

SYNOPSIS

In 1985, Applicant pleaded no contest to the felony offense of lewd and lascivious act in the presence of a child under the age of 16. The court withheld adjudication and sentenced Applicant as a first offender to three years of probation. As a result of the underlying conduct—having sexual intercourse and providing alcohol to a 14-year-old female client—Applicant was dismissed or terminated from his job as a state detention care worker. About 15 years later in 2000, he was caught shoplifting. He pleaded no contest and was fined. He gave false testimony about his 1985 criminal conduct during the security-clearance hearing. He has made multiple false statements about his background and conduct. Clearance is denied.

STATEMENT OF THE CASE

Applicant contests the Defense Department's intent to deny or revoke his eligibility for a security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on February 2, 2007. The SOR—which is equivalent to an administrative complaint—details the factual basis for the action and alleges security concerns under Guideline J for criminal conduct and Guideline E for personal conduct.

In addition to the Directive, this case is brought under the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines) approved by the President on December 29, 2005. The Revised Guidelines were then modified by the Defense Department, effective September 1, 2006. They supersede or replace the guidelines published in Enclosure 2 to the Directive. They apply to all adjudications and other determinations where an SOR has been issued on September 1, 2006, or thereafter.² The Directive is pending revision or amendment. The Revised Guidelines apply here because the SOR is dated after the effective date.

On March 12, 2007, Applicant replied to the SOR and requested a hearing. The hearing took place as scheduled on August 30, 2007, and the transcript was received on September 12, 2007.

RULINGS ON PROCEDURE

Department counsel moved to amend the SOR by adding to subparagraph 1.c under Guideline J (alleging a violation of 18 U.S.C. § 1001—making a false statement within the jurisdiction of a federal agency) and by adding three falsifications allegations (subparagraphs 2.e, 2.f, and 2.g) under Guideline E (Appellate Exhibit I). The motion was supported by the record evidence, Applicant had no objections, and the motion to amend was granted (R. 17–23, 42–43).

¹ Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).

² See Memorandum from the Under Secretary of Defense for Intelligence, dated August 30, 2006, Subject: Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005).

FINDINGS OF FACT

Under Guideline J, the SOR alleges Applicant pleaded no contest to criminal offenses in 1985 and 2000. Under Guideline E, the SOR alleges Applicant was dismissed from his job in 1985 due to the underlying criminal conduct. Also, the SOR alleges Applicant made false statements during interviews and when completing two security-clearance applications. Applicant does not dispute the criminal proceedings or the dismissal, but he denies making deliberately false statements. In addition, the following facts are established.

Applicant is a 46-year-old senior mail clerk who has worked for the same company or its subcontractor since 1986. His work involves handling the company's mail, which from time to time contains classified information. He is seeking to retain a security clearance previously granted to him by the Defense Department.

Applicant has never married. He is a high-school graduate and he has taken some college courses. He has a 14-year-old daughter whom he obtained custody of from the mother. The daughter lives with Applicant. In addition to his regular job, Applicant has worked as a high-school sports official for many years.

In 1985, Applicant pleaded no contest to the felony offense of lewd and lascivious act in the presence of a child under the age of 16 (Exhibits 3, 4, 5, 6, 8, and 9). The court withheld adjudication and sentenced Applicant as a first offender to three years of probation. The probation was supervised, and he completed it without a violation.

Applicant met the girl through his state public employment as a detention care worker at a juvenile detention center. As a result of the underlying conduct—having sexual intercourse and providing alcohol to a 14-year-old female client—Applicant was dismissed or terminated from his job as a state detention care worker (Exhibit 7).

During the criminal case in 1985, he initially denied having sexual intercourse with the girl. In time, he admitted having sexual intercourse with the girl at his home in February 1985, but he denied having intercourse with her at his home in May 1985 as she reported (Exhibits 4 and 5). During a Defense Department background investigation in 1986, he admitted having sexual intercourse with the girl at his home in February 1985 (Exhibit 13). He denied having sexual intercourse with her in May 1985.

In his hearing testimony, Applicant denied having sexual intercourse with the girl at any time (R. 61). He did not have a reasonable explanation for his change of story (*See* R. 62–72, 85). His denial was not credible.

In 1986, Applicant completed a security-clearance application for the Defense Department (Exhibit 2). In response to Question 14 about arrests, Applicant answered “yes” and described his 1985 arrest for lewd and lascivious act with a child resulting in three years of probation. In response to Question 15a about ever using any illegal drug, Applicant answered “no” when he knew he had tried marijuana in 1979 (Exhibit 12).

In 2000, he was caught and charged with shoplifting (retail theft) of a grocery item. He pleaded no contest and was fined \$155.

In 2004, Applicant completed another security-clearance application for the Defense Department (Exhibit 1). In response to Question 21 about ever having been charged with or convicted of any felony offense, Applicant answered “no.” He should have reported his 1985 criminal offense. In response to Question 26 about other offenses (not listed elsewhere) in the last seven years for which he had been arrested for, charged with, or convicted of, Applicant answered “no.” He should have reported his 2000 shoplifting offense. In response to Question 27 about illegal drug use, he reported a one-time use of marijuana in 1979.

GENERAL PRINCIPLES OF LAW AND POLICIES

No one has a right to a security clearance.³ As noted by the Supreme Court in *Department of Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁴ A favorable decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.⁵ An unfavorable decision: (1) denies any application; (2) revokes any existing security clearance; and (3) prevents access to classified information at any level and retention of any existing security clearance.⁶ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.⁷ The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.⁸ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.⁹ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁰ In *Egan*, the Supreme Court said that the burden of proof is less than the preponderance of the evidence.¹¹ The

³ *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) (“it should be obvious that no one has a ‘right’ to a security clearance”); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (“It is likewise plain that there is no ‘right’ to a security clearance, so that full-scale due process standards do not apply to cases such as *Duane*’s.”).

⁴ *Egan*, 484 U.S. at 531.

⁵ Directive, ¶ 3.2.

⁶ Directive, ¶ 3.2.

⁷ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

⁸ Directive, Enclosure 3, ¶ E3.1.14.

⁹ Directive, Enclosure 3, ¶ E3.1.15.

¹⁰ Directive, Enclosure 3, ¶ E3.1.15.

¹¹ *Egan*, 484 U.S. at 531.

agency appellate authority has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.¹²

The Revised Guidelines set forth adjudicative guidelines to consider when evaluating a person’s security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept. A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant’s loyalty.¹³ Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

CONCLUSIONS

Personal conduct under Guideline E¹⁴ includes issues of false statements and credible adverse information that may not be enough to support action under any other guideline. In particular, a security concern may arise due to “[c]onduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations [that may] 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.”¹⁵

SOR subparagraph 2.a concerns Applicant’s 1985 dismissal from his state public employment due to his criminal misconduct with the girl. This matter does not fall within a disqualifying condition under Guideline E. On this basis, a favorable finding will be made on this subparagraph. But this matter is considered under Guideline J as a consequence of his 1985 criminal conduct.

The SOR alleges that Applicant made six false statements (one to the police department in 1985 and five to the Defense Department in 1986, 2004, and 2005). Applicant contends his statements were not deliberately false. Given the record evidence, the multiple allegations will be treated collectively instead of analyzing each falsification allegation individually.

The doctrine of *falsus in uno, falsus in omnibus* (false in one thing, false in everything) should be considered in assessing Applicant’s credibility. In his hearing testimony, Applicant lied when he contradicted prior statements wherein he admitted having sexual intercourse with the girl in February 1985. Because his testimony on this key fact is not credible, his attempts to refute and

¹² ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

¹³ Executive Order 10865, § 7.

¹⁴ Revised Guidelines at 10–12 (setting forth the disqualifying and mitigating conditions).

¹⁵ Revised Guidelines at 10.

rebut the six falsification allegations are likewise not credible. In short, Applicant's testimony on these points has no credibility whatsoever. On this basis, the record evidence is sufficient to prove Applicant made deliberately false statements as alleged in the SOR. Accordingly, the record evidence is sufficient to conclude that both DC 1¹⁶ and DC 2¹⁷ apply against Applicant.

All of the mitigating conditions under Guideline E have been considered and none apply in Applicant's favor. His deliberately false hearing testimony precludes any credit in extenuation or mitigation.

Under Guideline J for criminal conduct,¹⁸ the security concern is that "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."¹⁹

The record evidence supports a conclusion that Applicant has a history of criminal conduct stemming from his felony offense in 1985 and his misdemeanor offense in 2000. In addition, Applicant committed criminal conduct when he made deliberately false statements to the Defense Department in violation of 18 U.S.C. § 1001, which is a federal criminal statute. Given these circumstances, both DC 1²⁰ and DC 3²¹ apply against Applicant.

All of the MCs under the guideline have been considered and none apply. His deliberately false hearing testimony militates against a conclusion of reform and rehabilitation.

To conclude, Applicant's favorable evidence (*See* Exhibits A, B, and C) is not sufficient to rebut, explain, extenuate, or mitigate the cumulative effect of his criminal conduct and false statements. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, the whole-person concept was given due consideration and that analysis does not support a favorable decision for Applicant.

¹⁶ DC 1 is "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."

¹⁷ DC 2 is "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative."

¹⁸ Revised Guidelines at 21–22 (setting forth the disqualifying and mitigating conditions).

¹⁹ Revised Guidelines at 21.

²⁰ DC 1 is "a single serious crime or multiple lesser offenses."

²¹ DC 3 is "allegations or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted."

FORMAL FINDINGS

_____ SOR ¶ 1–Guideline J:	Against Applicant
Subparagraphs a–c:	Against Applicant
SOR ¶ 2–Guideline E:	Against Applicant
Subparagraph a:	For Applicant
Subparagraphs b–g:	Against Applicant

DECISION _____

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

Michael H. Leonard
Administrative Judge