



**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. 11-01099

**Appearances**

For Government: Jeff Nagel, Esquire, Department Counsel  
For Applicant: Joseph Testan, Esquire

05/31/2012

**Decision**

WESLEY, Roger C., Administrative Judge:

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

**Statement of the Case**

On December 22, 2011, 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. The action was taken under Executive Order 10865, Safeguarding Classified Information within Industry (February 20, 1960), as amended, Department of defense Directive 5220.6, *Defense Industrial Personnel Security clearance review Program* (January 2, 1962), as amended (directive), and the Adjudicative Guidelines (Ags) implemented by the Department of Defense on September 1, 2006.

Applicant responded to the SOR on February 4, 2012, and requested a hearing. The case was assigned to me on December 22, 2011, and was scheduled for hearing on March 29, 2012. 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 five exhibits (GEs 1 through 5); Applicant relied on four witnesses (including himself) and five exhibits (AEs A-E). The transcript (Tr.) was received on April 6, 2012.

### **Procedural Issues**

Before the taking of evidence at the hearing, Department Counsel requested leave to withdraw from consideration the allegations covered by subparagraph 1.e of the SOR. (Tr. 45-46) There being no objections from Applicant, and for good cause shown, Department Counsel's request was granted. This amendment has no effect on the Guideline E allegations, which was not amended.

### **Summary of Pleadings**

Under Guideline J, Applicant is alleged to have been arrested and charged on multiple occasions (nine in all) between June 2004 and June 2008. for assorted alcohol - related and traffic-related offenses, including recurrent alcohol-related incidents and incidents of driving on a suspended license.

Under Guideline E, Applicant is alleged to have falsified material facts in his security clearance applications completed in February 2006 and August 2010, respectively, by omitting all but two of his arrests (i.e., his 2006 arrests), charges, and conviction history when asked to reply to questions 22 and 26 (police record) of the respective applications.

In his response to the SOR, Applicant admitted some of the allegations covering his arrests, charges, and convictions. He denied any knowledge of the exact fines or failure to appear charge in connection with the May 2005 speeding offense. He also denied falsifying his security clearance applications. He provided brief explanations in his answers.

### **Findings of Fact**

Applicant is a 31-year-old field service engineer 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 earned college credits from an accredited institution and was awarded a bachelor's degree in information technology management in February 2012. (GE 1; Tr.

20, 60) He enlisted in the Navy in August 1998 and served six years of active duty. He received an honorable discharge in June 2004. (GE 1; Tr. 51) While in the Navy, he had a security clearance and was never cited for a security violation. (Tr. 51)

Applicant married in 2012 and has two children, ages two and three. (GE 1) They are a close-knit family whose primary focus is on raising their young children and saving for their schooling. (Tr. 18-19) Applicant joined his current employer in July 2010 as a field service engineer. (GE 1; Tr. 54)

### **Appellant's arrest history**

Between June 2004 and June 2008, Applicant was cited on eight separate occasions for traffic-related and alcohol-related offenses. He admitted all of the underlying allegations. Applicant's first three cited offenses are traffic-related. In June 2004, he was cited for speeding, speeding over 100 miles per hour, unlicensed driver, and no insurance. He pleaded guilty to the no insurance charge and was fined an indeterminate amount. The court suspended imposition of sentence for three years, awarded him summary probation for three years, and dismissed the remaining charges. (GEs 3 and 5) The following year (in May 2005), he was arrested again for speeding and failure to appear on the previous offense. His unpaid fine (exact amount unproven) was referred by the court in July 2005 to collection and subsequently paid in full. In September 2005, Applicant was cited for a third traffic-related offense: for speeding and failure to appear. And in November 2005, his unpaid fine (exact amount unproven) was referred to collection. Appellant paid this fine in full.

Three of the cited offenses listed in the SOR involved alcohol-related incidents. In the first incident (in January 2006), Applicant was arrested for driving under the influence (DUI) with a blood-alcohol content (BAC) of .08 % or more. (GEs 3 through 5; Tr. 62-63) The following day he alerted his supervisor of the arrest. (Tr. 62) Upon appearing in court, he pleaded guilty of DUI and was sentenced to 180 days in jail (suspended for five years pending completion of probation), fined \$1,760, ordered to attend and complete the first conviction program and the MADD program. (GEs 3 and 5) When he failed to appear in court to provide proof of his completion of his MADD program, the court revoked his probation and issued a warrant for his arrest. He later appeared in court and secured the reinstatement of his probation. (Exs 3 and 5)

Six months later (in July 2006), Applicant was arrested and charged in an another alcohol-related incident with hit and run with injury, false report to officer, and failure to appear. The false report charge emanated from his making a police report falsely claiming his motorcycle was stolen. (GE 3) When he appeared in court in August 2008, he pleaded guilty to the hit and run charge and was fined, ordered to complete 14 days community service, and was placed on summary probation for three years. (GEs 3 through 5) Counts two and three were dismissed. (GE 3) The hit and run offense was considered an alcohol-related incident, and a warrant was later issued in November 2008, citing Applicant's failure to complete court-ordered community service. When he appeared in court in August 2010, the court reinstated his probation. (GEs 3 and 5)

In August 2007, Applicant was charged with disorderly conduct-alcohol. Arresting officers transported him to jail and impounded his motorcycle. Applicant acknowledges paying a fine of an undetermined amount. (GE 3) Whether this offense qualifies as a traffic-related offense is unclear from the developed evidence.

Applicant was involved in two additional incidents. In March 2008, he was cited for no proof of insurance, driving under a suspended or revoked license, and failure to appear. (GEs 3 and 5) The court dismissed these charges when he appeared in court in August 2008. (GEs 3 and 5) Applicant's last incident occurred in June 2008. He was arrested and charged with driving on a suspended or revoked license, no proof of insurance, and unlicensed driver. (GEs 3 and 5; Tr. 56) He pleaded no contest to being an unlicensed driver, and was fined (deferred) and given a suspended sentence for three years. He was also awarded summary probation for three years. The remaining charges were dismissed.

Applicant completed his court-ordered MADD classes in August 2010 and assures he has completed his probation conditions. (Tr. 57-58) His furnished driver's license reports a September 2010 issuance date and is consistent with his satisfying the court's probation conditions. (AE B) Since completing his probation conditions, Applicant has not been involved in any additional incidents (Tr. 57) and disposed of his motorcycle (in 2008). (Tr. 61) He rarely consumes alcohol anymore. (Tr. 58)

### **Applicant's SF-86 and e-QIP omissions**

Asked to complete a security clearance application (SF-86) in February 2006, following his reporting of a 2006 DUI arrest. Applicant answered "no" to question 26. This question inquired about his arrests, charges, and convictions. (GE 1; Tr. 63) Question 26 specifically asked him to list any arrests, charges, and convictions within the previous seven years (save for offenses that involved traffic fines of less than \$150). By answering "no," he omitted his three traffic-related offenses that occurred in 2004 and 2005. These omitted arrests resulted in imposed fines of undetermined amounts. Absent evidence of the amounts of the imposed fines, inferences cannot be reliably drawn as to the amounts or Applicant's state of mind. (GEs 4 and 5)

In August 2010, Applicant was asked to complete an e-QIP. (GE 1) In this application, he answered "no" to question 22, which similarly inquired about his police and conviction record. This question also specifically asked him to list any arrests, charges, and convictions within the previous seven years (save for offenses that involved traffic fines of less than \$150). After listing his most serious offenses (his 2006 DUI and hit and run offenses), Applicant omitted his 2004 and 2005 speeding citations, his 2007 disorderly conduct-alcohol arrest, and his 2008 driving under a suspended license charges. Applicant attributed these omissions to confusion and memory problems. These omitted arrests resulted in imposed fines of undetermined amounts. Based on the evidence presented, the proofs are too inconclusive to warrant any drawn inferences of the amounts of the imposed fines, or whether Applicant could have reasonably believed they exceeded the \$150 reporting threshold. (GEs 4 and 5) Whether or not Applicant's

2007 disorderly conduct incident can be characterized as a traffic-related incident or not is also unclear. Without more, no independent findings can be made as to whether this offense was a reportable incident.

With both security clearance applications, Applicant attributed his omissions to confusion and memory problems, and cited his listing of his most serious offenses (his January 2006 DUI arrest and conviction in both applications and his hit and run arrest in his 2010 E-QIP) as proof of his good intentions and lack of any falsification intent. (Tr. 64-66) Although he has some track record of making false theft charges to police in connection with his 2006 hit and run incident, his explanations are reconcilable with his claims of uncertainty over whether the omitted traffic offenses were excepted from reporting requirements by virtue of their resulting in imposed fines less than \$150.

Applicant was interviewed by agents from the Office of Personnel Management (OPM) in connection with both of his clearance applications. When interviewed in August 2006, he explained in considerable detail the circumstances associated with his January 2006 DUI. (GE 3) He was never asked about his 2004 and 2005 traffic-related incidents and volunteered no information. When interviewed following his 2010 clearance application, the OPM agent indicated at the outset that she was there to discuss Applicant's criminal issues. (GE 3) In this interview, the agent raised the 2008 no insurance and driving with a suspended license arrests with Applicant, which he acknowledged. However, the interview summaries contain no reported information on the amounts of the imposed fines.

### **Endorsements**

Applicant is well regarded by his supervisor of two years, his friends, and his coworkers (past and present). (AE A; Tr. 20-21) Uniformly, they characterize him as honest, reliable, and possessed of good judgment (AE A; Tr. 21, 26, 37-39) His supervisor credited him with having exemplary judgment and integrity. (AEs D and E; Tr. 26)

Applicant presents excellent performance evaluations. In his 2010-2011 evaluation, he was consistently credited with exceeding objectives in completing training courses, ship installations, and in some of his performance ratings he was assigned frequently and far exceeds expectations. (AE E) In his 2011-2012 evaluation, he was assigned equally impressive performance ratings and was assigned an overall rating of frequently exceeds expectations. (AE D) Applicant documents an equally impressive performance evaluation from his previous employer for the 2009 appraisal period. (AE C)

### **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 changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. "[S]ecurity-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). And because all security clearances must be clearly consistent with the national interest, the burden of persuasion must remain with the Applicant.

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**

By virtue of the principles and policies framed by the AGs, 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 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. *See Kungys v. United States*, 485 U.S. 759, 792-800 (1988). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record.

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 materiality showing, 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, the judge must consider and weigh the 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 evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. "[S]ecurity-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). And because all security clearances must be clearly consistent with the national interest, the burden of persuasion must remain with the Applicant.

## **Analysis**

Applicant is a dependable technician for his defense contractor who presents with a considerable history of assorted arrests and convictions (some alcohol-related but mostly traffic-related) over a five-year period. Principal security issues raised in this case

center on Applicant's arrest history and his omissions of his arrests in the SF-86 and e-QIP he completed in 2006 and 2010, respectively

### **Criminal arrest issues**

Applicant's arrests and convictions, while mostly traffic-related, involve numerous offenses of driving on a suspended driver's license. Summarized, Applicant was arrested on eight occasions between 2004 and 2008, and was found guilty on six 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." This disqualifying condition embraces traffic-related offenses that resulted in fines exceeding \$150.

Without any evidence to challenge Applicant's explanations of the underlying events and circumstances surrounding his various arrests and convictions, his demonstrated restorative progress since his last arrest in 2008 is entitled to considerable weight. In turn, the criminal conduct concerns that are based on his history of recurrent arrests between 2004 and 2008 are entitled to mitigation credit. Applicant has avoided any incidents with law enforcement since his last reported arrest of July 2008, and demonstrates added growth and maturity in his professional and personal relationships with his friends and family.

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 current employer, and strengthened family relationship with his spouse over the past four years of their marriage and courtship. Applicant has also established himself to be a responsible parent of his children.

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, rehabilitation, and maturity 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.i of the criminal conduct guideline.

### **Personal conduct concerns**

Security concerns over Applicant's judgment, reliability and trustworthiness are raised under Guideline E as the result of his omissions of some of his arrests and convictions in the SF-86 and e-QIP he completed in February 2006 and August 2010, respectively. By omitting these arrests and charges (regardless of disposition), Applicant failed to furnish potentially material 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," has some potential application to Applicant's situation. Because of the absence of evidence of the amounts of the imposed fines associated with the covered arrests, it is not clear whether the omitted arrests qualify as reportable ones.

Given the absence of any evidence of the amounts of the imposed fines associated with his reported arrests, and whether Applicant could reasonably believe the amounts exceeded the \$150 reporting threshold, Applicant's explanations of his omissions are fully reconcilable with tenets of truthfulness and consistent with his claims of uncertainty over whether the listed traffic-related arrests and convictions were reportable ones. While the arrests and convictions themselves might have resulted in fines exceeding \$150, this is by no means clear from the documentation in evidence and Applicant's explanations.

Because Applicant's answers to his completed SF-86 and E-QIP are considered truthful ones when made, there is no need to consider any good-faith corrections in his ensuing OPM interviews. Summarized, Applicant's answers to questions posed by the OPM agent who interviewed him in 2008 and 2010 were sufficiently reconcilable with his SF-86 and e-QIP answers to questions inquiring about his prior arrests and convictions to enable him to avoid any need to make prompt, good faith corrections.

In evaluating all of the circumstances surrounding Applicant's SF-86 and e-QIP omissions, his explanations, and whole-person considerations, his disclosures are sufficient 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, are each core policy concerns of the personal conduct guideline (AG ¶ 15). Overall, Applicant's explanations are persuasive enough to warrant conclusions that the falsification allegations relative to his completed 2006 SF-86 and 2010 e-QIP covering his past traffic-related arrests and convictions are mitigated.

Also covered under the personal conduct guideline are Applicant's arrests and convictions associated with his traffic-related and alcohol-related arrests. While mitigated under the criminal conduct guideline, these arrests and convictions reflect pattern rule violations covered by DC ¶ 16 (a)(3), "a pattern of dishonesty or rule violations." His actions are aged, though, and have not been repeated. Mitigation credit is available to him under MC ¶ 17 (c), " the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment." Evaluating all of the facts and circumstances developed in the record, Applicant mitigates security concerns associated with the allegations covered by subparagraph 2.a of the personal conduct guideline. Considered together, his past traffic-related arrests and convictions are mitigated under 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 1d and 1.f. through 1.i:	For Applicant
GUIDELINE E (PERSONAL CONDUCT):	FOR APPLICANT
Subparas. 2.a through 2.c:	For Applicant

### **Conclusions**

In light of all the circumstances presented by the record in this case, it is 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

