

KEYWORD: Personal Conduct

DIGEST: Applicant is 50 years old and has been employed as a program manager with a federal contractor since 1984. He has held a security clearance for more than ten years. When he filled out his security clearance application in 2002 to update his record, he did not disclose two 2001 criminal charges. He failed to mitigate the security concerns raised by his personal conduct. Clearance is denied.

CASENO: 04-12680.h2

DATE: 09/27/2007

DATE: September 27, 2007

In re:)	
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SSN: -----)	ISCR Case No. 04-12680
)	
Applicant for Security Clearance)	
)	

**REMAND DECISION OF ADMINISTRATIVE JUDGE
SHARI DAM**

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel
Kathryn D. MacKinnon, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 50 years old and has been employed as a program manager with a federal contractor since 1984. He has held a security clearance for more than ten years. When he filled out his security clearance application in 2002 to update his record, he did not disclose two 2001 criminal charges. He failed to mitigate the security concerns raised by his personal conduct. Clearance is denied.

REMAND STATEMENT OF THE CASE

On May 8, 2002, Applicant completed a security clearance application (SCA). On August 3, 2005, the Defense Office of Hearings and Appeals (DOHA) under Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons under Guidelines E (Personal Conduct) and J (Criminal Conduct) why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant a security clearance to Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted.

On August 24, 2005, Applicant filed his Answer and elected to have the case decided on the written record in lieu of a hearing. On July 28, 2006, Department Counsel prepared a File of Relevant Material (FORM) and provided Applicant with a complete copy on July 11, 2006. Applicant had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. Applicant submitted additional information on August 9, 2006, without objection from Department Counsel. The case was assigned to me on August 16, 2006, and I subsequently marked Applicant's submission as .Applicant Exhibit (AX) A (8 pages).

On August 31, 2006, I granted Applicant's security clearance. Department Counsel appealed. On May 21, 2007, the Appeal Board remanded the case and directed me to issue a new decision:

In which [my] findings take into account all the record evidence on the question of Applicant's knowledge and intent in his response to Questions 24 and 26. The decision should address those matters identified in this opinion as bearing on the issues, as well as any others fairly raised by the evidence.

In particular, the Appeal Board took issue with my credibility determination that was made without a hearing on the personal conduct allegation. The Appeal Board stated, "It is significant that, this case having been decided on the written record, the [Administrative] Judge did not have an opportunity to evaluate Applicant's demeanor while testifying." ISCR Case No. 04-12680 at 3 (App. Bd. May 21, 2007). The Appeal Board went on to comment about the inherent problem with making a credibility determination without a hearing. *Id.* It further stated in a footnote on page 2 that, "The Judge's favorable decision under Guideline J is not at issue in this appeal."

Based on the credibility concerns raised by the Appeal Board and in the interest of facilitating the search for the truth, on June 21, 2007, I issued an Order For Hearing in which I requested the

parties to submit their views as to whether Applicant should be provided a hearing. On June 29, 2007, Department Counsel timely filed a Government Response to the Administrative Judge's Proposal to Reopen Hearing. In the pleading, Department Counsel opposed the reopening of the record and challenged an administrative judge's authority to order a hearing. On July 18, 2007, Applicant filed his request for a hearing.

In an effort to more thoroughly address the Appeal Board's concerns, on August 15, 2007, I entered an Order Setting Hearing for August 30, 2007, limiting the scope of the hearing to Applicant's state of mind when he completed the security clearance application and addressed the falsification issue in subsequent documents. Two days later, Department Counsel filed an Emergency Request for Clarification of Remand Order, requesting the Appeal Board to intervene and prohibit me from proceeding with the hearing. On August 21, 2007, the Chairman of the Appeal Board issued a Memorandum for Chief Department Counsel and Applicant, noting that the Appeal Board "had no authority to consider appeals which are interlocutory in nature." The Chairman declined to grant the Department Counsel's requested relief. On August 27, 2007, Department Counsel sent me a letter, seeking clarification as to the procedures for the scheduled hearing. On that same day, I responded to Department Counsel's inquiry and copied Applicant.

On August 30, 2007, I held the scheduled hearing via a video-teleconference. Applicant was present at a government facility in Boston, MA. Department Counsel and I were present at DOHA's offices in Arlington, VA. At the commencement of the hearing, I marked as Hearing Exhibits (HX) 1 through 4, documents that are contained in the file.¹ DOHA received the hearing transcript on September 12, 2007.

REMAND FINDINGS OF FACT

Based on the entire record, including Applicant's testimony at the hearing, I make the following findings of fact:

Applicant is 50 years old. He has worked for a federal contractor since January 1984 and became a program manager in 2000-2001. In that capacity he is responsible for obtaining contracts and running jobs for clients. (Tr. 25-27). He earned a Bachelor of Science in Business Management in 1992. (Tr. 21). He has held a security clearance for at least 10 years without interruption. (HX 4). Although he does not work with classified information regularly, he is familiar with handling classified documents. (Tr. 28). He submitted his security clearance application (SCA) on May 8, 2002, for purposes of a periodic reinvestigation.

In June 2001, Applicant and his daughter attended a concert where he consumed three or four beers over a four-hour period. He departed the concert, and was arrested and taken to the police station after he failed a field sobriety test.. He was subsequently charged with (Count 1) Operating Under the Influence of Liquor (DUI), and (Count 2) Operating Negligently. After a jury trial, he was acquitted of Count I and found guilty of Count 2. He was ordered to pay a \$325 fine. (HX 3 at 2-3). His driver's license was suspended for six months because he refused to take a Breathalyzer test. (Tr.

¹All pleadings and correspondence issued subsequent to the Remand Order are part of the record.

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One month later Applicant was again arrested and taken to the police station where his car was impounded. He was then transported to court and charged with Operating With a Suspended License. He paid the court costs and the matter was dismissed.² At the time of the arrest, he was driving his son's car to a repair shop when he was stopped because the car did not display a valid registration sticker. Applicant admitted he should not have been driving on a suspended license. (HX 3 at 3).

During this 2001 time frame, Applicant was going through a difficult period, as he recently was divorced and had his children living with him. He normally does not drink during the week, but may have a couple beers or a glass of wine on the weekend. Alcohol has not caused him any personal or work-related problems. He has not been intoxicated "in about 25 years." (HX 3 at 4). He told one of his co-workers about the June incident, but did not report it to his employer because he did not know he was required to do so. (*Id.* at 3)

In May 2002, Applicant completed a SCA to update his record. In executing that form he certified that his answers were "true, complete, and correct" to the best of his knowledge and belief. In response to Question 24. Your Police Record - Alcohol/Drug Offenses: *Have you ever been charged with or convicted of any offenses(s) related to alcohol or drugs? For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607,* Applicant answered "No," and did not disclose the June 2001 alcohol related DUI or the Operating Negligently charge. He did not think he was required to disclose the DUI because he interpreted the word "charged with" to mean found guilty. (Tr. 13). He "wasn't found guilty on an alcohol or drug-related offense, so [he] put no."(*Id.*). He did not disclose the conviction for Operating Negligently because he did not "feel that that (sic) was related to drugs or alcohol." (*Id.*).

In response to Question 26. Your Police Record - Other Offenses: *In the last 7 years have you been arrested for, charged with, or convicted of any offense (s) not listed in modules 23, 22, 23, 24 or 25? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related) For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607,* Applicant answered "No," and did not list the July 2001 arrest and charge for driving on a suspended license. Again, he interpreted the question to require disclosure only if he had been found guilty. Because the case was dismissed the day he went to court, he felt he did not need to disclose it. (Tr. 14).

In April 2004, Applicant was interviewed about his answers to the above two questions. After re-reading both questions twice during his interview with a government investigator, he realized he should have disclosed the information. (HX 3 at 2). In his August 2006 written response to the FORM, he denied that he intentionally withheld information from the Government. (HX 4).

²The amount of the fine is not included in this record.

He argued that both “questions do not, in fact, reference the words ‘arrested’ or ‘court appearances’ but rather they refer to the terms ‘convicted’ and ‘charged.’ I believe these terms leave a lot of room for misinterpretation.” (*Id.* at 1). At the hearing, he again asserted that he misunderstood the two questions. (Tr. 29) When pointed out to him during his testimony that Question 26 does mention the word “arrested,” he admitted he made a mistake in his written response because he did not have the SCA or SOR in front of him while drafting the letter. (Tr. 20). He did not have any difficulty understanding any other question on the SCA. (Tr. 29).

At the time he completed the SCA, Applicant was aware of the criminal charges in his background. In response to a question about the Government’s right to know of those incidents, he testified, “I think they should know about it if I was found guilty, that’s why I didn’t—that’s why I answered no originally. I would have thought the Government should know if I was found guilty.” (Tr. 32).

Applicant was uncertain whether he would have been embarrassed to disclose the criminal charges on the SCA. Although he does not think holding a security clearance is important for his job, he believes it would be inconvenient not to have one. (Tr. 30).

Two of Applicant’s colleagues attest to his overall responsible character and trustworthiness, including the colleague to whom he reported the June 2001 incident. His March 2006 work evaluation documents his above average job performance in multiple categories. (AX A at 3-8)

POLICIES

Enclosure 2 of the Directive, *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, sets forth criteria which must be evaluated when determining security clearance eligibility. Within those adjudicative guidelines are factors to consider in denying or revoking an individual’s request for access to classified information (Disqualifying Conditions), and factors to consider in granting an individual’s request for access to classified information (Mitigating Conditions). By recognizing that individual circumstances of each case are different, the guidelines provide substantive standards to assist an administrative judge in weighing the evidence in order to reach a fair, impartial and common sense decision.

The adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at a balanced decision. Enclosure 2 of the Directive describes the essence of scrutinizing all appropriate variables in a case as the “whole person concept.” In evaluating the disqualifying and mitigating conduct, an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual’s age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other 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.

Granting an applicant’s clearance for access to classified information is based on a high degree of trust and confidence in the individual. Accordingly, decisions under the Directive must

include consideration of not only the *actual* risk of disclosure of classified information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information. Directive, Enclosure 2, ¶ E2.2.2. The decision to deny an individual a security clearance is not necessarily a judgment about an applicant's loyalty. Executive Order 10865, § 7. Instead, it is a determination that an applicant has not met the strict guidelines established by the Department of Defense for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988). The Directive presumes a rational connection between past proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the corresponding burden of rebuttal shifts to the applicant to present evidence in refutation, extenuation, or mitigation sufficient to overcome the position of the government. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); Directive, Enclosure 3, ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his clearance." *Id.*

REMAND CONCLUSIONS

After reconsideration of all evidence and taking Applicant's testimony, I conclude the following with respect to the allegations set forth in Paragraph 1 of the SOR:

Guideline E: Personal Conduct

Guideline E articulates the Government's concern regarding personal conduct. "A security concern may exist when conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information." E2.A5.1.1.

The Government alleged that Applicant falsified his SCA by failing to disclose an alcohol related offense and a subsequent driving offense, which constituted a disqualification under Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.2: "The deliberate omission, concealment, or falsification of relevant and material 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." Although Applicant admitted he failed to disclose the information, he denied any intention to falsify his application throughout this proceeding.

When a falsification allegation is controverted or denied, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as

a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time the omission occurred. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004).

After listening and observing Applicant testify, his explanation that he did not intentionally withhold information from the Government, but instead misunderstood the two questions, is not credible. He is an articulate intelligent individual, whom I believe did not misinterpret the words "charged with" in Questions 24 and 26 by construing them to be limited to a finding of guilt. His August 3, 2006 response to the FORM inaccurately claimed that both questions do not reference the word "arrest" which is another reason he misunderstood the questions. During his examination, he admitted that Question 26 contained the words "arrested for" and that he made another mistake in his response because he did not have the SCA or SOR in front of him while drafting his answers. However, the hearing record reveals that the real reason he did not disclose the two incidents, occurring the previous year, was based on his belief that the Government did not have a right to know of the conduct unless he was found guilty. Because he was acquitted on the DUI and the later driving charge was dismissed, he did not feel compelled to disclose the information. The Government established a disqualification under PC DC E2.A5.1.2.2.

After the Government raised a disqualification, the burden shifted to Applicant to mitigate or rebut the allegations. Three Personal Conduct Mitigating Conditions (PC MC) under this Guideline are potentially applicable: (1) E2.A5.1.3.1. "The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability;" (2) E2.A5.1.3.2. "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily; and (3) E2.A5.1.3.3. "The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts."

Applicant failed to disclose information pertaining to past alcohol and criminal behavior that is quite pertinent to a determination of judgment, trustworthiness, or reliability in the security clearance process. Hence, E2.A5.1.3.1. is not applicable. Although the falsification was limited to two questions on Applicant's 2002 SCA, he did not provide the correct information voluntarily, nor did he correct the falsification before being interviewed by the Government in 2004. Consequently, the two remaining PC MCs are not applicable.

After weighing the disqualifying and mitigating factors, and evaluating the evidence in the context of the whole person, including Applicant's years of holding a security clearance without any allegations of impropriety and his colleagues' support, I find that Applicant failed to mitigate the personal conduct security concerns. Accordingly, Guideline E is decided against Applicant.

REMAND FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph 1 Guideline E (Personal Conduct)

AGAINST APPLICANT

Subparagraph 1.a:
Subparagraph 1.b:

Against Applicant
Against Applicant

REMAND DECISION

In light of all of the circumstances presented by the record in this case, it is clearly not consistent with the national interest to grant or continue Applicant's security clearance. Clearance is denied.

Shari Dam
Administrative Judge