

KEYWORD: Personal Conduct

DIGEST: Applicant has an eight year history of substandard behavior. This behavior includes an arrest for recklessly endangering another person, criminal mischief, and criminal conspiracy. While holding access to sensitive compartmented information, he misappropriated government property several times, submitted a government requisition to procure a watch for personal use, used various drugs on numerous occasions, mishandled classified material, and falsified his security clearance application. This documented behavior raised personal conduct concerns that Applicant was unable to mitigate. Clearance is denied.

CASENO: 06-21724.h1

DATE: 09/27/2007

DATE: September 27, 2007

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| Applicant for Security Clearance |) | |
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**DECISION OF ADMINISTRATIVE JUDGE
ROBERT J. TUIDER**

APPEARANCES

FOR GOVERNMENT

Francisco Mendez, Esq., Department Counsel

FOR APPLICANT

Leslie McAdoo, Esq.

SYNOPSIS

Applicant has an eight year history of substandard behavior. This behavior includes an arrest for recklessly endangering another person, criminal mischief, and criminal conspiracy. While holding access to sensitive compartmented information, he misappropriated government property several times, submitted a government requisition to procure a watch for personal use, used various drugs on numerous occasions, mishandled classified material, and falsified his security clearance application. This documented behavior raised personal conduct concerns that Applicant was unable to mitigate. Clearance is denied.

STATEMENT OF THE CASE

On September 15, 2003, Applicant submitted a Security Clearance Application (SF 86).¹ On January 19, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, 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 Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, modified and revised.²

The SOR alleges security concerns under Guideline E (Personal 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.

In an answer dated and notarized on February 6, 2007, Applicant responded to the SOR allegations and requested a hearing. The case was assigned to me on April 4, 2007. On March 28, 2007 Department Counsel moved to amend the SOR adding two additional allegations under Guideline E. At the hearing, Counsel for Applicant stated she had no objection to the Government's motion, and the motion was granted. Tr. 10-12. On May 2, 2007, DOHA issued a notice of hearing scheduling the case to be heard on May 30, 2007. The hearing was held as scheduled. On June 8, 2007, DOHA received the transcript (Tr.).

FINDINGS OF FACT

¹Government Exhibit (GE) 1(Standard Form (SF) 86, Security Clearance Application) was signed by Applicant on September 15, 2003. Additionally, the Government offered two additional SF 86s. GE 6 is an unsigned SF 86 dated June 29, 2005, and GE 7 is an SF 86 dated June 29, 2005 originally signed by Applicant on June 29, 2005, and signed two additional times on September 8, 2005 and October 26, 2006.

²On 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.

In his reply to the SOR, Applicant admitted all 11 allegations listed in the January 19, 2007 SOR under Guideline E. His admissions are incorporated herein as findings of fact. Also, at the hearing, Applicant admitted the two additional allegations alleged in the Amended SOR dated March 28, 2007. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 31 years old.³ After graduating from high school, he enlisted in the Army Reserve in April 1995 under the Delayed Entry Program. Following an injury he received in a fight, he was discharged from the Army Reserve in April 1996 under an Entry Level Separation. Tr. 53-54. In January 1996, he was charged with recklessly endangering another person, criminal mischief, and criminal conspiracy. He participated in a drive-by shooting incident where one of his accomplices opened fire on the home and automobile of an individual his accomplice “disliked.” Although Applicant had a loaded weapon at the time, he stated he did not fire his weapon during the course of this drive-by shooting, and no one was hurt. Tr. 49-52. He was found guilty of criminal mischief, and as a result of his participation in this offense was ordered to pay \$800 restitution, awarded probation, and as part of an agreement with the court, agreed to enlist in the Army.

In November 1996, Applicant enlisted in the in the U.S. Army and served continuously until he was honorably discharged in October 2003 as a Sergeant (pay grade E-5). His Military Occupation Specialty (MOS) was 92Y20/Unit Supply Specialist (“Supply Sergeant”). AE B. He was awarded a top secret clearance in February 1998, which he maintained throughout his service in the Army. He estimates he has earned approximately 92 college credit hours while in the Army. Tr. 22. Applicant has been married since May 1998, and has two sons, ages three and one. His wife is a librarian by profession and is currently a stay-at-home mother. Applicant has been employed by a defense contractor since March 2005 as a network engineer 1A. Tr. 66-67. He seeks a secret security clearance as a requirement of his employment. Tr. 67-68.

Following Applicant’s discharge from the Army, he sought employment with a government agency requiring sensitive compartmented information (SCI). That agency conducted an extensive background investigation and during the course of that investigation, disqualifying information was uncovered that lead to his being denied SCI access. GE 2. Applicant appealed that denial and the original denial decision was sustained. GE 3 through 6.

The following is a summary of undisputed disqualifying information uncovered in that investigation discussed *supra* which formed the basis for the majority of the SOR allegations. While Applicant was an Army Supply Sergeant holding access to SCI, he used marijuana and cocaine from 1997 to 1998, and used marijuana again in July 2003. In May 1998, he was awarded nonjudicial punishment for altering a government requisition form in which he ordered a watch for personal use. He was sentenced to 15 days extra duty and required to return the watch. In 1999, he misappropriated for personal use three computer chairs and a desk intended for turn-in and took them home.

In 1999, Applicant redirected three government Mac G-3 computer systems to a friend that were not inventoried. The computer systems were valued at \$500 each. Between 1999 and 2001, he

³GE 1, *supra* n. 1. is the basis for the facts in this paragraph, unless otherwise stated.

misappropriated for personal use RAM memory, CD Rom and/or floppy computer parts intended for recycling or destruction. In 2002, he took home a classified hard drive marked "Secret" to use in conjunction with his personal home computer. After keeping the hard drive in his vehicle overnight, he decided to return it with other hard drives scheduled to be destroyed. In 2003, he misappropriated a laser jet printer and a 110 volt power supply for personal use. In 2003, he misappropriated a CISCO Router Number 2530 valued at \$800 for personal use. He arranged to return the CISCO Router to his Sergeant after his July 2004 security interview with another government agency. Again, all the above occurred while Applicant held a Top Secret/SCI security clearance.

He admitted to falsifying his September 2003 SF 86 regarding past drug use by failing to disclose his use of marijuana between 1996 and 2003, his use of cocaine between 1997 and 1998, and use of LSD, mushrooms and ecstasy in 1996. He also admitted to falsifying his September 2003 SF 86 by denying past drug use while possessing a security clearance.

Applicant accepted responsibility for his past conduct and suggested among other things that he has matured, is a family man and home owner, and responsible for supporting his family. He submitted an impressive collection of documents that included reference letters, performance evaluations from his Army service and post-Army civilian employment, and various awards and training certificates. AE A through X.

POLICIES

In an evaluation of an applicant's security suitability, an administrative judge must consider the "Adjudicative Guideline for Determining Eligibility For Access to Classified Information" (Guideline[s]), 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 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. Guideline ¶ 2. An administrative judge's over-arching 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 decision.

Specifically, an administrative judge should consider the nine adjudicative process factors listed at Guideline ¶ 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."

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 “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” Guideline ¶ 2(b). 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 by “substantial evidence,”⁴ 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).⁵

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.

The scope of an administrative judge’s decision is limited. 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. Executive Order 10865, § 7.

CONCLUSIONS

⁴ “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).

⁵ “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).

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:

Under Guideline E for personal conduct,⁶ a security concern typically exists when conduct has been identified involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Such conduct 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.

The record evidence supports a conclusion that Applicant has a history of personal conduct problems. His history of personal conduct is a security concern because it includes a deliberate falsification of relevant facts from his September 2003 SF 86,⁷ and adverse information suggesting a cumulative pattern of inappropriate behavior and drug use that occurred while holding SCI access.⁸ The record clearly establishes these two disqualifying conditions.

Applicant received partial credit in mitigation when applying two Mitigating Conditions under Guideline E. The third MC⁹ has applicability because of the length of time that has elapsed since Applicant's last documented incident in 2003. The fourth MC¹⁰ has applicability because Applicant accepts full responsibility for his behavior and points to life changes suggesting that he has turned a positive corner in his life. These, however, are not enough to overcome the years of substandard behavior beginning in 1996 when he was convicted of criminal mischief prompting his entry into the Army and culminating with his falsification of his SF 86 in 2003 seeking a security clearance.

I recognize many of the documented incidents discussed *supra* occurred when Applicant was relatively young. Individually, some of these incidents could potentially be overlooked due to passage of time. Collectively, they establish a troubling pattern that demonstrates Applicant engaged in behavior far below that expected of a person holding access to SCI. Applicant was held accountable on at least two occasions. The first occurred when he was arrested in 1996, prompting him to join the Army, and the second in 1998 when he was awarded nonjudicial punishment. Both of these events failed to make a sufficient impression on Applicant, and he continued engage in a substandard pattern of behavior spanning eight years.

⁶Revised Guidelines at 10-11 (setting forth the disqualifying and mitigating conditions).

⁷DC 16(a) is "deliberate . . . falsification of relevant facts from any personnel security questionnaire."

⁸DC 16(c) is "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."

⁹MC 17(c) ". . . so much time has passed . . . that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment."

¹⁰MC 17(d) "the individual has acknowledged 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."

I would like to accept Applicant's representation that he has turned around based on the fact he is a family man, a responsible employee, a home owner, and has reached an acceptable level of maturity. I am also confronted with the fact past behavior is the best predictor of future behavior. Most disconcerting is Applicant's conduct while he held to SCI. Having said that, if Applicant continues on his present course, he may well achieve a state of reform warranting favorable considerable consideration. Unfortunately, when weighing the record Applicant established, I am not convinced enough time has elapsed to demonstrate Applicant should be granted a security clearance.

Applicant also receives credit for accepting responsibility and I am impressed with his accomplishments in the Army and his post-Army accomplishments. Verification of being drug-free would have been helpful, especially in light of the number of drugs Applicant used. His egregious behavior while maintaining a security clearance in the Army weighed heavily against him in assessing his security eligibility under the "whole person" analysis. In short, Applicant failed when given the opportunity to decide between a right and wrong choice.

Based on the record evidence as a whole, Applicant presented insufficient evidence to explain, extenuate, or mitigate the personal conduct security concern. Likewise, he has not met his ultimate burden of persuasion to obtain a favorable clearance decision.

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"¹¹ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guideline. Applicant has not mitigated and overcome the government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

FORMAL FINDINGS

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| SOR ¶ 1 - Guideline E: | Against Applicant |
| Subparagraphs a - m: | Against Applicant |

DECISION

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

Robert J. Tuidier
Administrative Judge

¹¹See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).