



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



In the matter of:)	
)	
[NAME REDACTED])	ISCR Case No. 10-10000
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Candace Le'i Garcia, Esquire, Department Counsel
For Applicant: *Pro se*

09/26/2012

Decision

MALONE, Matthew E., Administrative Judge:

Applicant failed to mitigate the security concerns raised by her deliberate omission of relevant information from her most recent security clearance application. Applicant's request for a security clearance is denied.

On March 20, 2007, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for her job with a defense contractor. After reviewing the completed background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) sent interrogatories¹ to Applicant seeking to clarify or augment information contained therein. Based on her responses to the interrogatories and the results of the background investigation, DOHA adjudicators were unable to find that it is clearly consistent with the national interest to grant Applicant's request for access to classified information.²

¹ Authorized by DoD Directive 5220.6 (Directive), Section E3.1.2.2.

² Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

On March 28, 2012, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns addressed at Guideline E (Personal Conduct) of the adjudicative guidelines (AG).³ Applicant timely responded to the SOR and requested a decision without a hearing. On June 27, 2012, Department Counsel issued a File of Relevant Material (FORM)⁴ in support of the preliminary decision to deny Applicant's request for a clearance. Applicant received the FORM on July 12, 2012, and was given 30 days to file a response to the FORM. Applicant did not respond to the FORM and the case was assigned to me on September 7, 2012.

Findings of Fact

The Government alleged that Applicant deliberately made three false official statements in response to questions in her eQIP. (FORM, Item 1) Specifically, it was alleged that, in response to questions in eQIP Section 5 (*Other Names Used*), she deliberately did not list a surname she no longer uses (SOR 1.a); and that, in response to questions in eQIP Section 13 (*Your Spouse*), she deliberately omitted a previous marriage to a man whose last name she omitted in response to Section 5 (SOR 1.b). Finally, it was alleged that Applicant deliberately omitted a 1976 felony arrest and conviction for attempted murder of a police officer, who was also the former spouse she omitted in eQIP Section 13. (SOR 1.c)

Applicant has been employed as an investigator by a defense contractor since September 2006. She has also been working since July 2005 as an investigator for a state agency where she lives. She has been married to her current husband since March 1978, and she has lived in the same house since July 1979. In May 1992, she earned a bachelor's degree in criminal justice, and much of her professional career has been spent in law enforcement and investigations. FORM, Item 4.

In 1976, Applicant was employed as a law enforcement officer and was required to carry a weapon as part of her duties. At the time, she was married to a man who was employed as a state investigator. He, too, carried a weapon as part of his duties. One day in August 1976, Applicant and her husband got into an argument which escalated into gun play. Applicant claims she shot her husband when he reached for his weapon. He survived, and she was arrested and charged with attempted murder of a police officer, a felony. In 1977, she pleaded *nolo contendere*, a finding of guilty was entered, and she was fined and placed on probation for six years. However, in August 1980, her probation was ended and the conviction was set aside. FORM, Items 5 and 6. It is likely that Applicant's prior marriage ended around 1977.

In her March 2007 eQIP, Applicant did not list her previous marriage. Instead, in the section marked "Former Spouse(s)" she selected "Not Applicable" as her answer. She also did not list her surname from that marriage. In the section marked "Other Names Used," she selected "Not Applicable." FORM, Item 4.

³ See Directive, Enclosure 2. See also 32 C.F.R. § 154, Appendix H (2006).

⁴ See Directive, Enclosure 3, Section E3.1.7. The FORM included seven documents (Items 1 - 7) proffered in support of the Government's case.

In response to question 23.a (*Have you ever been charged with or convicted of any felony offense?*)(emphasis added), Applicant answered “no.” Section 23 requires disclosure of any such arrest even if the record of that arrest has been sealed or otherwise stricken. The only exception stated in this section of the eQIP does not apply to Applicant. *Id.*

In April 2010, Applicant was interviewed as part of her background investigation. FORM, Item 5. During the interview, she was asked about her failure to disclose her arrest in her eQIP and her failure to disclose this information “during her first interview.” She stated she thought she did not have to disclose her arrest because the conviction had been expunged. Court records provided by Applicant in response to DOHA interrogatories show only that she was released early from probation and that the guilty verdict was set aside. They do not show that the record of her felony arrest and conviction was expunged. FORM, Item 5.

Applicant did not admit or deny any of the SOR allegations. However, a plain reading of each responsive pleading shows that she denied intentionally falsifying her eQIP answer. As to SOR 1.a and 1.b, Applicant stated that she “did not feel the [eQIP] question to be applicable and responded accordingly.” She also explained that because her previous marriage ended “over 40 years ago,” she considered that marriage “irrelevant at the time” she completed the eQIP. FORM, Item 3.

As to SOR 1.c, Applicant again stated she “did not feel the question to be applicable.” She reiterated her belief, stated in her April 2010 subject interview, that she did not have to disclose her 1976 arrest because the record had been expunged and the guilty verdict set aside. Also in response to SOR 1.c, Applicant claimed that she “was advised that [she] did not need to disclose” her arrest information. She further insisted that her “responses to the questionnaires have nothing to do with [her] ability to provide good judgment, candor, honesty or willingness to comply with rules and regulations.” *Id.* Finally, as to all three allegations, Applicant averred that she fully disclosed the information about her prior marriage and her arrest during her subject interviews. *Id.*

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁵ and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the “whole-person” concept, those factors are:

- (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

⁵ Directive. 6.3.

which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information.

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest⁶ for an applicant to either receive or continue to have access to classified information. Department Counsel must produce sufficient reliable information on which DOHA based its preliminary decision to deny or revoke a security clearance for an applicant. Additionally, Department Counsel must prove controverted facts alleged in the SOR.⁷ If the Department Counsel meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the case for disqualification.⁸

Because no one is entitled to a security clearance, an applicant bears a heavy burden of persuasion to establish that it is clearly consistent with the national interest for the applicant to have access to protected information.⁹ A person who has access to such information enters into a fiduciary relationship with the government based on trust and confidence. Thus, there is a compelling need to ensure each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the nation's interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of the government.¹⁰

Analysis

Personal Conduct

Applicant did not disclose in her eQIP that she was married before her current marriage began in 1978. She also did not disclose the surname she used during her previous marriage. Finally, she did not disclose her arrest and conviction for felony attempted murder of a police officer. Applicant denied the SOR allegations of deliberate falsification of her eQIP answers. However, despite Applicant's denials, I conclude the

⁶ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁷ Directive, E3.1.14.

⁸ Directive, E3.1.15.

⁹ See *Egan*, 484 U.S. at 528, 531.

¹⁰ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

Government met its burden of producing sufficient information to establish the facts alleged in the SOR.¹¹ These facts raise security concerns about Applicant's judgment and reliability, which are expressed at AG ¶ 15 as follows:

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 other failure to cooperate with the security clearance process.

More specifically, available information requires application of the disqualifying conditions at AG ¶ 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.

Omission of information because of mistake, a misunderstanding of the question asked, or simple oversight, is not a security concern because such conduct does not demonstrate intent to mislead or deceive. Applicant's omission of her former married name or the fact of her previous marriage, standing alone, might not have disqualifying security significance. As to her omission of her 1976 felony arrest and conviction, if she reasonably believed she did not have to list that information due to expungement or advice from an attorney, then there may not be an intent to deceive or mislead the Government.

However, Applicant did not show that the charge was expunged, and she did not provide any information regarding what advice she may have received about her obligation to disclose this information in her eQIP. By contrast, her omission of all three pieces of information reasonably supports a conclusion that the Applicant was trying to conceal the criminal conduct related to her prior marriage. Further, her responses to the SOR allegation evince a deliberate decision to withhold this information based on her own assessment of what may be applicable to the Government's assessment of her personal conduct.

Finally, the summary of her April 2010 interview suggests that Applicant also withheld this information during an earlier interview. Thus, I do not accept her claim that she promptly disclosed that information during the interview process. Based on a consideration of all of the foregoing, I conclude there is no basis for application of any of the mitigating conditions at AG ¶ 17. Accordingly, Applicant has not mitigated the security concerns about her personal conduct.

Whole-Person Concept

¹¹ Directive, E3.1.14.

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guideline E. I have also reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is a 58-year-old college graduate with several years of investigative experience to her credit. She does not, however, have any known experience in adjudication of personnel security clearances. Nonetheless, she deliberately omitted relevant information in her background because she decided it was not applicable to a determination of her “ability to provide good judgment, candor, honesty or willingness to comply with rules and regulations.” FORM, Item 3. Applicant’s intentional falsifications, as well as her responses to the SOR, are fundamentally at odds with the Government’s interest in ensuring it receives candid responses to reasonable inquiries during the security clearance application and investigation process. This record leaves me with significant doubts about Applicant’s truthfulness and reliability. Because protection of the national interest is paramount in these determinations, those doubts must be resolved for the Government.

Formal Findings

Formal findings 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 E:	AGAINST APPLICANT
Subparagraphs 1.a - 1.c:	Against Applicant

Conclusion

In light of all available information, it is not clearly consistent with the national interest for Applicant to have access to classified information. Applicant’s request for a security clearance is denied.

MATTHEW E. MALONE
Administrative Judge