



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



In the matter of: )  
)  
) ISCR Case No. 11-06649  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Tovah Minster, Esq., Department Counsel  
For Applicant: Hiawatha Burris, Personal Representative

11/29/2013

**Decision**

O'BRIEN, Rita C., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, I conclude Applicant has not mitigated the security concerns raised under the guideline for personal conduct. Her request for a security clearance is denied.

**Statement of the Case**

On September 11, 2013, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) that detailed security concerns under Guideline E (personal conduct). This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992) as amended; and the Adjudicative Guidelines (AG) implemented by the Department of Defense on September 1, 2006.

In her September 25, 2013 Answer to the SOR, Applicant denied both allegations under Guideline E. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on October 25, 2013. At the November 13, 2013 hearing, I admitted

four Government exhibits into evidence (GE 1-4). Applicant testified and did not present documentation. DOHA received the transcript of the hearing (Tr.) on November 22, 2013.

### **Findings of Fact**

After a thorough review of the pleadings, Applicant's response to the SOR, and the evidence, I make the following additional findings of fact.

Applicant is 34 years old, single, and has an 11-year-old daughter. She received a bachelor's degree in business administration in 2002. She has worked for her current employer, a federal contractor, since 2002. Her position is financial analyst. She was granted a secret security clearance in 2002, and a top secret clearance in 2005. In 2010, she completed a security clearance application for her periodic security reinvestigation. She testified that she has received a promotion and commendation from her employer, but did not provide supporting documentation. (GE 1; Tr. 24-31, 49)

On August 6, 2000, when Applicant was 21 years old, she was arrested and charged with three counts of Destruction of Private Property, value less than \$1,000. All three charges were misdemeanors. At the hearing, Applicant testified that she and her boyfriend had an argument, and he accused her of damaging his car. He called the police and Applicant was brought to the police station, charged, and released with a court date. At the hearing, Applicant testified she was aware of the three misdemeanor charges, and that they were dismissed. The court report confirms that all three charges were dismissed on March 15, 2001. (GE 4; Tr. 24, 31-34)

On April 18, 2002, when she was 23 years old, Applicant was arrested and charged with destruction of property or monument,<sup>1</sup> value equal to or greater than \$1,000, a felony. As part of her reinvestigation, Applicant was interviewed by an agent of the Office of Personnel Management (OPM) on October 15, 2010. During her interview, she said that the 2002 incident occurred when she had an argument with her boyfriend, and demanded to be admitted to his apartment. When he refused, Applicant damaged his screen door. She was arrested and subsequently released. However, in her Answer to the SOR, Applicant stated that the charge was based on her boyfriend's claim that she had "keyed his car" after a domestic dispute. At the hearing, Applicant said she thought the 2002 charge related to an altercation with the same boyfriend that occurred in 2000. (GE 2, 3; Tr. 34-39)

At the court hearing on June 11, 2002, Applicant was represented by a public defender. In her Answer, she stated, "However, I was told by my attorney, at the time of my guilty plea that the charge was being reduced to a misdemeanor. On that basis I pleaded guilty." She stated during her security interview that her boyfriend did not

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<sup>1</sup> Applicant testified she did not know why the word "monument" was included in the charge, because the incident did not involve a monument. (Tr. 20, 62, 65)

appear at the hearing, and therefore, the charge was dismissed. The court report shows the charge was *nolle prosequi*. (GE 2, 3; Tr. 38-39)

Applicant testified that during and after her court appearance, she did not know the charge was a felony. She also testified that she did not realize the 2002 charge was a felony-level charge until she was completing a job application. She amended her testimony to say she did not remember how she learned of the felony charge. (GE 2, 3; Tr. 34-39)

In September 2010, Applicant completed a security clearance application for her periodic reinvestigation related to her top secret security clearance. Section 22, "Police Record," subsection (c) asked, "Have you EVER been charged with any felony offense?" [emphasis in original] She answered "No." At the hearing, Applicant testified that at the time she completed the application, she was not aware she had been charged with a felony. (GE 1, 2; Tr. 39-41)

Applicant completed DOHA interrogatories in July 2013. She was provided an opportunity to review the OPM agent's summary of her security interview, and correct any inaccuracies. Applicant adopted it as an accurate reflection of the interview. She made no changes, and signed a notarized statement that it was "true and correct to the best of my knowledge and belief." (GE 2; Tr. 41-47)

In response to the interrogatories, Applicant stated that when she was interviewed, she was unaware that the 2002 offense was a felony-level charge. During the interview, when asked about felony offenses, Applicant denied having been arrested on felony-level charges. She also denied ever having been arrested for any offense, regardless of the level of the charge. After the agent confronted her with the evidence of her 2002 arrest, she admitted the arrest, and stated she did not list it in her security clearance application because she was uncertain about the time frame required by the question. She also did not disclose the 2000 arrest to the agent. At the hearing, she stated she did not remember if she disclosed the 2000 arrest. She also testified she did not disclose the 2002 arrest because she did not know it was a felony. When asked why she claimed she was confused about the question's time frame, she reiterated that she thought all of the charges were misdemeanors, and all were dismissed, and that therefore she was not required to list them on her application or disclose them to the agent. She denies deliberately falsifying information on her application or at her security interview. (GE 2; Tr. 41-49)

### **Policies**

Each security clearance decision must be a fair and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the AG.<sup>2</sup> Decisions

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<sup>2</sup> Directive. 6.3.

must also reflect consideration of the factors listed in ¶ 2(a) of the Guidelines, commonly referred to as the “whole-person” concept. The presence or absence of a disqualifying or mitigating condition does not determine a conclusion for or against an applicant. However, specific applicable guidelines are followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guideline E (personal conduct).

A security clearance decision is intended only to resolve the question of whether it is clearly consistent with the national interest<sup>3</sup> for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the Government’s case. Because no one has a “right” to a security clearance, an applicant bears a heavy burden of persuasion.<sup>4</sup> A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness to protect the national interests as her or his own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government.<sup>5</sup>

## **Analysis**

### **Guideline E (Personal Conduct)**

AG ¶ 15 expresses the security concern about personal conduct:

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.

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<sup>3</sup> See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

<sup>4</sup> See *Egan*, 484 U.S. at 528, 531.

<sup>5</sup> See *Egan*; AG ¶ 2(b).

The Guideline E allegations implicate the following disqualifying condition under 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; and

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

Applicant was arrested in 2000 on three misdemeanor charges, and in 2002 on a felony charge. The Government alleges that she deliberately failed to disclose these arrests during her investigation. She answered “No” to a straightforward question on her 2010 security clearance application that asked if she had ever been charged with a felony-level offense. The word “EVER” was written in capital letters to clearly distinguish it from the questions that are limited to a specific time frame. She also failed to disclose either the 2000 or the 2002 arrest when questioned during her 2010 security interview. Applicant admitted her 2002 arrest only when confronted with the evidence garnered from her security investigation. Moreover, she did not disclose the 2000 arrest at all during the interview, despite being asked if she had ever been arrested on any level of offense. She gave varying reasons for not disclosing the facts: that she was confused about the time frame, and that the charges were dismissed so she did not have to report them. She also repeatedly contended that she did not know the 2002 arrest involved a felony-level charge. However, she stated in her Answer that when she appeared in court, her attorney informed her the charge would be reduced to a misdemeanor, and she agreed to plead guilty on that basis, that is, in order to have it reduced from the more serious felony level. Her statement shows that she was aware that she had been charged originally at the felony level. I conclude Applicant intended to conceal her police record from the Government. AG ¶¶ 16 (a) and (b) apply.

The following mitigating conditions are relevant:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

(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.

The record includes no evidence that Applicant attempted to correct the answers on her security clearance application. On the contrary, she continued to

conceal the charges and arrests during her subsequent security interview, until she was confronted with the evidence of her police record. Applicant's failure to be forthright with the government during a security clearance investigation cannot be considered minor, because it undermines the integrity of the security clearance process. I cannot conclude that such conduct will not recur, because after failing to be forthright on her application and at her interview, Applicant continued to give conflicting information at the hearing. Although Applicant's arrests are not recent, her failures to be forthright occurred in 2010, and at the 2013 hearing. Applicant's conduct casts doubt on her trustworthiness and judgment. AG ¶¶ 17(a) and (c) cannot be applied.

### **Whole-Person Analysis**

Under the whole-person concept, an administrative judge must evaluate the applicant's security eligibility by considering the totality of an applicant's conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under the cited guidelines, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant is an intelligent and educated woman who has maintained a position as a financial analyst with a federal contractor for several years. It is not credible that she would not understand a simply worded question that asked if she had ever been arrested. Her credibility is also undermined because she concealed her arrests during her security interview, until she was confronted with evidence.

The record evidence fails to satisfy the doubts raised about Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns raised by the cited adjudicative guideline.

### **Formal Findings**

Paragraph 1, Guideline E                      AGAINST APPLICANT

Subparagraphs 2.a – 2.b                      Against Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to allow Applicant access to classified information. Applicant's request for a security clearance is denied.

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RITA C. O'BRIEN  
Administrative Judge