

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: In October 2004, Applicant deliberately answered “no” to the security application question of whether he had ever been charged or convicted of an offense related to alcohol or drugs. In February 2006, Applicant was interviewed by an Office of Personnel Management (OPM) investigator. On two occasions during the early part of the interview, Applicant replied that he had committed no alcohol or drug-related offenses. Only after additional questioning did he finally acknowledge his alcohol-related offense in April 2001. Applicant’s favorable character evidence does not mitigate the criminal and personal conduct. Clearance is denied.

CASENO: 06-14190.h1

DATE: 05/29/2007

DATE: May 29, 2007

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In Re:)	
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-----)	ISCR Case No. 06-14190
SSN: -----)	
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
PAUL J. MASON**

APPEARANCES

FOR GOVERNMENT
Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT

SYNOPSIS

In October 2004, Applicant deliberately answered “no” to the security application question of whether he had ever been charged or convicted of an offense related to alcohol or drugs. In February 2006, Applicant was interviewed by an Office of Personnel Management (OPM) investigator. On two occasions during the early part of the interview, Applicant replied that he had committed no alcohol or drug-related offenses. Only after additional questioning did he finally acknowledge his alcohol-related offense in April 2001. Applicant’s favorable character evidence does not mitigate the criminal and personal conduct. 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 July 30, 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 criminal conduct guideline (Guideline J), and the personal conduct guideline (Guideline E) of the Directive. In his answer dated August 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 February 26, 2007. Applicant received the FORM on March 5, 2007. Applicant submitted a timely response on March 19, 2007. The case was assigned to me for decision on April 25, 2007.

FINDINGS OF FACT

The SOR alleges criminal conduct and personal conduct. Applicant admitted the factual allegations with explanations. In response to subparagraph 1.a.,¹ Applicant noted that the alcohol-related offense was the only negative information in his record. Applicant is 62 years old, and married with four children. He seeks a secret security clearance.

On April 4, 2001 (subparagraph 1.a.), Applicant was charged with operating a vehicle while under the influence of liquor (OUI). The arresting officer requested Applicant take a field sobriety test. Applicant declined because he was still on crutches from a hip replacement. A breath test registered “.18,” or .10 over the legal limit. Prosecution of the case was deferred without a finding, and Applicant was fined about \$250.00, and required to attend an alcohol education program. Applicant successfully completed a group, alcohol education program.

¹ Applicant did not provide an answer to subparagraph 1.b. I shall assume he denies this allegation.

In response to subparagraph 2.a., Applicant explained that he was in a state of frustration (over unanticipated problems related to his hip replacement), and rationalization when he filled out the security clearance application (SCA) on October 13, 2004. He stated:

. . . and since the case (subparagraph 1.a.) was continued without a finding, I thought I could rationalize my way through the alcohol related questions. I was under the apparent erroneous impression (which I discovered after I submitted the application) that a negative response to the module in question would negate my chances of getting a clearance and retaining the job (Item 2).

Applicant also thought DOHA would look at his countervailing record showing 35 years of safeguarding classified information with four defense contractors. I find Applicant intentionally omitted information from the SCA when he answered “no” to question 24 of the SCA on October 13, 2004.

Applicant provided explanations why he did not provide truthful information about the alcohol-related offense during the initial portions of his OPM interview (subparagraph 2.b.) on February 19, 2006. First, he assumed that during the period between the SCA and his interview, DOHA had made the decision that Applicant’s favorable information submitted in the security investigation had overcome the false information he provided in the SCA. Second, he assumed the interview was only a formality to receiving a security clearance. Applicant reacted with surprise when he was asked about the OUI, but stated that he eventually talked about the OUI before the interview was over. Applicant also became upset at the investigator for not showing him compassion during the interview, and calling him a liar. Applicant was also embarrassed by the incident. The OPM investigator had to ask Applicant at least two times about the alcohol-related offense before Applicant finally conceded the information. I find Applicant intentionally concealed information from the investigator during the initial portions of the interview.

In his response to the FORM (March 19, 2006), Applicant considers his 36-year job record should be strong evidence that he can be trusted to properly handle classified information. He disagrees with the government’s claim that he is candidate for influence because his family and his employer are aware of the alcohol-related incident. Next, Applicant disagrees that his experience in completing other applications provided him with ample notice and time to internalize and answer all the SCA questions correctly. Applicant reiterated his displeasure over the lack of understanding about his first-time experiences in the security investigation. If he had known that answering positively would have not jeopardized his career, then he would not have been intimidated about answering questions about the alcohol-related offense. He still believes that insufficient attention (nine days) was given to presenting positive information in his record. Finally, Applicant asked if he could be placed on probation for a period of time to prove his trustworthiness to DOHA.

Applicant’s program manager wrote a character statement on March 19, 2007. He stated that in the last two and one-half years, Applicant has demonstrated an outstanding job performance.

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) “[T]he 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 DISCR 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. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *See Egan*, 481 U.S. at 531; *see* Directive E2.2.2.

Criminal Conduct (Guideline J)

Violation of the criminal law creates doubt about a person’s judgment, reliability and trustworthiness.

Personal Conduct (Guideline E)

This guideline addresses conduct that involves questionable judgment, untrustworthiness or dishonesty.

CONCLUSIONS

Criminal conduct (CC) refers to a pattern of criminal activity that raises negative inferences about a person’s judgment, reliability and trustworthiness. Applicant’s alcohol-related driving offense in April 2001 represents a one-time demonstration of poor judgment on the highways and is extenuated by the passage of time. However, Applicant concealed this offense when he submitted

his SCA in October 2004. Next, Applicant was asked a couple times during his OPM interview in February 2006 whether he had ever been charged or convicted of an alcohol-related incident. His response was that he had not. His deliberate omission of material information constitutes a violation of 18 United States Code (U.S.C.) § 1001, and falls within the scope of CC disqualifying condition (DC) E2.A10.1.2.1. (*allegations or admission of criminal conduct, regardless of whether the person was formally charged*).

There are three mitigating conditions (MC) that are potentially relevant to the circumstances of this case: CC MC E2.A10.1.3.1. (*the criminal behavior was not recent*); CC MC E2.A10.1.3.2. (*the criminal behavior was an isolated incident*); and CC MC E2.A10.1.3.6. (*there is clear evidence of successful rehabilitation*). The first two mitigating conditions do not apply as Applicant's deliberate falsifications were recent and there was more than one falsification. Clear evidence of successful mitigation begins with providing truthful information during all phases of the security investigation. Applicant's 35 years with a security clearance while working for several defense contractors, and having performed well for the last two and one-half years at his current job constitutes favorable evidence of rehabilitation. However, this evidence does not meet Applicant's ultimate burden of persuasion under CC MC E2.A10.1.3.6., as his most recent falsification occurred less than 18 months ago. I find against Applicant under the CC guideline.

Personal conduct (PC) is defined as exhibiting questionable judgment or dishonesty during the security investigation. PC DC E2.A5.1.2.2. (*the deliberate omission, concealment, or falsification of relevant and material facts from a personnel security questionnaire used to determine security clearance eligibility*) applies to Applicant's deliberate omission of material information from question 24 of the SCA in October 2004. During the initial portion of his OPM interview in February 2006, Applicant deliberately concealed information about the alcohol-related offense on two occasions. PC DC E2.A5.1.2.3. (*deliberately providing false information concerning relevant and material matters to an investigator in connection with a personnel security or trustworthiness determination*) applies to the falsifications that occurred during the OPM interview in February 2006.

PC MC E2.A5.1.3.1. (*the information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness or reliability*) does not apply. Information about a person's criminal record is important to the government's assessment of an applicant's overall security suitability. Even though Applicant had only one criminal offense in his background, the government (through the SCA and other investigative tools) has a legitimate right to know about alcohol-related behavior so that an informed decision can be made about Applicant's credentials.

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*) does not apply due to the recency of the falsifications. Though correct information was eventually provided, it was only after Applicant realized he could not credibly deny his alcohol-related offense in April 2001.

PC MC E2.A5.1.3.3. (*the individual made prompt, good-faith efforts to correct the falsification before confronted with the facts*) applies in those situations where the person comes forward with the information before being confronted with facts. Applicant concealed his DUI from

his October 2004 SCA. He did not correct his falsifications until the investigator mentioned the jurisdiction and approximate date when Applicant was arrested. PC MC E2.A5.11.3.3. does not apply. The PC guideline is found against him.

The final determination for granting a security clearance must be an overall commonsense determination based upon careful consideration of the specific guidelines to be evaluated in the context of the whole person concept. While the DUI offense is serious, it is extenuated by the passage of time without recurrence. Conversely, Applicant's pattern of deliberate conduct in concealing the conduct from his SCA in October 2004 and again on two occasions in February 2006 occurred when he was between 60 and 62 years old. In October 2004, Applicant's choice was to either answer question 24 honestly, or rationalize his negative answer. He chose to provide false information. Though embarrassment and apprehension over losing his security clearance or his job were the motivating factors for concealing the DUI, neither reason justifies lying on an SCA or in an interview. The interview presented Applicant with a second chance to be forthright with the government. Instead, he again chose not to disclose the DUI offense.

Applicant's proper handling of classified information for the past 35 years and his exemplary job performance for the past two and one-half years weigh in Applicant's favor, but neither mitigates nor justifies his deliberate omissions. Applicant's evidence in rehabilitation is insufficient to overcome the negative evidence under the CC and PC guideline.

FORMAL FINDINGS

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