

SYNOPSIS

_____ In October 2001, Applicant was terminated from his job for misusing the employer's credit card, and for poor performance as communicated by a customer. In November 2002, Applicant engaged in four counts of misdemeanor check deception. His subsequent denials (1) that he was terminated for misuse of his employer's credit card in October 2001, (2) that he deliberately omitted information in June 2004 from his security form and from his May 2005 interview concerning the reasons for his termination, (3) that he deliberately concealed the check deception charges from his security form in June 2004, and (4) that he still contends he did not conceal anything, establish adverse findings under the personal conduct and criminal conduct guidelines that have not been mitigated. Clearance is denied.

STATEMENT OF CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On August 31, 2006, under Executive Order 10865 and Department of Defense Directive 5200.6, DOHA issued a Statement of Reasons (SOR) detailing the reasons for its security concerns raised under the personal conduct guideline (Guideline E), and the criminal conduct guideline (Guideline J) of the Directive. Applicant furnished three answers to the SOR. One answer is dated October 1, 2006, one is undated, and one is time-stamped by DOHA on November 3, 2006. Applicant requested a decision be made on the record in lieu of a hearing.

A copy of the Government's File of Relevant Material (FORM, the Government's evidence in support of the SOR) was sent to Applicant on January 9, 2007. Applicant received the FORM on January 17, 2007. Applicant's response to the FORM was due by February 16, 2007. No response was submitted. The case was assigned to me for decision on March 22, 2007.

RULINGS ON PROCEDURE

Pursuant to E3.1.17. of the Directive, I am amending SOR 2.a. by changing the number of counts inside the parentheses from 3 counts to 4 counts. The second sentence in SOR 2.a. is deleted and replaced with, "The four offenses were dismissed upon Applicant's payment of restitution."

FINDINGS OF FACT

The SOR contains five allegations of personal conduct (Guideline E) set forth in paragraph 1. Applicant denied all allegations under paragraph 1. Paragraph 2 contains two allegations of criminal conduct (Guideline J) which he admitted. Applicant is 45 years old and has been employed as a lead technician with a defense contractor since August 2003. He was in the United States Air Force Reserve from 1983 to 1986, and has held a security clearance since 1988. Applicant is married.

According to documentation provided by Applicant's former employer in October 2001, Applicant's supervisor terminated Applicant for two primary reasons. The supervisor's termination letter (Item 9, SOR 1.a.), was based on "a number of areas of deep concern." Those areas were (1) misuse of a credit card for the second time, (2) unacceptable customer rating based on the client

specifically requesting Applicant not be allowed on-site, and (3) being absent for two days without notice. The termination letter was sent certified mail to Applicant on October 11, 2001, and was signed by Applicant on October 13, 2001 (Item 10). Item 11 (September 20, 2001) describes the rules for proper use of the employer credit card, and an example of how one should be filled out. Item 12, dated April 2, 2001 describes the situations in which the credit card was to be used. In bold print, the statement indicates the card is to be used for business only, and improper use could lead to disciplinary action “up to and including termination.” According to the statement, the company must be reimbursed if the charge is not for business. The final portion of the exhibit reflects a few non-business entries reimbursed by Applicant, and situations where no receipt was provided. Applicant provided reimbursement to the company in two checks amounting to \$118.00.

Applicant’s denial of SOR 1.a. is based on his claim the supervisor told him individually that his termination was for unsatisfactory job performance. Even though the supervisor may have discussed one of the reasons for his termination, that discussion does not change the fact that Applicant received the termination letter detailing management’s reasons for his termination. Item 9 indicates Applicant was supposed to meet with this supervisor on October 11, 2001 to discuss his job performance and future with the company. Applicant failed to appear, and the reasons for termination were sent (certified mail) to his residence. Applicant signed for the termination letter (Item 10).

On June 25, 2004, less than three years after his termination, Applicant certified a Security Clearance Application, Standard Form 86 (SCA). In response to question 20 (Your Employment Record), Applicant indicated “yes,” and chose the explanation that he “left a job by mutual agreement following allegations of unsatisfactory performance.” From Applicant’s point of view, the circumstances surrounding his termination were not based on mutual agreement as Applicant stated in the remarks module of question 20 of the SCA. Rather, Applicant indicated his disagreement with his supervisor’s explanation for the termination (the customer was unhappy with Applicant’s job performance). He claimed he had been receiving outstanding performance ratings in the past year before his termination. The termination letter (Item 9) does not support Applicant’s position that the termination was mutually agreed to based on allegations on unsatisfactory performance. Considering the evidence as whole, I find Applicant did not leave by mutual agreement. I also find he provided misinformation about his job termination.

In response to question 26 (in the last 7 years, have you ever been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25?) of the same SCA (and alleged in SOR 1.c.), he answered “no.” Applicant failed to reveal his four misdemeanor charges for check deception in November 2002 (less than two years before he certified the SCA). Applicant’s explanation for the “no” answer is that he was arrested for some traffic offense and was never provided notice of the check deception charges that resulted in his restitution. Yet, in response to SOR 2.a., Applicant admitted he was cited for the check charges but assumed the corresponding creditors had been paid or the debts owed had been discharged in bankruptcy.

A summary of filings and other proceedings related to the check deception charges (SOR 1.c., 2.a.) is set forth in Item 13, showing Applicant received notice of the charges over the course of approximately five months between September 2002 and January 2003, when the charges were dismissed. I find against Applicant under SOR 1.c. and 2.a.

On the same SCA furnished by Applicant in June 2004, he answered “no” to question 36 (In the last 7 years, have you had a lien placed against your property for failing to pay taxes or other debts?) Though Applicant admitted in his answer that he knew about taxes he needed to pay in 2000, there is insufficient information for me to make a finding under SOR 1.d. against Applicant.

Applicant denied he provided false information to the investigator (SOR 1.e.) on May 25, 2005. Applicant’s reliance on the previous conversation with the supervisor regarding Applicant’s poor performance does not change the contents of termination letter describing the primary reasons for Applicant’s termination. He knew about both reasons, but only divulged one to the investigator.

I find Applicant concealed information by not disclosing both reasons for his job termination in October 2001.

Subparagraph 2.a. reflects that Applicant was found guilty of four counts (not three) of check deception. The records reflect all charges were dismissed on condition Applicant pay restitution (Item 13) which he paid.

POLICIES

Enclosure 2 of the Directive sets forth guidelines containing disqualifying conditions (DC) and mitigating conditions (MC) that should be given binding consideration in making security clearance determinations. These conditions must be considered in every case along with the general factors of the whole person concept. However, the conditions are not automatically determinative of the decision in any case nor can they supersede the Administrative Judge’s reliance on his own common sense.

Burden of Proof

Initially, the government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualifies, or may disqualify, the applicant from being eligible for access to classified information. *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988) “[The Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant’s security suitability.” ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting ISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. “[Security clearance determinations should err, if they must, on the side of denials.” *See Egan*, 481 U.S. at 531; *see* Directive E2.2.2.

Personal Conduct (Guideline E)

This guideline applies to poor judgment or dishonesty, or an unwillingness to comply with rules and regulations.

Criminal Conduct (Guideline J)

Violating the law shows poor judgment and unreliability.

CONCLUSIONS

In applying for security clearance access, an applicant has a responsibility to provide truthful information during all phases of a security investigation. Two important stages in the investigation occur in the completion of the SCA and the interview with an investigator. Applicant's denial of SOR 1.a. and 1.e. is discredited by the documentation to the contrary reflecting the two primary reasons he was terminated. His deliberate omissions (SOR 1.a., 1.b. 1.c., and 1.e.) meet the definition of personal conduct (PC) disqualifying condition (DC) E2.A5.1.2.2. (*the deliberate omission of relevant and material facts from any personnel security questionnaire used to determine security clearance eligibility*) and PC DC E2.A5.1.2.3. (*deliberately providing false misleading information concerning relevant and material matters to an investigator in connection with a personnel security or trustworthiness determination*). First, under SOR 1.b (question 20 of the SCA), Applicant did not leave the job by mutual agreement. Rather he conceded he was being terminated even though he thought he had been receiving outstanding performance appraisals in the year before his termination. Concerning SOR 1.c., the printout (Item 13) and Applicant's statement in response to SOR 2.a. completely impeaches his present assertions to the contrary.

Under SOR 1.d. (question 36, liens within the last 7 years), Applicant knew he had taxes to pay when he filed his bankruptcy. However, there is insufficient evidence for me to conclude from his knowledge of taxes he owed that he had liens filed against him, particularly when there is no documentation to show the state filed a lien based on taxes owed. SOR 1.a., 1.b., 1.c., and 1.e. are found against Applicant. SOR 1.d. is found for him.

The mitigating conditions (MC) under the PC guideline have been analyzed, but none apply as Applicant does not believe he was terminated for misusing a credit card. PC MC E2.A5.1.3.1. (*the information was unsubstantiated or not pertinent to judgment and trustworthiness*) is inapplicable. Information about previous jobs or criminal history is material in the government's predictive determination about security clearance access.

PC MC E2.A5.1.3.2. (*the falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*) and PC MC E2.A5.1.3.3. (*The individual made prompt, good-faith efforts to correct th falsification before being confronted with the facts*) are also unavailable as Applicant still contends he did not conceal any information. Based on the totality of the evidence, except for SOR 1.d., Applicant's deliberate falsifications have not been mitigated.

The adverse evidence of personal conduct also has independent significance under the criminal conduct (CC) guideline. CC DC E2.A10.1.2.1. (*allegations or admission of criminal conduct, regardless of whether the person was formally charged*) applies to SOR 2.a. and 2.b. First, Applicant admitted four counts of check deception in November 2002. The fact that the prosecutor withdrew the charges does not eliminate Applicant's fraudulent conduct. After Applicant's criminal behavior in November 2002, he violated 18 United States Code (U.S.C.) § 1001 in June 2004, when

he deliberately concealed information about (1) why he was terminated from his job in October 2001 and (2) his criminal record. Information regarding previous jobs and a criminal record is material because these items of information can change the course of the government's security investigation in making a predictive decision about an applicant's security suitability.

The CC guideline has three mitigating conditions that may apply here. However, Applicant's current view he did deliberately falsify the security form or the information in his interview forecloses the application of any of the following conditions. Those conditions are CC MC E2.A10.1.3.1. (*the criminal behavior was not recent*), CC MC E2.A101.3.2. (*the crime was an Isolated incident*), and CC MC E2.A10.1.3.6. (*there is clear evidence of successful rehabilitation*). Applicant has not been forthright with the government about his past. SOR 2.a., 2.b., and the CC guideline are found against Applicant.

Applicant's dishonest conduct under the PC and CC guidelines justify the same conclusion even when the circumstances of this case are evaluated under the broader factors of the whole person concept. Providing untruthful information about one's background during a security investigation is serious. Applicant's deliberate falsifications in June 2004 and May 2005 are aggravated by his ongoing position that he did nothing wrong. Though the conversation between Applicant and the supervisor could have taken place before his termination in October 2001, Applicant's employer at the time mailed the company's official position to Applicant by certified mail which Applicant signed for. His decision not to disclose either that information or his criminal history information reinforces the ultimate finding against Applicant under the PC and CC guidelines.

FORMAL FINDINGS

Paragraph 1 (Personal Conduct, Guideline E):	AGAINST THE APPLICANT
Subparagraph a.	Against the Applicant.
Subparagraph b.	Against the Applicant.
Subparagraph c.	Against the Applicant.
Subparagraph d.	For the Applicant.
Subparagraph e.	Against the Applicant.
Paragraph 2 (Criminal Conduct, Guideline J):	AGAINST THE APPLICANT.
Subparagraph a.	Against the Applicant.
Subparagraph b.	Against the Applicant.

DECISION

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

Paul J. Mason
Administrative Judge