

KEYWORD: Personal Conduct; Criminal; Security Violations

DIGEST: Applicant did not present sufficient evidence to rebut, explain, extenuate, or mitigate the cumulative effect of his history of mishandling classified information, false statements and related personal conduct, and criminal conduct. Eligibility for a security clearance is denied.

CASENO: 03-11408.h1

DATE: 07/23/2007

DATE: July 23, 2007

In re:)	
)	
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SSN: -----)	ISCR Case No. 03-11408
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
MICHAEL H. LEONARD**

APPEARANCES

FOR GOVERNMENT

Stephanie C. Hess, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant did not present sufficient evidence to rebut, explain, extenuate, or mitigate the cumulative effect of his history of mishandling classified information, false statements and related personal conduct, and criminal conduct. Eligibility for a security clearance is denied.

STATEMENT OF THE CASE

Applicant contests the Defense Department's intent to deny or revoke his eligibility for a security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on February 7, 2007. The SOR—which is equivalent to an administrative complaint—details the factual basis for the action and alleges a security concern under Guideline E for personal conduct, Guideline J for criminal conduct, and Guideline K for handling protected information.

In addition to the Directive, this case is brought under the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines) approved by the President on December 29, 2005. The Revised Guidelines were then modified by the Defense Department, effective September 1, 2006. They supersede or replace the guidelines published in Enclosure 2 to the Directive and Appendix 8 to DoD Regulation 5200.2-R. They apply to all adjudications and other determinations where an SOR has been issued on September 1, 2006, or thereafter.² Both the Directive and the Regulation are pending formal amendment. The Revised Guidelines apply to this case because the SOR is dated February 7, 2007, which is after the effective date.

Applicant replied to the SOR on February 19, 2007, and requested a hearing. On February 27th, he filed an amended reply to the SOR. The case was assigned to another administrative judge on May 9, 2007, who caused a notice of hearing to be issued scheduling the hearing for June 20, 2007. The case was reassigned to me on June 9, 2007, due to a scheduling conflict. The hearing took place as scheduled. DOHA received the hearing transcript on June 29, 2007.

FINDINGS OF FACT

Based on his amended answer, Applicant admitted the factual allegations set forth in SOR subparagraphs 1.a, 1.b, 1.c, 1.h, and 2.a. He denied the remaining allegations. Based on the record evidence as a whole, I find the following facts:

¹ Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).

² See Memorandum from the Under Secretary of Defense for Intelligence, dated August 30, 2006, Subject: Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005).

1. *Introduction*

Applicant is a 39-year-old aeronautical engineer for an aerospace and defense company. He has worked for this company since November 1999. He holds a bachelor's degree and will soon complete a master's degree in technical management. He has never been married and he has no children. At his job, he works on a program involving military fighter aircraft. He has a favorable work history, as shown by the numerous letters of recommendation submitted by coworkers (Exhibit A). He is seeking to obtain a security clearance for his employment in the defense industry.

2. *Applicant's Mishandling of Classified Information during the 1980s–1990s*

From January 1986 to August 1995, Applicant served as a Sailor on active duty in the U.S. Navy. He achieved the rating of machinist's mate after completing nuclear field A school. When he was honorably discharged from the Navy, he was a machinist's mate first class (paygrade E-6).

In about 1989, he was serving onboard an aircraft carrier. Like others on his ship, he kept classified information in his locker/bunk area to study. This resulted in him accidentally removing a 15 to 20-page classified training handout from the ship when he made a trip to visit his parents. The handout was a hand-drawn schematic of reactor plant subsystems. He discovered the handout when he arrived at his parents' home. He did not report the matter, and intended to return the handout to the ship. He forgot the handout at his parents' home. During the drive back to the ship, he remembered the handout. He exited the interstate at the first opportunity and called his father. He told his father to burn the handout in the fireplace. He felt comfortable asking his father to do this because his father had served in the U.S. Air Force and had held a security clearance. Applicant never reported this incident to the Navy.

In about 1991 or 1992, while serving onboard the same ship, Applicant was, on short notice, put in charge of his department's technical library. He immediately started to inventory the classified materials and discovered a few manuals were missing. He did not report the missing manuals that night, and he resumed his inventory the following morning thinking the manuals would likely turn up. The inventory was completed the next day and materials were still missing. He reported the matter to his supervisor. An investigation was conducted. It resulted in the department's security officer and his supervisor being reprimanded. He received a non-punitive letter of reprimand for his role in the incident. Because the letter was not punitive, it did not become a part of his permanent military record. The letter was not made part of the record evidence, and the factual basis for reprimand is unclear.

In about 1992, while serving as the custodian of his department's technical library onboard the aircraft carrier, he removed a classified schematic diagram of the nuclear power plant. He was revising a technical manual and replaced the old schematic with the revised schematic. Instead of destroying the old schematic, he kept it as a souvenir, hiding it under his bunk on the ship. When he was reassigned in June 1992, he took the schematic with him. He kept the schematic for 18 months to 2 years until he decided he should not keep it any longer. He destroyed it by cutting it up, placing it in a bag, and putting it in the trash. Applicant never reported this incident to the Navy.

3. *Applicant's 1999 Extortion Charge*

Toward the end of his military service, Applicant enrolled at a nearby state military college. He earned an associate's degree in August 1995, the same month he was discharged from the Navy. He then enrolled at a prestigious state university to pursue his bachelor's degree, which he completed in May 1999. During this time, Applicant became involved with a woman and that relationship eventually resulted in the extortion charge.

Applicant met the woman in 1997 when she began cutting his hair. They dated for a period, but then resumed a platonic friendship. The relationship ended in about January 1999 when Applicant decided to terminate their friendship and informed the woman of his decision. In February 1999, Applicant was arrested on the extortion charge. The basis for the extortion charge was that the woman alleged that Applicant had demanded money from her or he would tell her boyfriend they had dated. Applicant was held in jail for a few hours until he posted bond. The case was set for trial until the prosecution elected to dismiss the charges. Applicant appeared in court on or about June 14, 1999, and the court dismissed the charge. Applicant maintains the woman fabricated the charge.

4. Applicant's 1999 Security-Clearance Application

Shortly after starting work with his current employer in 1999, Applicant was selected by his company to fill a contract position with another governmental agency (AGA). This position required a top-secret security clearance along with access to sensitive compartmented information (SCI). To obtain the clearance and SCI access, Applicant submitted a security-clearance application on December 1, 1999 (Exhibit 2). In signing the application, Applicant certified that his statements were true, complete, and correct to the best of his knowledge and belief and were made in good faith. Also, he acknowledged that a knowing and willful false statement could be punished under federal law.

Other than a number of foreign contacts, foreign travel, and the dismissed extortion charge, Applicant did not report anything of security significance. In particular, in response to Question 27 about illegal drug use, Applicant replied "No," meaning that he had not illegally used any controlled substance in the last seven years. His answer to Question 27 was false because he was then using the drug Ecstasy. He had used Ecstasy, in a social or party atmosphere, from July 1999 through November 1999. He continued using Ecstasy until about November 2000. He used it about twice a month during the six-month period of December 1999–May 2000. Other than this period, he used it infrequently. He stopped using it due to feeling guilty about violating his employer's no-drug use policy.

Based on the 1999 security-clearance application, a background investigation was conducted. In about May 2000, Applicant was required to take a polygraph examination.³ He told the examiner about the non-punitive letter of reprimand. During the interview, he was asked if he had withheld information about mishandling classified information. Although he then did not remember the 1989 incident set forth in SOR subparagraph 1.a, he did remember the 1992 incident set forth in SOR subparagraph 1.c. He did not disclose it in response to the examiner's question.

Applicant took a second polygraph examination about one month later in June 2000. During the examination, the examiner accused Applicant of trying to manipulate the polygraph by

³ In deciding this case, I have not considered the results of any polygraph examinations.

controlling his breathing (known as countermeasures). Applicant was not controlling his breathing, but was flexing his sphincter muscle in an attempt to manipulate the polygraph. He learned about this method by conducting research about the polygraph. He was doing this because he was lying about his mishandling of classified information. He denied using any countermeasures and the examination ended with an argument between Applicant and the examiner.

Two to three months later in about September 2000, Applicant was scheduled for his third polygraph examination. Applicant denies deliberately failing to disclose information about handling classified information during this interview. He may have told the examiner about mishandling classified information, but does not explicitly recall having done so.

In about January or February 2001, Applicant met for an interview with another investigator. In this interview, he admitted that he had been lying about mishandling classified information. He detailed his mishandling of classified information as described above. He also admitted to using countermeasures (flexing his sphincter) during the polygraph examination. Based on these matters, the AGA denied Applicant a security clearance in about August 2001.

5. *Applicant's 2001 Security-Clearance Application*

A few months later in October 2001, Applicant completed a second security-clearance application (Exhibit 1). In signing the application, Applicant certified that his statements were true, complete, and correct to the best of his knowledge and belief and were made in good faith. Also, he acknowledged that a knowing and willful false statement could be punished under federal law.

In response to Question 21 about his police record, Applicant reported the extortion charge. In response to 27 about illegal drugs, Applicant reported using Ecstasy from about July 1999 to November 2000. He estimated his usage at 13 to 14 times. In response to Question 32 about his investigative record, he reported being denied a security clearance by AGA in August 2001.

Another background investigation was conducted based on the 2001 security-clearance application. In a sworn statement, dated October 2002, Applicant described, among other things, the circumstances surrounding the extortion charge and his use of Ecstasy (Exhibit 4). In a second sworn statement, dated March 2003, he provided information about his family and friends who are foreign nationals (Exhibit 5). In a third sworn statement, dated August 2004, he provided information about the denial of a security clearance in 2001 (Exhibit 6).

In a fourth sworn statement, dated December 2006, he gave a detailed, nine-page accounting of: (1) his association with relatives and friends who are foreign nationals; (2) his foreign travel; (3) his military service; (4) his arrest for extortion; (5) his illegal drug involvement; and (6) the denial of a security clearance by AGA (Exhibit 7).⁴ He admitted mishandling classified information and telling numerous lies trying to conceal it (Exhibit 7 at 8). He lied because he was fearful what would happen to him if he admitted mishandling classified information. He pledged that he would never intentionally mishandle classified information in the future and would be truthful about all security matters. In this regard, Applicant described his now positive attitude toward security matters for his present employment duties (R. 95–103).

⁴ I have relied heavily on Exhibit 7 in making my findings of fact.

POLICIES

The Revised Guidelines set forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept. A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.⁵ Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

BURDEN OF PROOF

The only 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.⁶ There is no presumption in favor of granting or continuing access to classified information.⁷ The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.⁸ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.⁹ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁰

No one has a right to a security clearance.¹¹ As noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."¹² Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

⁵ Executive Order 10865, § 7.

⁶ ISCR Case No. 96-0277 (App. Bd. Jul. 11, 1997).

⁷ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

⁸ Directive, Enclosure 3, ¶ E3.1.14.

⁹ Directive, Enclosure 3, ¶ E3.1.15.

¹⁰ Directive, Enclosure 3, ¶ E3.1.15.

¹¹ *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) ("It is likewise plain that there is no 'right' to a security clearance, so that full-scale due process standards do not apply to cases such as Duane's.").

¹² *Egan*, 484 U.S. at 531.

CONCLUSIONS

1. The Personal Conduct Security Concern

The concern under Guideline E is conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, which may 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.

The three incidents of mishandling classified information set forth in SOR subparagraphs 1.a, 1.b, and 1.c under Guideline E are properly addressed under Guideline K, where they are also alleged. This is consistent with the change in the Revised Guidelines that eliminated the catch-all disqualifying condition of any "reliable, unfavorable information" from Guideline E. The current version of Guideline E has more limited language, and includes conditions that relate to false statements, or credible adverse information that is not sufficient to support action under another guideline. Here, the matters in subparagraphs 1.a, 1.b, and 1.c do not fall within any disqualifying condition under the current version of Guideline E. On this basis, I find for Applicant on these subparagraphs under Guideline E; however, they will be addressed under Guideline K.

The same logic applies to the denial of the security clearance by the AGA in 2001 as set forth in subparagraph 1.h. In my view, this matter does not fall within a disqualifying condition under Guideline E. On this basis, I find for Applicant on this subparagraph. But the denial is a relevant and material fact that I have considered in deciding this case.

Turning to the falsification allegations, the government has established its case under this guideline. He lied on his 1999 security-clearance application when he deliberately omitted, concealed, or falsified relevant facts by denying any involvement with illegal drugs. He continued lying in May and June 2000 by deliberately providing false or misleading statements about his history of mishandling classified information in the Navy. Aggravating his false statements are his efforts to manipulate the polygraph examination in June 2000. I am not persuaded, however, that the evidence is sufficient to establish a falsification during the September 2000 interview as set forth in subparagraph 1.g.

Although he eventually cooperated and provided a full accounting of his conduct, it was only after significant time and resources were expended. Given the false statements made when he completed the 1999 security-clearance application and during interviews in May and June 2000, both DC 1¹³ and DC 2¹⁴ apply.

¹³Deliberate 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.

¹⁴Deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

I reviewed the mitigating conditions under the guideline and conclude none apply. Making deliberately false and misleading statements to the government during the security-clearance process is serious misconduct. It is not easily explained away, extenuated, or mitigated.

2. *The Handling Protected Information Concern*

The concern under Guideline K is that deliberate or negligent failure to comply with rules and regulations for protecting classified or other sensitive information raises doubt about an individual's trustworthiness, judgment, reliability, or willingness and ability to safeguard such information. As such, it is a bona fide security concern.

The government has established its case under this guideline. Applicant was involved in two incidents that raise concerns about his willingness and ability to properly handle and safeguard classified information.

The incident in 1989 is of moderate concern because Applicant should have reported the incident as soon as he discovered that he had inadvertently taken the classified training handout to his parents' home. He complicated the situation by forgetting it and then telling his father to destroy it without reporting the incident to the Navy.

The incident in 1991–1992 is of no concern. He was reprimanded for his role as the newly appointed custodian of the department's technical library. But the letter was not punitive, which indicates that he was not the root cause of the library's security problems. And because the basis for the reprimand is unclear, this incident does not rise to the level of a security concern under the guideline.

The incident in 1992 presents the most serious concern. It was an intentional and knowing violation when Applicant removed and kept the classified schematic. Taken together, the two incidents of concern paint a picture of Applicant as an individual who had a lax attitude toward handling classified information. Given these circumstances, DC 2¹⁵ and DC 7¹⁶ apply.

I reviewed the mitigating conditions under the guideline and conclude Applicant receives some credit. Each MC is summarized and discussed below.

The first MC—so much time has elapsed since the behavior, or it has happened so infrequently or under such unusual circumstances, that it is unlikely to recur and no longer casts doubt on the individual—applies in a limited fashion. The two incidents of concern took place when he was in the Navy. This was many years ago when he was a relatively young Sailor, and that is no longer the case. The credit in mitigation is limited, however, due to Applicant's efforts to conceal his history of mishandling classified information.

The second MC—the individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward security—does not apply. Although he now

¹⁵ Collecting or storing classified or other protected information at home or in any other unauthorized location.

¹⁶ Any failure to comply with rules for the protection of classified or other sensitive information.

professes a positive attitude toward security, there is no evidence showing Applicant had counseling or remedial security training.

The third MC—the security violations were due to improper or inadequate training—does not apply. There is no evidence to support the conclusion that improper supervision or training contributed to Applicant’s two incidents of mishandling classified information. The fault was Applicant’s on those two occasions.

3. *The Criminal Conduct Security Concern*

The concern under Guideline J is that 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.

Starting with the 1999 extortion charge, the government has not established its case. Besides Applicant’s testimony, the only evidence supporting this matter is the FBI Identification Record (Exhibit 3), which merely shows Applicant was arrested in February 1999 for extortion. Applicant claims the charge was made up by a former girlfriend. The charge was dismissed or dropped a few days before trial. Based on these facts, the evidence is insufficient to prove criminal conduct of any security significance.

In addition to the extortion charge, the criminal conduct at issue here is making a false statement within the jurisdiction of a federal agency in violation of 18 U.S.C. § 1001 based on the four falsification allegations (SOR subparagraphs 1.d, 1.e, 1.f, and 1.g). Because I concluded that three of the falsification allegations were substantiated, the criminal conduct concern under Guideline J is decided against Applicant as well. None of the mitigating conditions apply. Given the gravity of his misconduct, his evidence in reform and rehabilitation is insufficient to mitigate his criminal conduct of making false statements to the federal government.

4. *Conclusion*

I have also considered this case in light of the whole-person concept and conclude the disqualifying evidence outweighs the mitigating evidence. In particular, I considered Applicant’s highly favorable letters of recommendation (Exhibit A). But I gave the letters less weight because none of the individuals who wrote the letters were familiar with the nature of the allegations in this case (R. 83).

In his closing argument, Applicant conceded that he has made mistakes in the past. He argues that he has reformed during the last several years and this period should be enough to mitigate his case (R. 118–119). Although many years have passed since he mishandled classified information in the Navy, and several years have passed since he lied on his security-clearance application in 1999 and during interviews in 2000, the passage of time is not sufficient to mitigate the security concerns. The record evidence shows Applicant was untruthful and dishonest during the security-clearance process. His multiple false statements and attempt to manipulate the investigative process is serious misconduct. The seriousness of his misconduct continues to create a substantial doubt about his reliability, trustworthiness, and good judgment. Stated somewhat differently, the gravity of his misconduct outweighs the favorable evidence.

Viewing the record evidence as a whole, I conclude Applicant did not present sufficient evidence to rebut, explain, extenuate, or mitigate the cumulative effect of his history of mishandling classified information, false statements and related personal conduct, and criminal conduct. And Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision.

FORMAL FINDINGS

_____ Here are my conclusions for each allegation in the SOR:

_____ SOR ¶ 1–Guideline E:	Against Applicant
Subparagraphs a, b, c:	For Applicant
Subparagraphs d, e, f:	Against Applicant
Subparagraphs g, h:	For Applicant
SOR ¶ 2–Guideline J:	Against Applicant
Subparagraph a:	For Applicant
Subparagraph b:	Against Applicant
SOR ¶ 3–Guideline K:	Against Applicant
Subparagraph a:	Against Applicant (on ¶¶ 1.a and 1.c)

DECISION

_____ In light of all the circumstances, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Eligibility for a security clearance is denied.

Michael H. Leonard
Administrative Judge