

DATE: November 13, 2007

In re:)	
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)	
-----)	ISCR Case No. 06-04450
SSN: -----)	
)	
Applicant for Security Clearance)	

**DECISION OF ADMINISTRATIVE JUDGE
CLAUDE R. HEINY**

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

David P. Price, Esq.

SYNOPSIS

It was alleged Applicant was involved in security violations, falsified and misrepresented material facts on his security clearance applications and during interviews. I find there were no security violations or intentional falsifications. The record evidence is sufficient to mitigate or extenuate the negative security implications listed in the SOR. Clearance is granted.

STATEMENT OF THE CASE

On September 28, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating that DOHA could not make the preliminary

affirmative finding¹ it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR set forth reasons why a security clearance could not be granted or continued due to security violation, personal conduct, criminal conduct, and security concerns.

On October 18, 2006, Applicant answered the SOR and requested a hearing. On June 18, 2007, I was assigned the case. On July 5, 2007, a Notice of Hearing was issued for the hearing held on July 25, 2007. On August 3, 2007, DOHA received the transcript (Tr.).

FINDINGS OF FACT

Applicant is 46-years-old, self employed, and is seeking to obtain a security clearance. Applicant served in the U.S. Navy until September 2002 when he retired at the grade of E-8 after 24 years of service. (App Ex E) While in the Navy, Applicant held various security clearances. He spent 18 years as an anti-terrorism force protection officer. (Tr. 187) His specialty was as a military police investigator. While in the service he received numerous service and joint service commendation medals, achievement medals, and letters of commendation. (App Ex E)

Coworkers hold Applicant in the highest regard for his professional and personal skills as well as integrity, strong character, honesty, sincerity, and trustworthiness. Applicant is regarded as an ethical, loyal person, and a self-starter who has a strong commitment to his family, country and friends. Applicant has excellent knowledge of corporate and industrial security policies, procedures and programs. He demonstrates professional performance exhibiting traits of morality, honesty, and good character. He is an outstanding security professional and trusted colleague. (App Ex G) Applicant also received a letter of appreciation from the FBI related to his work. (App Ex C)

A coworker in a high tempo environment believes Applicant to be honest and trustworthy. (Tr. 121) Another acquaintance to provide testimony was a senior government career security counterintelligence officer and security manager, responsible for special access programs, who is familiar with the personnel security process and defense industrial security clearances, and has known Applicant since 2002. (Tr. 128-130, 140) This individual attempted to hire Applicant because he felt “so strongly about him and his talents and his ethical background.” (Tr. 133) This person stated Applicant was one of the most ethical and knowledgeable security officers he ever had the opportunity to work with. (Tr. 140-141) Applicant has an outstanding reputation among the members of the professional community (Tr. 142) and is very highly spoken of by those who have worked with him. (Tr. 142)

Applicant worked for a construction company as the facility security officer (FSO). (Tr. 143). Even though he was the FSO, he was not responsible for personnel security clearance applications, adjudications, or investigations. (Tr. 256) In 2002 or 2003, Applicant was informed by a company engineer about a telephone call from an individual believed to be Chinese. An individual left a message on a coworker’s voice mail. Applicant used a recording device to copy the message and turned it over to the FBI.

There was concern the company might have been targeted by a foreign government. At the time, Applicant’s company was participating in a bid proposal on a construction project in China.

¹Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

After the company received the contract, numerous individuals, believed to be Chinese, contacted the company wishing to partner with the company on the project. The FBI and the senior government career officer previously mentioned investigated the recording. (Tr. 155)

The recording occurred outside of secured area. (Tr. 154, 157, 259) It was later alleged Applicant brought a recording device into a secure area for purposes of recording the telephone message. The company later set up a secured space, but the recording did not take place in that space. (Tr. 154) Applicant changed his job from corporate FSO to a project FSO and turned the recorder and recording over to the corporate FSO. Applicant could not keep the recorder because he was moving to a secure area. (Tr. 155)

In October 2004, Applicant, as FSO for the general contractor, wanted to provide the subcontractors uniformity and help on construction projects. (Tr. 190) In July 2004, Applicant copied data onto nine computer disks (CDs), hand carried two of them to subcontractor facilities, and placed them into dedicated project space. (Tr. 160) The CDs were to be put into “flyaway²” packages. The CDs contained non-sensitive templates of information on how to do document control, safeguarding records, keeping employees’ clearances current, and other security matters (Tr. 157,158) When reviewed and approved by the State Department, Applicant’s actions were applauded. The CDs greatly aided consistency, operation, and execution. (Tr. 158)

The material was unclassified, but the disks were made on a classified system. “Migration” is a problem when a classified system is used to make CDs. Although unlikely, some parts of files or fragments could inadvertently “migrate” onto the CDs. (Tr. 159) The CDs were not initially marked secret, but the two were so marked when the mistake was discovered. (Gov Ex 2, 3, Tr. 160) The other seven copies were destroyed and new CDs were made on an unclassified system. (Tr. 160)

Applicant discussed the creation of the CDs with the senior government employee previously referenced. Applicant was directed to investigate the incident. In fact, he was asked to investigate himself. Gov Ex 3 bears Applicant’s signature. The company made a log entry of the incident, an entry made by Applicant. (Gov Ex 3, Tr. 62, 194) An investigator was told by company officials that the State Department would have the incident report. (Tr. 93) The State Department found Applicant’s actions were not a security violation. (Tr. 160)

The State Department referred to the incident as an “infraction.” A security infraction being an incident where the rules have not been followed as opposed to a security “violation” where compromise cannot be ruled out. Even though improperly marked, the material was hand carried and properly safeguarded. (Tr. 161) There was no compromise of information. The subject interview outline (Gov Ex 10) question 127 references the storing or safeguarding of “classified information.” The material on the CDs was unclassified information.

Applicant was interviewed four times by a special investigator for the Department of State. (Tr. 78) In May 2005, during an interview, Applicant stated he had not had any security violations. The previously described incident had been addressed and resolved by the U.S. Department of State and no further action was taken. There was no security violation. (Tr. 194)

²CDs are called “flyaways” because once made a person would fly to the subcontractor’s location and the CD would be left at the security office at that location. (Tr. 175-176)

As the FSO, Applicant would often identify deficiencies about the handling of facility security issues. (Tr. 96) Applicant was not getting cooperation needed from coworkers. Applicant was not liked by some of his former company's employees. (Tr. 96) When Applicant discovered construction problems related to security he was ostracized by his coworkers. His discoveries of security problems were not well received because the company was on a fixed price contract and every discovery cost the company money. As FSO Applicant was required to report the incidents to the government. After the third or fourth incident report, the company directed Applicant to first inform the company of any incident so they could take corrective action before the incidents were reported to the government. (Tr. 152)

Applicant became frustrated about these issues and the company's demand to screen his reports before they went to the government. (Tr. 165) Applicant was obligated to inform the government about the company's demand to screen his reports and the government talked to the company. At this time, Applicant was under significant stress and was suffering from back problems. (Tr. 165) Applicant was not sleeping well, he was very on-edge, and stressed. (Tr. 179-180) Applicant said he left his company for health reasons. His stress in performing his job was sufficient to leave the company.

After leaving the construction company, Applicant started his own business. (Tr. 218) Applicant is a member of several professional and community organizations. (Tr. 218, App Ex B, F) In April 2005, as part of his marketing plan for his new company, Applicant sent out emails about his company and his experience to members of a national industrial security professional society. (Gov Ex 5, Tr. 219) The emails were sent one month after leaving his previous job. The society's president told Applicant it was against society's rules to use the society directory to solicit work or for general advertising purposes. (App Ex B) Since being told about the rule, Applicant has not used the society directory to solicit work.

In December 2001, Applicant received a bachelor of science degree in security management from a college and university. (App Ex D) It is accredited by the Association for Online Academic Excellence, which was established to uphold and maintain high standards for all levels of online post secondary education. (App Ex D) The Applicant was unaware the school was not accredited by the Department of Education. In June 2002, Applicant completed a security clearance application, Standard Form (SF) 86 (Gov Ex 2) and in response to question 5, concerning his education, Applicant stated he completed received his bachelor of science degree. He made the same response on his April 2005 SF 86 (Gov Ex 1) and listed her schools he had attended. The forms do reference correspondence schools and extension classes, but do not ask if the schools are accredited.

While in the Navy, Applicant attended online and distant learning programs from a variety of schools. (App Ex F) In the 1980's or early 1990's, Applicant attended extension classes at the base educational building. The courses were not attended in residence, but as part of a distant learning program. Fifteen years later, in April 2005, Applicant completed his SF 86. (Gov Ex 2) Applicant did not have copies of his college transcripts when he completed his SF 86. He knew the city where the school was located, but did not have transcripts of his courses. On his SF 86, Applicant stated he obtained credits toward a BS degree from a university between 1989 and 1991 at a city university when in fact the courses were from a city college. (App Ex F, page 7) Applicant asserts he did not intentionally misrepresent the name of the school. (Tr. 201)

In August 2005, Applicant listed his academic credentials on his company's website. In September 2006, Applicant listed his academic credentials on his company's website as graduating with a bachelor science degree. He did not state the school was not an accredited institution. In September 2006, he listed his academic credentials on his company web site. He did not disclose the institution was not accredited on his web site.

The Government chose not to put forth evidence on the allegations listed in SOR 2.b, 2. c, 2.e, 2.f, 2.m, and 2.o. (Tr. 15) These allegations relate to the listing of Applicant's education on his SF 86 and elsewhere.

Shortly after his December 1997 divorce, Applicant met a woman when he was on 30 days leave in the U.S. He was stationed overseas at the time. Four or five months later, she came to visit him at his overseas location and after three weeks they married prior her returned to the U.S. A month later, Applicant received two calls from friends who had seen Applicant's wife kissing and gallivanting with another man. (Tr. 205) Applicant called his wife, confronted her about the information, stated they had prematurely entered into the marriage, and should get the marriage annulled. The marriage was annulled and Applicant later learned the grounds for the annulment was listed as fraud. Fraud is one of a very limited number of reasons annulment can be granted in his state. He denies any fraud on his part. (Tr. 206) Applicant has had no further contact with the woman. Applicant believed an annulment declared the marriage null and void, having the effect as if the marriage never occurred. (Tr. 261)

In response to question 8 on his June 2002 SF 86 and question 13 on his 2005 SF 86, Applicant listed his current spouse whom he married in 2000, and a December 1997 divorce to a former spouse whom he had married in 1984. He did not list his 1998 marriage, which was annulled in 1999. He asserts he failed to list his annulment because there was no block on his SF 86 for annulments. The form does have a check block for being divorced or widowed but not for an annulment. When Applicant was interviewed about his SF 86, he asked about former spouses and failed to disclose this 1998 marriage. (Tr. 68) When asked about the annulment, Applicant stated he thought he had put it on the form. (Tr. 69)

In 1979, Applicant—then age 17—had been detained when he was a passenger in a car coming home from a football game. Alcohol was found in the car. He was released to his parents. He was unaware the incident resulted in any charges until he received the SOR. In 1984, Applicant—then age 22 or 23—received non judicial punishment (NJP) under Article 15 Uniform Code of Military Justice (UCMJ) for use of a controlled substance, having tested positive for marijuana. He forfeited \$300 per month pay for two months. Following his NJP, he received a clearance in 1991 and at other times prior his retiring from the Navy in September 2002. Applicant failed to list the 1979 incident and his 1984 NJP on either of his SF 86s. (Gov Ex 1, 2)

When questioned during an interview about his answers on the SF 86s, Applicant explained his reasoning for his answers and how he interpreted the questions asked. (Tr. 217) Applicant answered "yes" to question 23. d on his 2005 SF 86 (Gov Ex 1) which asked if he had every been charged with or convicted on any offense related to alcohol or drugs. He listed his 1984 DUI in the space provided following question 23. f. The following question, question 23. e, asked if he had any disciplinary proceedings under the UCMJ, including non judicial punishment, during the previous seven years. Applicant stated he thought he did not have to list the 1984 Article 15 because it was outside the scope of the question, it having occurred 20 years before the SF 86s was completed.

Applicant answered “no” to question 24. a, concerning use of illegal drugs, which asks if Applicant had ever used marijuana since age 16 or in the last seven years, which he had not. His use occurred 20 years prior.

Similar questions are asked on Applicant’s 2002 SF 86. (Gov Ex 2) Question 24. asked if Applicant was “ever” charged with alcohol or drug offenses. Question 25. related to non judicial disciplinary proceedings under the UCMJ and limits the period in question to the previous seven years. Questions 27 and 29, related to illegal drug use, and question 30, related to alcohol use, limits the period in question to the previous seven years.

POLICIES

The Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, dated August 2006, sets forth Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in Section 6.3 of the Directive. The adjudicative guidelines are to be applied by administrative judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. The presence or absence of a particular condition or factor for or against clearance is not determinative of a conclusion for or against an applicant. However, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, I conclude the relevant guidelines to be applied here are Guideline K, security violation, Guideline E, personal conduct, and Guideline J, criminal conduct.

BURDEN OF PROOF

The sole 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. Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, an applicant from being eligible for access to classified information. The burden of proof in a security clearance case is something less than a preponderance of evidence, although the government is required to present substantial evidence to meet its burden of proof. Substantial evidence is more than a scintilla, but less than a preponderance of the evidence. All that is required is proof of facts and circumstances which indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. Additionally, the government must prove controverted facts alleged in the SOR. Once the government has met its burden, the burden shifts to an applicant to present evidence to refute, extenuate or mitigate the government's case. Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.³

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), “no one has a ‘right’ to a security clearance.” A person who has access to classified

³ ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15

information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access to classified information in favor of protecting national security. Security clearance determinations should err, if they must, on the side of denials.

CONCLUSIONS

The Government asserts two security violations. A foreign national called an engineer at his former company. As FSO, Applicant made a copy of the voice mail and gave it to the FBI. The recording did not take place in a project secure area. I find for Applicant as to SOR 1.a. Applicant made nine CDs containing non classified information on a classified computer. This was an infraction, but the State Department states it was not a security violation. I find for Applicant as to SOR 1.b. I find neither the recording of the voice mail and turning it over to the FBI nor the making of the CDs to be a security concern. I find for Applicant as to SOR 2.b.

Under personal conduct the concern is 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.

During a May 2005 interview, Applicant told the investigator he did not have any security violations. That was true. I find for Applicant as to SOR 1.c. Applicant listed his college and university on his two SF-86s and website. The college was not accredited, but the form does not require an applicant to vouch for his school. Additionally, Applicant was required to list his schools on his SF-86s and his failure to list them would have been improper. The government chose not to introduce evidence about his listing of this school. I find for Applicant as to SOR 2.b, 2.c, 2.e, and 2.f.

Applicant attended a distant learning course while in the Navy at an on base location. He knew the classes were from a school in a city, but did not have access to his transcript when completing his SF-86. The difference between the university attended and the university listed is important to someone with a greater knowledge of educational institutions. The difference is not so obvious to someone with a more limited post high school education. I find this was not an intentional falsification. I find for Applicant as to SOR 2.d.

Applicant met a woman while on 30 days leave from the military. A few months later, she visited him at his over seas location. Before ending her three week vacation, the two married and she returned to the U.S. Within a month of her return to the U.S., Applicant learned she was not faithful to him. He talked with her and they agreed on an annulment. The state has limited grounds for annulments. Fraud was the stated reason for the action. After the woman left the overseas location, Applicant never cohabited with her. After the annulment, Applicant never talked with her again.

When Applicant completed his SF 86, he did not list his annulment. He did list his current wife and his former wife from whom he was divorced. The SF 86 asks about deceased spouses and divorced spouses, but not about annulments. Since there was no place to list an annulment, Applicant did not list it. Applicant lived with this woman less than two months and talked with her for a few months more. Their time together as husband and wife was minimal. It lasted from late in her three week visit to Applicant's overseas location until her departure. There seems little to be gained by Applicant by failing to list this extremely short marriage. Additionally, an annulment treats the marriage as if it never occurred. I find Applicant's actions not to be an intentional falsification. I find for Applicant as to SOR 2.g, 2.h, and 2.i.

Applicant was convicted of DUI in 1984. He listed the offense under his police record when he completed his SF 86s. Twenty three years before filling out his 2002 SF 86, in 1979, Applicant was returning from a high school football game when the car was stopped. He was released to his parents. Only after the start of the process to deny his clearance did Applicant learn he had been charged with public drunkenness. An omission concerning his 1979 arrest is not deliberate if the person did not know he had been arrested.

On his 2005 SF 86 (Gov Ex 1), in response to question 23.d, Applicant indicated he had been charge with or convicted of an offense related to alcohol or drugs and listed his 1984 DUI. The following question, 25.e, asked him if he had any NJP action within the previous seven years. Applicant had received Article 15 punishment following a positive urinalysis for marijuana in 1984. Applicant was 22 or 23 years old at the time and the NJP occurred 21 years before the SF 86 was completed. This was outside the seven year period for NJP. Because it was outside the period, Applicant answered "no" to the question. Applicant should have listed his 1984 NJP action because it was drug related and therefore not limited to the prior seven years.

On his 2002 SF 86 (Gov Ex 2) the question about his alcohol and drug offenses and police record was question 24. and the question about NJP was question 25. Someone not familiar with the SF 86 could have the impression an NJP incident was only of concern if it had occurred within the previous seven years. Applicant states he did not intentionally falsify his SF 86s. Following his NJP, in 1991, and at times thereafter, while in the Navy, he received security clearances. It is not impossible to believe Applicant did not think the government was concern with an NJP action that had occurred twenty plus years earlier and before additional clearances were granted. I find for Applicant as to 2.j, 2.k, and 2.l.

While employed by the construction company, Applicant was under considerable stress and was having problems sleeping. The company wanted him to clear reports submit to the government through the company before they were forwarded to the government. Each time Applicant discovered a problem it cost the company money because of the fixed cost nature of the contract. Saying he left the company for health reasons was not a falsification. Government offered no evidence on SOR 2.m. I find for Applicant as to SOR 2.m.

After leaving the company, Applicant opened his own company and solicited business. He was a member of a professional society and used the society's email list to contact individuals and companies. The society president told Applicant the society's directory was not to be used for advertisement or for soliciting work and Applicant never repeated his mistake. There is no evidence Applicant used information from his previous company to solicit work. I find for Applicant as to SOR 2.n.

SOR 2.alleged Applicant used inappropriate language at the construction company. Government offered no evidence about inappropriate language. I find for Applicant as to SOR 2.o.

Under Guideline E, personal conduct, the government has shown Applicant's answers to some of the questions on his two SF 86s were incorrect, but this does not prove the Applicant deliberately failed to disclose information about his education, annulment, NJP, and 1979 arrest. The Applicant has denied intentional falsification. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government when applying for a security clearance is a security concern. But every inaccurate statement is not a falsification. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully. It is material if it could change the course of the investigation into Applicant's suitability for holding a clearance. For the reasons previously listed, I find Applicant did not knowingly and willfully falsify his SF 86s or falsify information provided to an investigator.

Paragraph 3 of the SOR alleges Applicant violated 18 U.S.C. § 1001 by deliberately making a materially false statement on his security clearance application. For the reasons discussed above, I find there was no deliberate falsification of his SF 86 or during interviews. I find no violation of 18 U.S.C. § 1001 and find for Applicant as to SOR 3.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; An applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; An applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

Coworkers hold Applicant in the highest regard for his professional and personal skills as well as integrity, strong character, honesty, sincerity, and trustworthiness. Weight was given to the testimony of the senior government career security counterintelligence officer and security manager not only related to Applicant's character, but as to whether security violations occurred. I find no security violations, no intentional falsifications, and no criminal conduct.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7, of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 Security Violation: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Paragraph 2 Personal Conduct: FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: For Applicant

Subparagraph 2.d: For Applicant
Subparagraph 2.e: For Applicant
Subparagraph 2.f: For Applicant
Subparagraph 2.g: For Applicant
Subparagraph 2.h: For Applicant
Subparagraph 2.i: For Applicant
Subparagraph 2.j: For Applicant
Subparagraph 2.k: For Applicant
Subparagraph 2.l: For Applicant
Subparagraph 2.m: For Applicant
Subparagraph 2.n: For Applicant
Subparagraph 2.o: For Applicant
Subparagraph 2.p: For Applicant

Paragraph 3 Criminal Conduct: FOR APPLICANT

Subparagraph 3.a: For Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Claude R. Heiny
Administrative Judge