2004) he was charged with driving on a revoked license, deficient windshield wipers (window side), and speeding. (GE) Applicant pled guilty to no driver's license and was sentenced to 90 days in jail (suspended) and fined. And in October 2004, he was charged with contributing to the delinquency of a minor (a felony). This charge was *nolle prossed*. (GE 7)

Applicant was charged with driving on a revoked license on three more occasions in 2005. In January 2005 and July 2005, charges of driving on a revoked license were dismissed. (GE 7) He pleaded guilty, though to driving on a revoked license in March 2005 and was fined. (GE 7) Since his last traffic-related conviction in July 2005, Applicant has not encountered any additional confrontations with law enforcement officers. (see GEs 4 and 7; Tr. 26) He claims to have turned his life around and no longer engages in the type of conduct that exposed him to risks of arrest for traffic-related offenses. (GE 4)

### **Applicant's E-Qip and OPM interview omissions**

Asked to complete a security clearance application (E-QIP) on November 20, 2007, Applicant answered "no" to question 23, which inquired about his police and judicial record. The question specifically asked to list any arrests, charges, and convictions within the previous seven years (save for offenses that involved traffic fines of less than \$150). In answering in the negative, he omitted all of his arrests that occurred between July 2001 and July 2005. Some of these arrests resulted in jail sentences and imposed fines in excess of \$150. (see GE 7)

Applicant attributed his omissions to (a) uncertainty over whether listing the offenses was important, given that his omitted offenses involved only traffic offenses and a contributing to the delinquency of a minor charge (subparagraph 1.j) that was dismissed and (b) confusion over whether he needed to list a felony arrest (covered by subparagraph j) that did not include a conviction. (see GE 4; Tr. 27-32) Applicant's confusion claims are not well corroborated by the court documentation in the record.

In both his OPM interview and his SOR response, Applicant admitted to intentionally omitting his listed arrests in his E-QIP. In neither the summary of interview nor his SOR response did Applicant make any manifest attempt to identify and explain the source of his confusion. Afforded an opportunity to provide more detailed explanations of his claimed confusion over question 23 in his hearing testimony, Applicant failed to do so. (Tr. 27-32) Close review of court records reveals that several of the covered arrests involving driving on a suspended license and resulted in imposed fines of \$150 and above, and in a few instances, jail time. (see GEs 6 and 7)

Most of Applicant's covered arrests in the SOR include driving on a suspended licence charge, which facially, at least, reflect charges that carry potential jail time and fines exceeding \$150 on conviction. (see exhibits 3, 4, and 7) Before responding to the E-QIP, Applicant made no tangible attempt to match the offenses with the punishment and fines imposed. (see GE 4; Tr. 42-43) Without more detailed explanations of why he provided a negative answer to question 23 without any attempt to provide explanations or qualifications in the comment section of the E-QIP, Applicant cannot avert drawn inferences that he falsely omitted all of his listed arrests out of concern that his disclosures could adversely affect his job and security clearance.

In October 2008, an agent from OPM scheduled an interview with Applicant to discuss his 2007 E-QIP answers. (GE 4). The summary of interview produced from OPM documents Applicant's being contacted by the OPM agent for the specific purpose of discussing his omitted arrests and convictions. When asked about his arrest history, Applicant assured he did not list the arrests because he considered them old traffic offenses that had been resolved. (GE 4). Applicant's explanations do not reflect prompt, voluntary disclosures of his arrest history to the interviewing OPM agent.

### **Endorsements**

Applicant is well regarded by his supervisor and coworkers. His supervisor and coworker both describe him as a productive and dependable performer. (see AE A) His furnished credit report documents a good payment record with his creditors. (AE B)

### **Policies**

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified

information. These guidelines include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate security concerns." These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c)

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the revised AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) 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 extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral chances; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Viewing the issues raised and evidence as a whole, the following adjudication policy concerns 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. 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, ¶ 15.

## **Burden of Proof**

Under the Directive, a decision to grant or continue an Applicant's request for 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 commonsense 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 adversarial 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 by substantial evidence any controverted facts alleged in the SOR; 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 proof shifts to the applicant for the purpose of establishing his or his security worthiness through evidence of refutation, extenuation or mitigation of the Government's case. Because Executive Order 10865 requires that all security clearances be clearly consistent with the national interest, "security-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

## **Analysis**

Applicant is a dependable technician for his defense contractor who presents with a considerable history of assorted arrests and convictions (mostly traffic-related) over a five-year period. Principal security issues raised in this case center on Applicant's history of arrests that entail repeated driving on a suspended license charges, and his unqualified omissions of his arrests in the E-QIP he completed in November 2007.

### **Criminal arrest issues**

Applicant's arrests and convictions, while mostly traffic-related, involve numerous offenses of driving on a suspended driver's license. Altogether, Applicant was arrested on 13 separate occasions between 2000 and 2005 and was found guilty on eight occasions.

Applicable disqualifying conditions under the criminal conduct guideline include 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, formally prosecuted or convicted.”

Since July 2005, Applicant has not been involved in any arrest incidents. He has avoided any incidents with law enforcement since his last reported arrest of July 2005, and shows added growth and maturity in his professional and personal relationships.

Without any evidence to challenge Applicant’s explanations of the underlying events and circumstances surrounding his various arrests and convictions, his demonstrated steady restorative progress since his last arrest in 2005 are entitled to considerable weight. In turn, the criminal conduct concerns that are based on his history of recurrent arrests between 2000 and 2005 are entitled to mitigation credit.

Applicant may rely on MC ¶ 32(a), “so much time has elapsed since the criminal behavior happened, or it happened under unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment.” Applicant’s prior arrests and convictions are currently aged and are outweighed by his substantial showing of good judgment and trust demonstrated with his civilian employer, and strengthened personal relationship with his fiancée over the past five years. Applicant has also established himself to be a responsible parent of his son.

Based on his own rehabilitative efforts to date that include encouraging contributions to his employer and changes in his family environment, the chances of any recurrent arrests are unlikely. Applicant may take advantage of MC ¶ 32(d) of the criminal conduct guideline, “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.”

Both from a consideration of the applicable guidelines, and from a whole-person perspective, Applicant demonstrates he possesses the strength of overall character and rehabilitation to meet all of the minimum requirements under the criminal conduct guideline for continued eligibility to hold a security clearance. Based on the confluence of corrective steps he has taken to date, he persuasively demonstrates that he has learned important lessons from his unfortunate lapses in judgment and will work earnestly to avoid any recurrence. Taking into account all of the facts and circumstances developed in the record, favorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a through 1.m of the SOR.

### **Personal conduct concerns**

Security concerns over Applicant’s judgment, reliability and trustworthiness are raised under Guideline E as the result of his omissions of his numerous arrests and convictions in the E-QIP he completed in November 2007. By omitting his arrests and charges (regardless of disposition), Applicant failed to furnish materially important background information about his arrest history that was needed for the Government to

properly process and evaluate his security clearance application. DC ¶ 16(a), “deliberate omission, concealment, or falsification of relevant facts to any personnel 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 to Applicant’s situation.

Applicant’s explanations of his omissions are not fully reconcilable with the arrests and convictions themselves, or with the explanations he provided the OPM agent who interviewed him in October 2008. While some of the arrests might have yielded fines under \$150, others resulted in fines exceeding \$150. And all of Applicant’s arrests and charges involving driving on a suspended license were serious enough to carry the potential for fines in excess of \$150, or jail time. That most of the incidents might be a little aged and resolved (Applicant’s OPM explanation) did not excuse him from listing them when asked to do so in his E-QIP.

Further, Applicant may not be credited with any prompt, good-faith corrections of his arrest omissions. Close examination of the 2008 summary of interview reveals that the OPM agent contacted Applicant in October 2008 (almost a year after Applicant completed his E-QIP) for the specific purpose of discussing his omitted arrests and convictions. Applicant’s explanations of his arrests and convictions followed specific questions asked of him by the investigator.

Summarized, Applicant’s answers to questions posed by the OPM agent who interviewed him in 2008 were not sufficiently prompt, or voluntary, to enable him to invoke MC ¶ 17(a), “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.” Applicant’s corrections, while manifestly forthcoming and sincere, do not meet either the prompt or good-faith prongs of MC ¶ 17(a), as these terms are generally understood in the Appeal Board’s jurisprudence. See ISCR Case No. 02-30369 at 5 (App. Bd. Oct. 27, 2006) (sustaining denial of security clearance); ISCR Case No. 04-00789 at 7 (App. Bd. June 28, 2006) (reversing grant of security clearance); ISCR Case No. 99-0557 at 4 (App. Bd. July 10, 2000) (reversing grant of security clearance).

In evaluating all of the circumstances surrounding Applicant’s E-QIP omissions, his ensuing corrections, his explanations, and whole-person considerations, his disclosures are insufficient to enable him to convincingly refute or mitigate the deliberate falsification allegations. Questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, security concerns are each core policy concerns of the personal conduct guideline (AG ¶ 15). They are clearly evident under the facts and policy considerations developed under this Guideline. Overall, Applicant’s explanations are not persuasive enough to warrant conclusions that the falsification allegations relative to his E-QIP omissions of his traffic-related arrests and convictions are mitigated. Unfavorable conclusions warrant with respect to the allegations covered by Guideline E.



### **Formal Findings**

In reviewing the allegations of the SOR in the context of the findings of fact, conclusions, and the factors and conditions listed above, I make the following separate formal findings with respect to Applicant's eligibility for a security clearance.

GUIDELINE J (CRIMINAL CONDUCT):	FOR APPLICANT
Subparas. 1.a through 1.m:	For Applicant
GUIDELINE E (PERSONAL CONDUCT):	AGAINST APPLICANT
Subpara 2.a	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.

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Roger C. Wesley  
Administrative Judge