



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
-----) ISCR Case No. 06-16801
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: *Pro Se*

February 6, 2008

Decision

HARVEY, Mark W., Administrative Judge:

Applicant failed to mitigate security concerns regarding Guidelines E (Personal Conduct) and J (Criminal Conduct). Clearance is denied.

Statement of the Case

On November 14, 2005, Applicant submitted a Electronic Questionnaires for Investigations Processing (e-QIP) also known as Security Clearance Application (SF 86).¹ On August 28, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him,² pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense*

¹Government Exhibit (GE) 4. There is an allegation of falsification of the 2005 SF 86.

²GE 1 (Statement of Reasons (SOR), dated Aug. 28, 2007). Item I is the source for the facts in the remainder of this paragraph unless stated otherwise.

Industrial Personnel Security Clearance Review Program (Directive), dated January 2, 1992, as amended, modified and revised.³ The SOR alleges security concerns under Guidelines E (Personal Conduct) and J (Criminal Conduct). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing.⁴ A complete copy of the file of relevant material (FORM), dated October 24, 2007, was provided to him, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation.⁵ Applicant provided a letter with two enclosures. Applicant's submission was received at DOHA on December 18, 2007. The case was assigned to me on January 31, 2008.

Findings of Fact

As to the SOR's factual allegations, Applicant admitted the allegations in SOR ¶¶ 1.a to 1.g in his response to the SOR. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 26 years old (GE 4). He married and subsequently filed for divorce in November 2003 (GE 4; GE 5 at 8). On August 11, 1999, he joined the Army (GE 6). He served on active duty for 3 ½ years (GE 6). He also served the last three years working for a defense contractor in Iraq.

On May 15, 2003, Applicant received nonjudicial punishment (NJP) imposed under Article 15, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 815, for failing to obey a lawful order by driving on April 7, 2002, while his driving privileges were suspended. He received extra duty for three days (suspended). See Response to SOR ¶ 1.a.

³On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guideline to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated Jan. 1987, as amended, in which the SOR was issued on or after Sep. 1, 2006. The revised Adjudicative Guidelines are applicable to Applicant's case.

⁴GE 3 (Applicant's response to SOR) is not dated or signed. Applicant wrote "I admit" and initialed next to each of SOR ¶¶ 1.a to 1.g. The third page of the SOR is not part of GE 3. He signed a receipt for the SOR on Sep. 16, 2007 (GE 2).

⁵Defense Office of Hearings and Appeals (DOHA) transmittal letter, is dated Oct. 29, 2007; however, Applicant's receipt is signed, but not dated. The DOHA transmittal letter informed Applicant that he had 30 days after Applicant's receipt to submit information.

On March 24, 2003, Applicant received NJP for failure to report for duty on February 12, 2003. He received forfeiture of \$357, reduction to Private First Class, as well as restriction and extra duty for 14 days. See Response to SOR ¶ 1.b.

On February 20, 2003, and on June 24, 2003, Applicant provided urine samples, which subsequently tested positive for the presence of the marijuana metabolite. He was also absent from his place of duty from May 12, 2003 until June 22, 2003 (GE 6, Block 29).

His charges of twice using marijuana, and absence from his place of duty were subsequently referred to a special court-martial. He was sentenced to 45 days' confinement (GE 5 at 6).⁶ However, the command chose to accept Applicant's request for a discharge in lieu of courts-martial under Chapter 10, Army Regulation 635-200 (GE 6). His discharge certificate, dated July 29, 2003, characterized his service as Other Than Honorable (GE 6). See Response to SOR ¶¶ 1.c – 1.e.

In his sworn response to interrogatories, Applicant said he only used marijuana twice in 2003 and was caught both times on urinalysis tests (GE 5 at 2, 4). He claimed his defense counsel said after he served his confinement his record would be expunged (GE 5 at 7). He did not provide a statement from his defense counsel.⁷

Falsification of SF 86

Applicant's SF 86, executed on November 14, 2005, asked three questions that are relevant to the issue of whether Applicant falsified his SF 86:

Section 19: Your Military Record Have you ever received other than an honorable discharge from the military?

Section 23: Your Police Record 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.

* * *

d. Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?⁸

⁶ He said he served 45 days of confinement; however, his confinement is not reflected on his DD Form 214 (GE 6).

⁷ Applicant's defense counsel probably advised Applicant that the charges would be dismissed by the convening authority when the Chapter 10 was approved, and therefore, he would not have a conviction. A competent defense counsel would not have advised Applicant that there would not be a record of the offenses, or that his record concerning these offenses would be expunged.

Section 24: Your Use of Illegal Drugs and Drug Activity The following questions pertain to the illegal use of drugs or drug activity. You are required to answer the questions fully and truthfully, and your failure to do so could be grounds for an adverse employment decision grounds for an adverse employment decision or action against you, but neither your truthful responses nor information derived from your responses will be used as evidence against you in any subsequent criminal proceedings.

a. Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana . . . ?

Applicant answered, “No” to these three questions.

In his response to interrogatories, Appellant said, “I did not answer the question truthfully because I no longer use illegal drugs and I did not want my company to fire me for a mistake I already paid for” (GE 5 at 7). He said he did not provide accurate information about his characterization of service because he applied to have his discharge upgraded, and a Veterans Administration representative told him that his discharge would be upgraded before his security clearance was processed (GE 5 at 7). In response to the FORM, Applicant briefly explained his answers to these three questions as follows:

As the documents show [I] have admitted to the findings that have been brought out concerning my violation of the Uniform Code of Military Justice and of presenting false information in my application for employment with my present employer. My reason, though not defensible, is that I needed to turn my life around and demonstrate that I could render honorable service to my country. I have served for over three years here in Iraq supporting our military and all of my evaluations have been outstanding. My supervisors have given their support of me and have submitted written documentation of their trust and confidence in me and my dedication to my country and job.

Applicant made the false statements “to secure a job to turn around [his] life.” He described his offenses on active duty as due to immaturity. He promised not to violate the trust he received from his employer.

His employer and a senior government employee provided letters lauding Applicant’s stellar performance in Iraq. Applicant was responsible for personnel actions and records in Iraq. Applicant is dependable, loyal, honest, professional, diligent and trustworthy. Applicant loves his country, family and supporting our troops.

⁸ In response to Section 23 of his SF 86, he said he received a court-martial for AWOL (GE 4 at 23).

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the Government has the initial burden of establishing controverted facts alleged in the SOR by "substantial evidence,"⁹ demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence "to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).¹⁰

⁹ See Directive ¶ E3.1.14. "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

¹⁰ "The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* Executive Order 12968 (Aug. 2, 1995), Section 3.

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegations set forth in the SOR:

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to 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.

AG ¶ 16 describes two conditions that could raise a security concern and may be disqualifying in this case:

(a) deliberate omission, concealment, or falsification of relevant 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; and,

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

Applicant deliberately provided false information on his 2005 SF 86. His rationale for providing false statements on his SF 86 was to secure employment with a government contractor. He also wanted to obtain a security clearance. His attempt to obtain these government benefits under false pretenses requires application of AG ¶¶ 16 (a) and 16(b).

In regard to Applicant's 2003 misconduct while on active duty in the Army, AG ¶ 16(d)(3) potentially applies. AG ¶ 16(d)(3) provides:

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

* * *

(3) a pattern of . . . rule violations.

In regard to the 2003 offenses of using marijuana twice, being absent from his place of duty, failure to report for duty, and disobeying an order, the drug allegations are more appropriately alleged under Guideline H (drug involvement), and all of the UCMJ violations are more appropriately alleged under Guideline J (criminal conduct) because all violations of UCMJ punitive articles are criminal offenses.

Moreover, the most serious UCMJ offenses, using marijuana twice and absent from place of duty over 30 days are encompassed in the Other Than Honorable discharge issued pursuant to Army Regulation 635-200, Chapter 10. See SOR ¶ 1.c. To eliminate the duplication, I find for Applicant under Guideline E for SOR ¶¶ 1.a, 1.b, 1.d, and 1.e. However, I specifically find that AG ¶ 16(d)(3) applies with respect to SOR ¶ 1.c.

AG ¶ 17 provides seven conditions that could mitigate security concerns in this case:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made

aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully.

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) 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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability; and,

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

None of the mitigating conditions in AG ¶ 17 apply. Applicant's falsification of his SF 86 on November 14, 2005, is recent.¹¹ He did not promptly inform the government of the falsification. He attempted to mislead a security investigation. He did not receive counseling designed to improve his conduct. Applicant's claim that his defense counsel told him his record would be expunged is not credible. No one advised him to falsify his SF 86. He admitted the false statement at issue, and the falsification of his SF 86 is substantiated. His statement that he changed does not convince me that similar misbehavior is unlikely to recur. The falsification of his SF 86 casts doubt on his current reliability, trustworthiness, and good judgment. He failed to tell the truth in 2005 when he thought that he would receive an advantage or benefit by falsification of his SF 86. His current service in Iraq is an important positive step, but it is not enough to mitigate his conduct.

¹¹ Arguably, AG ¶ 16(d)(3) does not apply because the conduct in SOR ¶ 1.c could have been alleged under a different guideline. Moreover, the conduct in SOR ¶ 1.c is partially mitigated under AG ¶ 16(c) because it happened over four years ago under unique conditions (while Applicant was on active duty), and as such the conduct is unlikely to recur. However, the conduct in SOR ¶ 1.c cannot be considered piecemeal. The Judge is required to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of an applicant's conduct. ISCR Case No. 03-02374 at 4 (App. Bd. Jan. 26, 2006) (citing ISCR Case No. 02-22173 at 4 (App. Bd. May 26, 2004)). When the active duty misconduct is considered in connection with the 2005 falsification of his SF 86, the personal conduct in SOR ¶ 1.c cannot be mitigated under AG ¶ 16(c). The misconduct on active duty continues to cast doubt on Applicant's current reliability, trustworthiness, or good judgment.

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to 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.”

AG ¶ 31 describes two conditions that could raise a security concern and may be disqualifying, ¶ 31(a), “a single serious crime,” and ¶ 31(c), “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.” SOR ¶ 2.a alleges that Applicant violated 18 U.S.C. § 1001 by falsifying three answers on his 2005 SF 86. I find that he deliberately falsified his 2005 SF 86.

For a violation of 18 U.S.C. § 1001 to occur, the falsification must be material. The Supreme Court defined “materiality” in *United States v. Gaudin*, 515 U.S. 506, 512 (1995): as a statement having a “natural tendency to influence, or [be] capable of influencing, the decision making body to which it is addressed.” See also *United States v. McLaughlin*, 386 F.3d 547, 553 (3d Cir. 2004).

If Applicant had provided accurate answers on his SF 86, his accurate answers are capable of influencing the government to deny his security clearance. His two uses of marijuana, absence from his unit in excess of thirty days, and Other Than Honorable discharge received in lieu of courts-martial are important derogatory information that occurred about 30 months before he signed his SF 86. The 2003 misconduct overall is sufficiently recent (at the time he signed his 2005 SF 86) and serious¹² to jeopardize approval of his security clearance. Making a false statement under 18 U.S.C. § 1001 is a serious crime, a felony (the maximum potential sentence includes confinement for five years and a \$10,000 fine). Accordingly, AG ¶¶ 31(a) and 31(c) apply because Applicant violated 18 U.S.C. § 1001.

AG ¶ 32 provides four conditions that could potentially mitigate security concerns:

- (a) 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;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) evidence that the person did not commit the offense; and,

¹² In Applicant's case, this includes aspects such as, the seriousness of the misconduct, and the number of violations of the law, regardless of whether the misconduct resulted in an arrest or conviction.

(d) there is 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.

AG ¶¶ 32(a) – 31(c) do not apply. Applicant's false statement occurred on his 2005 SF 86, which is somewhat recent. It casts doubt on Applicant's current reliability, trustworthiness and good judgment. He was not pressured or coerced into making his false statements on his 2005 SF 86. He admitted making the false statements, and the offense is substantiated.

AG ¶ 31(d) partially applies. There is some evidence of successful rehabilitation, including the passage of about 30 months since he completed his 2005 SF 86 without recurrence of criminal activity. He expressed his remorse. He has received some job training, and has an outstanding employment record serving in Iraq. However, his post-offense behavior is insufficient to mitigate the very serious misconduct in this case.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a): "(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) extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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." Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

Eventually Applicant disclosed his falsification of his 2005 SF 86 to security officials. His recognition of his misconduct and promise to refrain from future misconduct weighs in his favor. His 2003 misconduct on active duty occurred so long ago that it would be mitigated (in February 2008), but for the 2005 falsification of his SF 86. He provided evidence of remorse, or regret concerning his misconduct. He was embarrassed by his misconduct, and he recognized the damage his misconduct will cause his reputation. His record of good employment weighs in his favor. These factors show some responsibility, rehabilitation, and mitigation.

The evidence against mitigating Applicant's conduct is more substantial. His falsification of his 2005 SF 86 and his 2003 misconduct on active duty were knowledgeable and voluntary. His misconduct occurred in 2003 and 2005, and is therefore not isolated. He was sufficiently mature to be fully responsible for his conduct. Criminal misbehavior is not prudent or responsible. His falsification of his 2005 SF 86 is

particularly aggravating, and weighs heavily against granting or continuing his security clearance. He did not receive counseling or therapy, and may not have a clear understanding about how to avoid problematic situations and why he engaged in the misconduct. I have persistent and serious doubts about his judgment, reliability, and trustworthiness.

His criminal misconduct calls into question his current ability or willingness to comply with laws, rules and regulations. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the security concerns pertaining to personal conduct¹³ and criminal conduct.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my “careful consideration of the whole person factors”¹⁴ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the government’s case. For the reasons stated, I conclude he is not eligible for access to classified information.

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:

Paragraph 1, Guideline E:	AGAINST APPLICANT
Subparagraphs 1.a to 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Subparagraphs 1.d and 1.e:	For Applicant
Subparagraph 1.f to 1.h:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

¹³ Even if I had found “For Applicant” with respect to SOR ¶ 1.c because the conduct could have been alleged more appropriately under a different guideline, I still would have found against Applicant under the Guideline E for SOR ¶¶ 1.f to 1.h and under the whole person concept.

¹⁴ See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

Conclusion

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 eligibility for a security clearance for Applicant. Clearance is denied.

Mark W. Harvey
Administrative Judge