

KEYWORD: Personal Conduct

DIGEST: Applicant has a history of four minor infractions/incidents which in all likelihood would not have led to a security clearance denial. However, he was not forthcoming about these incidents on four separate occasions during the application process when he initially submitted a security clearance application in March 2003, and reaffirmed in September 2003 and again in February 2004, and when submitted a second security application in October 2005. Applicant failed to mitigate the security concerns arising from his falsifications. Clearance is denied.

CASENO: 06-18253.h1

DATE: 05/03/2007

DATE: May 3, 2007

In Re:	)	
	)	
	)	
-----	)	ISCR Case No. 06-18253
SSN: -----	)	
	)	
Applicant for Security Clearance	)	
	)	

**DECISION OF ADMINISTRATIVE JUDGE  
ROBERT J. TUIDER**

**APPEARANCES**

**FOR GOVERNMENT**

Richard A. Stevens, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

\_\_\_\_\_ Applicant has a history of four minor infractions/incidents which in all likelihood would not have led to a security clearance denial. However, he was not forthcoming about these incidents on four separate occasions during the application process when he initially submitted a security clearance application in March 2003, and reaffirmed in September 2003 and again in February 2004, and when submitted a second security application in October 2005. Applicant failed to mitigate the security concerns arising from his falsifications. Clearance is denied.

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### **STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On November 27, 2006, under the applicable Executive Order<sup>1</sup> and Department of Defense Directive,<sup>2</sup> DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision—personal conduct (Guideline E) of the Directive. Applicant answered the SOR in writing in an undated notarized response, which was received by DOHA on December 29, 2006. In his response, he elected to have a hearing before an Administrative Judge.

The case was assigned to me on February 21, 2007. On February 28, 2007, DOHA issued a notice of hearing scheduling Applicant's hearing for March 15, 2007. Applicant stated he received sufficient notice and was ready to proceed. Tr. 11. The hearing was conducted as scheduled.

The government offered five exhibits, which were admitted without objection as Government Exhibits (GE) 1 through 5. The Applicant offered four exhibits, which were admitted with objection as Applicant Exhibits (AE) A through D. DOHA received the transcript (Tr.) of the proceeding on March 28, 2007.

### **PROCEDURAL RULING**

At the hearing, Department Counsel asked me to take administrative notice of Article 111, Uniform Code of Military Justice (UCMJ), drunken or reckless operation of a vehicle, aircraft, or vessel. Reference was made to Article 111, UCMJ, in SOR ¶ 1.d.

Administrative or official notice is the appropriate type of notice used for administrative proceedings. *See* ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004); *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). The most common basis for administrative notice at ISCR proceedings is to notice facts that are either well known or taken from government reports. *See* Stein, ADMINISTRATIVE LAW, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for

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<sup>1</sup>Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.

<sup>2</sup>Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.

administrative notice). Applicant did not object to my consideration of Article 111, UCMJ for purposes of administrative notice. Tr. 11-12.

### FINDINGS OF FACT

Applicant denied the allegations in ¶¶ 1.e., 1.f., 1.g., and 1.h., i.e. the four falsification charges cited in the SOR. He did admit to ¶¶ 1.a., 1.b., 1.c., and 1.d. After a complete and thorough review of the evidence in the record, I make the following additional findings of fact.

Applicant testified at his hearing and I did not find his testimony credible.

Applicant is a 35-year-old Third Class Engineer for a defense contractor. He has been employed part-time by this defense contractor since October 2005. Additionally, he is an active duty Air Force Staff Sergeant, pay grade E-5, with an Air Force Specialty Code of 3E171, Heating, Ventilation, Air Conditioning, and Refrigeration. He has been in the Air Force since September 1992 and as an active duty member of the Air Force, he holds a secret clearance. As a defense contractor employer, he seeks a security clearance separate and apart from the clearance he holds in the Air Force.

Applicant graduated from high school in June 1992. He has been working on his associate's degree, maintaining a 4.0 GPA, and is two classes from completing his degree. Tr. 24-25.

Applicant was married to his first wife from October 1996 to November 2001. GE 1. That marriage ended by divorce. Applicant has been married to his second wife since March 2005. GE 1. Applicant has a 10-year-old son born from a relationship with a former girlfriend for whom he provides child support. His son lives with his mother. Applicant has no other children.

The SOR alleged four separate incidents to which Applicant admitted in his Answer to the SOR. They are:

1. That he was awarded non-judicial punishment (NJP) on September 27, 2005, and found guilty of wrongfully using a government computer to view pornographic images. He was sentenced to be reprimanded, and reduced one pay grade. His reduction in grade was suspended for six months. (SOR ¶ 1.a.). Applicant signed his Record of Nonjudicial Punishment Proceedings on September 27, 2005, indicating that he did not desire to appeal. GE 4.;

2. That he was arrested on July 21, 2002, and charged with disorderly conduct. This charge was dismissed. (SOR ¶ 1.b.). GE 3.;

3. That he was cited on May 5, 2001 and charged with provoking speech/gestures while at an overseas Air Force base. (SOR ¶ 1.c.) Apparently, no further action was taken against the Applicant.; and

4. That he was awarded NJP on April 19, 1998, and found guilty of drunken or reckless operation of a vehicle. He was sentenced to be reduced one pay grade. His reduction in grade was suspended for six months. (SOR ¶ 1.d.). GE 5.

On October 5, 2005, Applicant completed a security clearance application (SF-86). He responded negatively to question 23(d) inquiring whether he had ever been charged with or convicted of any offense(s) related to alcohol or drugs, and to question 23(e) inquiring whether in the last seven years he had ever been subject to court martial or other disciplinary proceedings under the UCMJ to include non-judicial punishment. (SOR ¶¶ 1.d. and 1.a.)

These responses were clearly untrue in light on his having been awarded non-judicial punishment as recently as September 27, 2005 for wrongfully using a government computer to view pornographic images (SOR ¶ 1.a.), and for his having been awarded non-judicial punishment on April 18, 1998 for drunken or reckless operation of a vehicle (SOR ¶ 1.d).

On March 27, 2003, Applicant completed an SF-86, which he reaffirmed on September 29, 2003, and again on February 17, 2004. He responded negatively to question 24 inquiring whether he had ever been charged with or convicted of any offense(s) related to alcohol or drugs, and to question 26 inquiring whether in the last seven years he had been arrested, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25. (SOR ¶¶ 1.d. and 1.b.).

These responses were clearly untrue in light of his having been awarded non-judicial punishment on April 18, 1998 for drunken or reckless operation of a vehicle (SOR ¶ 1.d.), and for his having been arrested and charged with disorderly conduct (SOR ¶ 1.b.).

Applicant's explanations for these omissions varied. As to SOR ¶ 1.e., referring to his NJP on April 19, 1998, Applicant explained he "was led to believe that because this incident happened on a military installation overseas and dealt with by military members overseas that it would not involve my civilian background in any manner. Being that I am in the military and this incident happened on a military installation handled by military personnel, I did not understand that I had a "Police Record." Therefore I answered "NO" to this question." Answer to SOR.

As to SOR ¶ 1.f., referring to his NJP on September 27, 2005, Applicant explained "The question asked in the last 7 years have you been subject to court martial or other disciplinary proceedings under the Uniform Code of Military Justice. I answered "NO" to this question because initially at the time I was asked this question I was in the process of receiving punishment for wrongfully using a Government Computer incident and hadn't actually received punishment. I clearly misunderstood the question entirely!" Answer to SOR.

As to SOR ¶ 1.g., referring to his NJP on April 19, 1998, Applicant explained “Because I was led to believe that because this incident happened on a military installation overseas and dealt with my military members overseas that it would not involve my civilian background in any manner. I was led to believe that this matter would be in military file for 2 years and would not follow me afterwards. Therefore I answered “NO” to this question.” Answer to SOR.

As to SOR ¶ 1.h., referring to his arrest and being charged with disorderly conduct on July 21, 2002, Applicant explained “I admit” to being arrested in [location] on July 22 (sic), 2002. “I deny” deliberately falsifying material facts by saying “NO” to the question because I was told by my lawyer at that time that the manner would be expunged and I specifically asked about this involving my security clearance. He said that if asked about the arrest to say “NO” because it did not happen.” Answer to SOR.

Applicant’s explanations for these discrepancies during his hearing did not vary significantly from the explanations given in his Answer to SOR, outlined above.

Applicant submitted five reference letters, 16 copies of different awards and achievements, 28 pages of training documents, and six pages of personal military history and information forms. AE A through D. The collective sense of these documents is that Applicant is a bright and motivated individual, who has made a substantial contribution to the Air Force during his 14 plus years of active duty.

## POLICIES

In an evaluation of an applicant’s security suitability, an administrative judge must consider Enclosure 2 of the Directive, which sets forth adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into disqualifying conditions (DC) and mitigating conditions (MC), which are used to determine an applicant’s eligibility for access to classified information.

These adjudicative guidelines are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, an administrative judge should apply these guidelines in conjunction with the factors listed in the adjudicative process provision in Section E2.2, Enclosure 2, of the Directive. An administrative judge’s overarching adjudicative goal is a fair, impartial and common sense decision. Because the entire process is a conscientious scrutiny of a number of variables known as the “whole person concept,” an administrative judge should consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision.

Specifically, an administrative judge should consider the nine adjudicative process factors listed at Directive ¶ E2.2.1: (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 pertinent 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.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to the relevant adjudicative guidelines are set forth and discussed in the Conclusions section below. Since the protection of the national security is the paramount consideration, the final decision in each case is arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests 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, facts must be established by "substantial evidence."<sup>3</sup> The government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive. Once the government has produced substantial evidence of a disqualifying condition, the burden shifts to the applicant to produce evidence and prove a mitigating condition. Directive ¶ E3.1.15 provides, "The applicant is responsible for presenting witnesses and other 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." 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).<sup>4</sup>

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an 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.

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<sup>3</sup>"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 (4<sup>th</sup> Cir. 1994).

<sup>4</sup>"The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, [evaluates] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and [decides] whether Applicant [has] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

The scope of an administrative judge's decision is limited. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance 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." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism.

## CONCLUSIONS

### **Guideline E – Personal Conduct**

The security concern under Guideline E, is that "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." Directive ¶ 15.

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:

The SOR alleges four minor offenses that occurred some time ago that gave rise to concerns identified in ¶¶ 1.a. through 1.d. First, an NJP for drunken or reckless operation of a vehicle that occurred in 1998 while Applicant was overseas, for which he received a suspended reduction. Second, a citation/charge for provoking speech/gestures that occurred in 2001 while Applicant was overseas, and for which no action was taken against Applicant. Third, an arrest in 2002 for disorderly conduct, for which the charge was dismissed. Fourth, an NJP for wrongfully using a government computer to view pornographic images in 2005, for which he received a suspended reduction and a reprimand.

Typically, under the UCMJ, NJP is reserved for the adjudication of minor offenses. It is further noted both his respective commanders who awarded Applicant NJP suspended his punishment. The civilian charge of disorderly conduct charge was dismissed and the provoking speech/gestures charge apparently did not result in any adverse action being taken against Applicant. While these charges document a higher level of law enforcement intervention than desired for Applicants seeking a security clearance, certain factors must be considered. Those include the time elapsed, the fact that two of the offenses were adjudicated in the lesser forum of NJP for which his punishment was suspended, the remaining two offenses resulted in a dismissal and/or no action being taken against Applicant, and there were no recurrences of the same or similar conduct.

Under the Directive, these four incidents raise potential concerns under disqualifying condition (DC) 16.(c): *credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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.* Under the facts of this case, Applicant is able to benefit from mitigating condition (MC) 17.(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.*

Under the particular facts and circumstances of this case, I conclude Applicant would not be prohibited from holding a security clearance as a result of SOR allegations ¶¶ 1.a. through 1.d. That is not the case for the remaining concerns raised under SOR ¶¶ 1.e. through 1.h.

SOR ¶¶ 1.e. through 1.h. alleged Applicant falsified material facts on two of the SF-86s he submitted, the first on October 5, 2005, and the second originally signed on March 27, 2003, and reaffirmed on the two separate dates of September 29, 2003, and on February 17, 2004.

Applicant's explanations for failing to list these offenses/incidents are simply not credible. In particular, it is inconceivable that he would be awarded NJP on September 27, 2005 for wrongfully using a government computer, and eight days later when completing his SF-86 on October 5, 2005, claim his failure to list that NJP was that he was in the "process of receiving punishment . . . and hadn't actually received punishment." Having signed his Record on Nonjudicial Punishment Proceedings on September 27, 2005, indicating he did not desire to appeal his punishment suggests something other than being in the "process of receiving punishment." His other explanations such as misunderstanding that he had a police record, that he thought being a military member overseas would not involve his civilian background, or that his unknown lawyer told him to answer "no" to security clearance questions involving his being arrested and charged with disorderly conduct are equally disingenuous.

Applicant is a bright and articulate individual with over 14 years in the Air Force. He has held a security clearance since he has been in the Air Force and is no stranger to the process. He provided considerable documentation expounding his many accomplishments in the Air Force. It is unfortunate that he chose not to disclose four relatively minor offenses. In my view, such disclosure would probably not have precluded him from being granted a security clearance. When an Applicant does not provide complete and accurate information, the government is justified in having a concern about that person's personal integrity. Applicant demonstrated a pattern of not telling the truth on at least four occasions during this application process.

Applicable is DC 16.(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.* None of the Directive’s mitigating conditions apply.

### **The “Whole Person” Concept**

I considered the potentially disqualifying and mitigating circumstances in light of the “whole person” concept. Applicant is a mature individual with many years of service to this country as a service member and an employee of a defense contractor. As indicated above, it is my view the four relatively minor infractions which Applicant chose to deny when undergoing the security clearance process would not have precluded him from being granted a clearance.

Unfortunately, Applicant’s deliberate falsification of his two SF-86s on four separate occasions raised significant concerns. As a mature individual, Applicant knew or should have known of the significance of these documents. His deliberate submission of inaccurate information – not once, but four times – is very troublesome. His explanations for providing inaccurate information are quite frankly unimpressive. Weighing all the facts and circumstances, I find Applicant has not mitigated the security concerns arising from the falsification of his security clearance applications.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline E:    **AGAINST APPLICANT**

- Subparagraph 1.a.:    For Applicant
- Subparagraph 1.b.:    For Applicant
- Subparagraph 1.c.:    For Applicant
- Subparagraph 1.d.:    For Applicant
- Subparagraph 1.e.:    Against Applicant
- Subparagraph 1.f.:    Against Applicant
- Subparagraph 1.g.:    Against Applicant
- Subparagraph 1.h.:    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 or continue a security clearance for Applicant. Clearance is denied.

Robert J. Tuidor  
Administrative Judge