



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



In the matter of: )  
)  
) ISCR Case No. 10-02717  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Gina Marine, Esq., Department Counsel  
For Applicant: Sam Levine, Esq.

August 30, 2011

**Decision**

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LAZZARO, Henry, Administrative Judge

Applicant's misdemeanor convictions for Driving Under the Influence (DUI), Cruelty to Animals, and Reckless Conduct were isolated incidents that are unlikely to recur. They have been mitigated. However, he deliberately falsified the security clearance application he submitted on October 18, 2009, by failing to disclose the arrest that led to the Cruelty to Animals and Reckless Conduct convictions. Clearance is denied.

On January 21, 2011, 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 alleges security concerns under Guideline J (criminal conduct) and Guideline E (personal conduct). Applicant's response to the SOR was received by DOHA on March 3, 2011. He admitted the allegation contained in SOR subparagraph 1.a., denied the allegations contained in SOR subparagraphs 1.b, 2.a, and 2.b, and he requested a hearing.

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<sup>1</sup> This action was taken under Executive Order 10865, DoD Directive 5220.6, dated January 2, 1992, as amended (Directive), and adjudicative guidelines which became effective within the Department of Defense for SORs issued after September 1, 2006.

The case was assigned to me on June 29, 2011. A notice of hearing was issued on July 11, 2011, scheduling the hearing for August 9, 2011. The hearing was conducted as scheduled. The Government submitted five documents that were marked as Government Exhibits (GE) 1-5 and admitted into the record without objection. Applicant testified, called three witnesses to testify on his behalf, and he submitted six documents that were marked as Applicant Exhibits (AE) 1-6. AE 1-3 were admitted into the record without objection. Administrative notice was taken of AE 4-6 without objection. The transcript was received on August 17, 2011.

### **Findings of Fact**

Applicant's admission to the allegation contained in SOR subparagraph 1.a is incorporated herein. After a thorough review of the pleadings, testimony, and exhibits, I make the following findings of fact:

Applicant is a 49-year-old man who has been employed as a quality assurance engineer by a defense contractor since October 2009. He held an interim secret level security clearance in that position from a few weeks after he was hired until it was revoked with issuance of the SOR. There is no allegation he mishandled or risked the compromise of classified information while in possession of the interim clearance. Three supervisors who know Applicant well and have had the opportunity to closely observe his work performance attest to his trustworthiness and opine that he can be relied upon to protect classified information if granted a security clearance.

His employment outside the defense industry is as follows: February 2007 to October 2009 - senior site operations manager; March 2006 to December 2006 - production unit manager; January 2004 to March 2006 - senior plant engineer; August 1998 to December 2003 - senior product development engineer. Applicant explained in the Electronic Questionnaire for Investigation Processing (e-QIP) he submitted on October 18, 2009, that he had been laid off from each position due to poor economic or business conditions. He also explained he had actually worked for the earliest employer listed in the e-QIP for almost 18 years. Applicant was unemployed from December 2006 to February 2007.

Applicant was first married in September 1991. That marriage ended in divorce in February 2001. He was married a second time in June 2002. That marriage ended in divorce in February 2008. Applicant has three children, ages 19, 17, and 15.

Applicant is extremely active in community and church affairs. He has served on the board of directors for three charitable entities and he is the past president of a chamber of commerce chapter. He is an Eagle Scout and he serves as a scout leader. He is a member of his church's choir, a church committee to increase spiritual renewal, and he assists with Sunday school.

On September 3, 2005, Applicant fatally shot a neighbor's dog that had entered Applicant's yard and threatened his dog. On September 27, 2005, Applicant was arrested at his home for this offense and charged with Aggravated Cruelty to Animals, a felony, Discharge of Firearms on or Near Public Highway or Street, a misdemeanor, and Reckless

Conduct, a misdemeanor. The felony charge was reduced to a misdemeanor charge of Cruelty to Animals and was disposed of by Applicant pleading guilty to that charge and the Reckless Conduct charge under his state's First Offender Act. The Discharge of Firearms on or Near Public Highway or Street charge was considered to have either been dismissed or merged into the Reckless Conduct charge. Applicant was placed on six months probation and he was required to pay \$2,000 as restitution. Applicant successfully completed the probationary sentence and paid the restitution. Accordingly, under the First Offender Act, he was discharged without an adjudication of guilt and can legally claim that he has not been convicted of the charges to which he entered pleas of guilty.

On January 31, 2009, Applicant was charged with DUI. His blood alcohol content (BAC) was .097. The state's presumptive BAC level for intoxication is .080. On June 6, 2009, he pled guilty to misdemeanor DUI and was sentenced to serve 12 months probation, pay a \$700 fine, perform 40 hours community service, and attend a DUI class. His driving privileges were also suspended for 120 days. He no longer drives after consuming alcohol.

Applicant disclosed the DUI arrest and conviction in the e-QIP he submitted in October 2009, and he provided details about the sentence imposed. He did not disclose the felony Aggravated Cruelty to Animals charge in response to e-QIP Section 22 c, inquiring if he had ever been charged with a felony. He also failed to report the Discharge of Firearms on or Near Public Highway or Street charge in response to e-QIP Section 22 d, inquiring if he had ever been charged with a firearm offense.

Applicant was questioned by an investigator from the Office of Personnel Management (OPM) on January 7, 2010. He provided the investigator with details about his DUI arrest and conviction. However, regarding the other offenses, he stated they were misdemeanors that had been expunged and he did not want to discuss them or provide any additional information about them.

In his SOR response, Applicant answered SOR subparagraph 2.a as follows:

No, I do not admit that I falsified material facts on a questionnaire for National Security Positions executed by me on October 18, 2009, "Have you ever been charged with a felony offense?" I answered no to this question, because I was charged with a misdemeanor cruelty to animals charge, as evidenced by the attached letter from (omitted), District Attorney, (omitted) Judicial Circuit (referring to AE 1).

He wrote as follows in response to SOR subparagraph 2.b:

No, I do not admit that I falsified material facts on a questionnaire for National Security Positions executed by me on October 18, 2009, "Have you ever been charged with a firearms or explosive offense?" I answered no to this question, because the count of Discharge of a Firearm on or Near a Public Street was not pursued by the District Attorney's Office, and was considered dismissed, as evidenced by the attached letter from (omitted), District Attorney, (omitted) Judicial Circuit (referring to AE 1).

Applicant's hearing testimony consistently and repeatedly was that he did not disclose the felony and firearms charges because he misread the questions and thought they were only inquiring about convictions. During cross-examination, he repeatedly asserted he believed that information about those charges had been expunged (Tr. 68, 69, 70, 73, and 85) and was irrelevant (Tr. 69 and 73). He asserted those were the reasons he did not want to discuss the matter with the OPM investigator. Those were also the reasons he claimed he did not disclose it to his current employer when he was interviewed before being hired, although he testified he did disclose the DUI.

## **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 and mitigating conditions for each applicable guideline. Clearance decisions must be fair and impartial decisions 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. Guideline J (criminal conduct) and Guideline 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>

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

<sup>3</sup> ISCR Case No. 97-0016 (December 31, 1997) at 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 3 (citations omitted).

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

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

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

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>

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## 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. (AG 30)

Applicant was convicted of Cruelty to Animals and Reckless Conduct in 2005 under his state’s First Offender Act. He was placed on probation and required to pay restitution. Those charges were discharged without an adjudication of guilt upon his completion of the probation and payment of restitution. He was convicted of DUI in 2009, and sentenced to probation, fined, ordered to perform hours community service, and attend a DUI class. Disqualifying Conditions (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* apply.

Applicant is 49 years old. He had no criminal history before the 2005 offense. The 2005 offenses were situational, unpremeditated, and solely the result of Applicant’s perception of imminent harm being inflicted upon his pet. There is no indication Applicant has an alcohol problem or that he ever committed an alcohol-related offense before his January 2009 DUI arrest. His BAC at the time of that arrest was only slightly above the state’s presumptive level of intoxication. Applicant successfully completed the probationary sentence that was imposed, including attendance at a DUI class. He no longer operates a motor vehicle after consuming alcohol. The totality of the available evidence strongly indicates that Applicant will not again engage in similar criminal conduct.

The following criminal conduct Mitigating Conditions apply: 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*; and 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*.

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<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.

## Guideline E, Personal Conduct

Conduct involving questionable judgment, lack of candor, dishonesty, or willingness 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)

Applicant disclosed his DUI arrest in the October 2009 e-QIP he submitted and provided a detailed description concerning the disposition of that charge. A review of the e-QIP discloses he fully answered all questions. He elaborated on the reasons he lost various jobs and the nature of his relationships with the persons he listed who knew him well in the e-QIP. He was obviously meticulous in gathering the necessary information and in completing the e-QIP. However, he failed to disclose the 2005 felony charge and firearm charge in response to two applicable questions in the e-QIP.

Applicant's hearing testimony was that his failure to disclose the information about his 2005 arrest and charges was simply because he misread the questions and believed they were asking only about convictions not charges. When he was questioned by an OPM investigator in January 2010, Applicant stated the 2005 offenses were misdemeanors that had been expunged and he did not want to discuss them or provide any additional information about them. In response to the SOR, he asserted he answered "No" to the question about felony charges because he was charged with a misdemeanor offense of cruelty to animals, and he answered "No" to the question about firearms charges because the count pertaining to the discharge of a firearm was not pursued by the district attorney's office and was considered dismissed. During cross-examination, Applicant repeatedly expressed his earlier belief that the 2005 charges had been expunged and were irrelevant. He also testified that while he told his current employer about the DUI offense, he did not mention the 2005 offenses.

I had the opportunity to closely observe Applicant's appearance and demeanor while he testified, most notably during cross-examination. In so doing, I was able to judge his credibility and form a reliable opinion about the veracity of his testimony.

Applicant's refusal to provide information or discuss the 2005 offenses when he was interviewed by the OPM investigator makes little sense if the omission of that information in the e-QIP was solely because he misread the questions as he testified. He did not assert misreading the questions in his response to the SOR. His repeated assertions during cross-examination that he believed the offenses had been expunged and were irrelevant is the most plausible explanation for the false answers he provided in the e-QIP.

Based on the totality of the evidence in this case, including Applicant's appearance, demeanor, and the content of his hearing testimony, I am convinced Applicant deliberately provided false answers to the questions inquiring about felony and firearms charges when he submitted his e-QIP in October 2009. DC 16(a): *deliberate omission, concealment, or falsification of relevant facts from 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. I have considered all mitigating conditions and conclude none apply.

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 and mitigating conditions, I find Applicant mitigated the criminal conduct security concern but failed to mitigate the personal conduct security concern. He failed to overcome the case against him or satisfy his ultimate burden of persuasion. It is not clearly consistent with the national interest to grant Applicant a security clearance. Guideline J is decided for Applicant. Guideline E is decided against Applicant.

### **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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.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.

Henry Lazzaro  
Administrative Judge

