

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant is 45 years old. He served in the U.S. Navy for twenty-one years. While in the service, he received Non-Judicial Punishments on three occasions and was convicted at a General Court-Martial for charges that were subsequently dismissed. He was arrested and charged with criminal conduct three other times. When he completed security clearance applications in November 2002 and May 2005, he did not disclose all of the criminal charges, a bankruptcy, and an employment termination. He failed to mitigate security concerns raised by his personal and criminal conduct. Clearance is denied.

CASENO: 05-03381.h1

DATE: 08/03/2007

DATE: August 3, 2007

In re:)	
)	
)	
-----)	ISCR Case No. 05-03381
SSN: -----)	
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
SHARI DAM**

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 45 years old. He served in the U.S. Navy for twenty-one years. While in the service, he received Non-Judicial Punishments on three occasions and was convicted at a General Court-Martial for charges that were subsequently dismissed. He was arrested and charged with criminal conduct three other times. When he completed security clearance applications in November 2002 and May 2005, he did not disclose all of the criminal charges, a bankruptcy, and an employment termination. He failed to mitigate security concerns raised by his personal and criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan. 2, 1992), as amended, DOHA issued a Statement of Reasons (SOR) on April 3, 2007, detailing the basis for its decision—security concerns raised under Guidelines J (Criminal Conduct) and E (Personal Conduct) of the Adjudicative Guidelines, issued on December 29, 2005, and implemented by the Department of Defense effective September 1, 2006. Applicant answered the SOR in writing on April 16, 2007, and elected to have a hearing before an administrative judge. The case was assigned to me on May 14, 2007. DOHA issued a Notice of Hearing on June 1, 2007, setting the case for hearing on June 27, 2007.

At the hearing, Department Counsel introduced Government Exhibits (GX) 1 through 11 into evidence without objections. Applicant testified in his case. DOHA received the hearing transcript (Tr.) on July 20, 2007.

FINDINGS OF FACT

Based on the entire record, including Applicant's admissions in his Answer to the SOR and at the hearing, I make the following additional findings of fact:

Applicant is 45-years-old and divorced. He married his first wife in June 1990 and divorced in June 1992. He married his second wife in March 1993 and divorced in August 2003. They have two children. He married his third wife in September 2004 and divorced in November 2005. (GX1 at 3). At the age of 19, he enlisted in the U.S. Navy in November 1980. When he left in March 2001, he was a Petty Officer First Class with a rank of E-5. (GX 1 at 4). He worked as a welder on naval vessels. (Tr. 21-22). He held an interim confidential security clearance while in the Navy. (Tr. 54).

After leaving the Navy, Applicant continued working as a welder for federal contractors. He started his current position as a quality assurance inspector in May 2006. (Tr. 26). He submitted a Security Clearance Application (SF 86) in November 2002, and another one in May 2005 while employed by other contractors.

Applicant has a history of criminal charges and arrests, involving eight offenses, dating from 1983 to 2001. They are listed in the SOR as follows:

(¶1.a) In June 1983, he was convicted at a General Court-Martial for the offense of Larceny-Theft of Shipmate's money, \$1,200. In May 1984, the Court of Military Review set aside the findings and ordered a new hearing. In June 1984, a rehearing was deemed impracticable and the case was dismissed. (GX 3). He denies the underlying allegations leading to the conviction. (Tr.28).

(¶1.b) In December 1992, he was charged with (1) Failure to Obey Police Officer, and (2) Speeding on Bridges. He was found guilty on both counts, sentenced to 30 days in jail, suspended, and ordered to pay approximately \$178 in fines and costs. He admitted that he was speeding at the time of his arrest, but denied that he failed to obey the police officer. (Tr. 28-29).

(¶1.c) He admitted that in September 1994, a Non-Judicial Punishment under Article 15 of the Uniform Code of Military Justice (UCMJ) was imposed on him for stealing two memory chips from the main commissary for a value of \$398. The court fined him approximately \$100 pay per month for two months, and reduced in grade to E-5, suspended for six months. (Tr. 30).

(¶1.d) He admitted that in August 1998, he received a Commanding Officer's Non-Judicial Punishment under Article 15 of the UCMJ for offense of Unauthorized Absence (two specifications) and False Official Statements (three specifications). He was reduced in rank to E-5, suspended for six months, and Restriction for 20 days. (Tr. 30).

(¶1.e) In July 2000, he received Non-Judicial Punishment for stealing various items. He was fined one-half pay per month for two months, reduced in rank to E-5. He was to be Administratively Separated for Misconduct-Pattern of Misconduct and Commission of a Serious Offense. The investigation into the incident was later closed and he was allowed to retire under Honorable conditions. He admitted that he stole a digital camera but denied that he stole the other items listed in the SOR. He claimed he had authorization to keep certain items for his personal use, rather than dispose of them. (Tr. 33-34).

(¶1.f) In November 2000, he was arrested and charged with Assault and Battery-Family Member. He had an argument with his 16-year-old stepson that became physical. The charge was dismissed in January 2001. (Tr. 35-36).

(¶1.g) In October 2001, the state court entered an Emergency Protective Order against him based on a petition filed by his spouse. The matter was later dismissed. (Tr. 37).

(¶¶1. I and h) In December 2001, Applicant was arrested and charged with Embezzlement, a felony. In February 2002, the court found him guilty of a misdemeanor and sentenced him to 12 months in jail, with 11 months suspended, and community service in lieu of jail time. It ordered him to pay an \$82 fine. The charges arose in August 2001 after he took discarded electronic items from his employer, a department store, in violation of store disposal policy. His employer later terminated his employment. (Tr. 37-39).

In October 2002, Applicant petitioned for a Chapter 7 bankruptcy.

Applicant completed a SF-86 in November 2002. Because he does not type, he filled out a work sheet that he gave to another employee to use in completing the application on line. He intentionally did not disclose on that worksheet any information about his employment and termination with the department store as required under questions 6 and 20. He did not list the December 2001 embezzlement charge required under question 21, or the court marital proceeding

under question 25. He did not list the November 2000 and December 2001 criminal charges that should have been disclosed under question 26. He also failed to disclose the October 2002 bankruptcy under question 33.

Applicant deliberately did not submit the information because he felt uncomfortable sharing it with another employee and felt his privacy rights were being infringed. He acknowledged that he disclosed a DUI charge, a reckless driving charge and an unauthorized absence fine while in the military. He decided that those disclosures were sufficient and he did not want to reveal incidents that were more embarrassing for him. (Tr. 68). In a January 2004 interview with a government investigator, he discussed some of the undisclosed information. (Tr. 48). He did not mention the Navy disciplinary actions. (Tr. 64). However, he did not tell the investigator the reason he failed to disclose certain information in the SF-86. (Tr. 49).

In May 2005, Applicant submitted another SF-86 after another employee completed it for him on line. He used his 2002 SF-86 as a templet and again deliberately left out the same adverse information he failed to disclose previously. By this time, he “was already fed up with going over this thing over and over and over.” (Tr. 50). He asserted. “I felt like I did it one time, I talked to the investigator, and that was all I was obligated to do.” (*Id.*). He believed that his statement to the investigator was sufficient disclosure and he had no intention of disclosing the adverse information to another employee. (Tr. 52). He acknowledged that his persistent concern for privacy outweighed his responsibility to disclose adverse information to the government. (Tr. 44-46). He now realizes he made a mistake by not disclosing the information. (Tr. 53; 66). His employer is unaware of this hearing. (Tr. 69).

POLICIES

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has “the authority . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position. . . that will give that person access to such information.” *Id.* at 527. The President authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). Each security clearance decision “must be a fair and impartial common sense determination based upon consideration of all relevant and material information and the pertinent criteria and adjudication policy.” Directive ¶ 6.3. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

The revised Adjudicative Guidelines (AG) set forth potentially disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

Upon consideration of all facts in evidence and application of all appropriate adjudicative factors and pertinent legal standards, I conclude the following with respect to the allegations set forth in the SOR:

Guideline E: Personal Conduct

Guideline ¶ 15 articulates the Government's 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."

The Government alleged in SOR ¶¶ 1.j through 1.u that Applicant falsified both his November 2002 and May 2005 SF-86 by failing to disclose adverse information related to his employment activities and record, an assault and embezzlement charge, a court martial, and a bankruptcy. Based on the evidence, including his admissions, the Government established a Personal Conduct Disqualifying Condition (PC DC). Under Guideline 16(a) an individual raises a security concern when there is a "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, determines security clearance eligibility or trustworthiness, or award fiduciary responsibilities." He deliberately failed to disclose requested information on security clearance applications.

After the Government produced substantial evidence of the disqualifying condition, the burden shifted to Applicant to provide evidence of a mitigating condition. After reviewing all of the Personal Conduct Mitigating Conditions, I considered only one to be potentially applicable. Guideline ¶ 17(d) provides mitigation when "the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur." Although Applicant honestly admitted his mistakes and attributed his refusal to reveal the information to indignation or embarrassment, he has not provided evidence that he obtained counseling to more fully understand his decision to withhold information. While I understand how he may have felt his privacy was being compromised during the first application process 2002, I find it troubling that he again decided to withhold the information in 2005, despite an interview about it, and justified his conduct with a belief that he had disclosed enough information. Only more recently, has he come to appreciate the gravity of his conduct. His previous behavior leads me to believe that he has not alleviated or resolved the internal conflict that gave rise to his conduct and attitude. Hence, Guideline ¶ 17(d) cannot apply.

Guideline J: Criminal Conduct

Guideline ¶ 30 articulates the Government’s concern about criminal conduct: “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.”

Based on the evidence, including Applicant’s admissions, the Government raised a security concern under two Criminal Conduct Disqualifying Conditions: “a single serious crime or multiple lesser offenses,” and “allegations or admissions of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.” Guideline ¶¶ 31(a) and (c). Applicant was charged with criminal misconduct on eight separate occasions. He was convicted six times. He also intentionally falsified material facts on his SF-86s, constituting a felony under Title 18, United States Code, Section 1001.

There are five Criminal Conduct Mitigating Conditions under Guideline ¶ 32. I considered two of them. Guideline ¶ 32(a) provides mitigation when “so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment.” Although Applicant’s last formal criminal charge occurred in December 2001, the falsification of his SF-86 occurred in November 2002 and May 2005. Given his long history of criminal problems and encounters, sufficient time has not elapsed since the 2005 falsification to warrant the application of this condition. Guideline ¶ 32(d) requires a showing that “there is clear 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.” Applicant exhibited remorse for his conduct, but he did not provide evidence of the other factors listed under this Guideline. Thus, it has limited application.

Whole Person Analysis

In addition to evaluating the disqualifying and mitigating conditions under each guideline, 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. The essence of scrutinizing all appropriate variables in a case is referred to as the “whole person” analysis. Guideline ¶ 2.a. In evaluating the conduct of the applicant, an administrative judge should consider: (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 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.

I considered the totality of the evidence in view of the “whole person” concept, including Applicant’s middle age, his demeanor while testifying and candid testimony about the reasons underlying his decision to withhold the requested adverse information on two SF 86s. I took into

account his military service and accomplishments. However, his decision to falsify his applications is a very serious concern. In both instances, he demonstrated that his personal concerns outweighed the government's concerns, which is a fundamental reason to deny a security clearance. His criminal and personal conduct create doubt about his judgment, reliability, trustworthiness, and willingness to comply with laws, rules and regulations. Until he presents sufficient evidence of rehabilitation and other behavioral changes, including a longer period of time free from misconduct, I am concerned that similar events may recur in the future. Thus, Applicant failed to mitigate the security concerns raised by his personal and criminal conduct. Accordingly, Guidelines E and J are concluded against him.

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
Subparagraphs 1.a.–1.u.:	Against Applicant
Paragraph 2. Guideline J (Criminal Conduct)	AGAINST APPLICANT
Subparagraphs 2.a-2.b:	Against Applicant

DECISION

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

Shari Dam
Administrative Judge