



Applicant responded to the SOR on September 20, 2013, and requested a decision be made without a hearing. At the Government's request, the case was converted to a hearing proceeding. The case was assigned to me on January 8, 2014, and was scheduled for hearing on February 19, 2014. The hearing was convened on that date. At hearing, the Government's case consisted of five exhibits (GEs 1-5). Applicant relied on one witness (himself) and no exhibits. The transcript (Tr.) was received on February 27, 2014.

### **Procedural Issues**

Before the close of the hearing, Applicant requested the record be kept open to permit him the opportunity to supplement the record with a probation report. For good cause shown, I granted Applicant seven days to supplement the record. The Government was afforded three days to respond. Within the time permitted, Appellant supplement the record with a DD Form 214 and two certificates of achievement. I admitted the exhibits as AEs A and B.

### **Summary of Pleadings**

Under Guideline E, Applicant allegedly (a) falsified his electronic questionnaire for investigations processing (e-QIP) of November 9, 2006, by omitting his 1981 felony child molestation and sexual conduct charge; (b) falsified his e-QIP of October 5, 2011, by omitting his 1981 felony child molestation and sexual conduct charge; and falsified material facts in his October 24, 2011 interview with a DOD investigator, by denying his 1981 felony child molestation and sexual conduct charge.

In his response to the SOR, Applicant denied all of the allegations. He claimed he did not know his 1981 charges were part of his arrest and court records.

### **Findings of Fact**

Applicant is a 60-year-old interior mechanic for a defense contractor who seeks a security clearance. Additional findings follow.

#### **Background**

Applicant married his first spouse in July 1976 and divorced her in November 1986. (GE 1) He had one child and two stepchildren from this marriage. (GEs 1 and 3-5) Applicant remarried in April 1989 and has two children and one stepchild from this marriage. (GE 3)

#### **Arrest history**

Introduced to drinking in high school, Applicant consumed alcohol regularly during his Navy enlistment and thereafter until he quit drinking altogether in 1986. (GE 5; Tr. 43) In April 1981, Applicant was arrested and charged with child molestation (a

felony) and sexual conduct. Preceding his arrest, he was caught by his wife in their bedroom fondling his eight-year old stepson and performing oral sex on him. (GE 5; Tr. 47-48)

Following the April 1981 incident, Applicant turned himself in to an unidentified counselor, who, in turn, reported him to the city's local police department. (GE 5) Applicant then turned himself into the police department, who detained him for 24 hours. Police released him on his own recognizance. Later, he was charged with felony child molestation and sexual conduct. (GEs 3 and 5) To what extent alcohol was a contributing factor to the incident is unclear. (GE 5; Tr. 45-46)

When Applicant appeared in court to answer the child molestation and sexual conduct with a minor charges, he pled guilty to the sexual conduct with a minor charge (a felony) as charged. (GE 5; Tr. 29, 32, 42) The court then placed him on supervised probation and assigned a counselor. His counseling regimen included alcohol, family, and group counseling and lasted about two years. (Tr. 28, 42-43) Applicant's court-ordered probation terms included vacating the family home for 13 months and 13 months of supervised probation. (GE 5; Tr. 34)

Applicant remained concerned whether over his sexual conviction would remain a part of his court records once he completed his probation conditions. According to Applicant's account, his probation officer assured him his arrest and conviction would be expunged from his court records once he completed his counseling requirements. (Tr. 28, 57-58) Applicant could not cite to any specific reasons, though, for expungement action in his case. And without any documentation to verify his claims, his expungement claims cannot be accepted and adopted. Although he advised his parents of the incident, he did not disclose his arrest and conviction to his employer. (GE 5)

During his 13-month exclusion from the family home, Applicant remained separated from his spouse. He returned to the family home following his 13-month separation and resided there for a couple of years before separating from his wife and divorcing her in 1986. (GEs 1, 2, and 5)

### **Applicant's e-QIP omissions**

Asked to complete e-QIPs in November 2006 and October 2011, Applicant disclosed his alcohol-related offenses, but omitted his 1981 felony child molestation and sexual conduct incident. (GEs 1 and 3) Applicant attributed his omissions to his belief that the charges and conviction had been expunged and no longer appeared in his court and police records. (GE 5; Tr. 28-31, 56-58) When questioned by Department Counsel whether he read the prefatory comments to question 23, he indicated that he had not. (Tr. 59-61) Question 23 asks for arrest and conviction details regardless of whether the underlying incident, or incidents, was expunged from the pertinent public court records. (GEs 1 and 3)

Whether Applicant's omissions of his 1981 felony child molestation/sexual conduct charges and sexual conduct conviction were the result of a justifiable misunderstanding or a deliberate attempt to conceal an embarrassing incident from his employer and the Government must be determined based on a consideration of all the surrounding circumstances. Pertinent facts in assessing intent and motive include Applicant's (a) an acknowledged preference to omit the 1981 incident if he could legally justify the omissions; (b) his concealment of the incident from his employer; and (d) most importantly, his omission of the incident despite the absence of any relied-on instructions for completing the e-QIP without disclosing the 1981 incident. (GE 5; Tr. 30-31) Inferences are warranted that the omissions were carefully weighed and were knowingly and wilfully made.

Shortly after completing his October 2006 e-QIP, Applicant was interviewed by an agent of the Office of Personnel Management (OPM). (GEs 4 and 5) Believing the 1981 incident had been expunged from his court and police records, Applicant declined to disclose the 1981 incident to the interviewing agent.

When interviewed by another OPM agent in October 2011, he was again asked about any other arrests and charges not previously disclosed. (GE 5; Tr. 3-31) He answered in the negative. (GE 5; Tr. 30-31) Only when confronted with the 1981 incident did Applicant acknowledge the charges and disposition. In this interview, he did not disclose a guilty plea or conviction. (GE 5) When questioned at hearing about whether he pled guilty to the charges, he indicated that he pled guilty to the sexual misconduct charge, a felony. (Tr. 28-30)

## **Endorsements**

Applicant did not provide any endorsements from friends and co-workers who have worked with him and are familiar with his character background. Nor did he provide any performance evaluations or evidence of charitable and civic contributions to his community. Applicant did furnish his military service records. His service records consisted of a DD Form 214 and two certificates of achievement. (AEs A and 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." They must be considered before deciding whether or not a security clearance should be granted, continued, revoked, 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©.

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 AGs. AG ¶ 2(a) is 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.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

### **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 *United States, v. Gaudin*, 515 U.S. 506, 509-511 (1995).

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 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 an interior mechanic employed by a defense contractor. In two separate e-QIP applications he omitted a 1981 child molestation/sexual conduct arrest and charges, and a sexual conduct conviction. In an OPM interview that followed his 2006 e-QIP application he failed to disclose the 1981 child molestation/sexual conduct incident. Only after he was confronted in an ensuing OPM interview following his 2011 e-QIP application did he disclose the 1981 incident.

Security concerns over Applicant's judgment, reliability and trustworthiness are raised under Guideline E as the result of his (a) omissions of his 1981 child molestation/sexual conduct arrest and charges, and conviction on sexual conduct charges, in the e-QIP applications he completed in 2006 and 2011 and (b) his continued failure to disclose the 1981 incident in ensuing OPM interviews until confronted with the incident by the agent who interviewed him in 2011. By omitting his 1981 child molestation/sexual conduct arrest and charges, and sexual conduct conviction, in official security clearance applications and follow-up OPM interviews until confronted, Applicant failed to furnish potentially material background information about a serious felony offense that was needed for the Government to properly process and evaluate his security clearance eligibility.

Both 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,” and DC ¶ 16(b), “deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative,” apply to Applicant’s situation. Each of these disqualifying conditions may be considered in evaluating Applicant’s 1981 arrest, charges, and conviction.

When first asked about his arrest history in a follow-up interview with an OPM investigator tasked to investigate Applicant’s arrest history in a 2006 interview, Applicant stayed with his story and declined to disclose his 1981 child molestation/sexual conduct arrests and charges, and ultimate conviction on the sexual conduct charge. For so long as he believed the 1981 arrest/charge and related sexual conduct conviction was deleted from public records, he did not want to disclose it to DOD and OPM investigators.

Applicant’s disclosures that resulted from questions asked of him in a follow-up 2011 OPM interview (over five years after he completed his 2006 e-QIP) do not meet the prompt, good-faith requirements of MC ¶ 17(a), “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.” His prompted answers to questions posed by the OPM agent who interviewed him in October 2011 cannot be fully reconciled with the prompt, good-faith requirements of MC ¶ 17(a). And none of the other mitigating conditions covered by Guideline E apply to Applicant’s situation.

In evaluating all of the circumstances surrounding Applicant’s withholding of material information about his 1981 child molestation/sexual conduct arrest and charges, and ultimate sexual conduct conviction, in the e-QIPs he completed, the answers he provided in his ensuing OPM interview, his interrogatory responses, and his hearing testimony, his explanations and the timing of his corrections are insufficient 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). Considering all of the circumstances surrounding his omissions of his 1981 child molestation/sexual conduct incident in the 2006 and 2011 e-QIP applications he completed, and in the OPM interviews that followed until confronted, his imputed knowing and wilful omissions are neither refuted nor mitigated.

From a whole-person standpoint, the evidence is insufficient to demonstrate that Applicant has mounted responsible, good-faith efforts to provide accurate background information to the Government in the 2006 and 2011 e-QIP applications he completed. While military service is recognized and commended, it is not enough to meet security eligibility requirements. Applicant’s omissions were material and precluded him from meeting the conditions of demonstrated trust and reliability necessary to satisfy minimum security eligibility requirements under Guideline E.

In making a whole-person assessment, careful consideration was given to the respective burdens of proof established in *Egan (supra)*, the AGs, and the facts and circumstances of this case in the context of the whole person. Unfavorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a-1.c.

### **Formal Findings**

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE E:	AGAINST APPLICANT
Subparagraphs 1.a through and 1.c:	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