

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant has failed to mitigate four falsifications on his SF 86 pertaining to his criminal record, marijuana use, and a tax lien. Although his forgery conviction and firearms arrest occurred over 12 years ago, his falsifications constitute recent criminal conduct as well as raising personal conduct concerns. Clearance is denied.

CASENO: 02-08992.h1

DATE: 04/29/2005

DATE: April 29, 2005

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 02-08992

**DECISION OF ADMINISTRATIVE JUDGE**

**ROGER E. WILLMETH**

**APPEARANCES**

**FOR GOVERNMENT**

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant has failed to mitigate four falsifications on his SF 86 pertaining to his criminal record, marijuana use, and a tax lien. Although his forgery conviction and firearms arrest occurred over 12 years ago, his falsifications constitute recent criminal conduct as well as raising personal conduct concerns. Clearance is denied.

**STATEMENT OF THE CASE**

On December 22, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to the applicable Executive Order [\(1\)](#) and Department of Defense Directive, [\(2\)](#) issued a Statement Reasons (SOR) to Applicant. The SOR details security concerns under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). The SOR states that DOHA was unable to find that it is clearly consistent with the national interest to grant him access to classified information and recommends that his case be submitted to an Administrative Judge.

On January 16, 2004, Applicant answered the SOR and requested a hearing. The case was assigned to me on May 4, 2004. A notice of hearing was issued on July 8, 2004, and the hearing was held on July 27, 2004. During the hearing, eight Government exhibits (Govt Ex) and the testimony of Applicant were received. Without objection by Department Counsel, I allowed Applicant until August 17, 2004 to submit additional evidence. Applicant did not provide additional evidence. The transcript (Tr) was received on August 10, 2004.

## PROCEDURAL ISSUES

At the close of the evidentiary portion of the hearing, Department Counsel moved to amend the SOR. Department Counsel requested that SOR ¶ 2.a be amended to reference question 22, not 21, of the SF 86. I grant that amendment because it conforms to the evidence in the record.

Department Counsel also requested ¶ 2.e be added to the SOR to allege Applicant falsified his answer to question 39 of the SF 86 by not disclosing his tax lien. Although the record establishes that a tax lien was filed against Applicant, it is not clear from the record whether the tax lien was still outstanding at the time Applicant submitted the SF 86. Therefore, I deny that amendment.

## FINDINGS OF FACT

Having thoroughly considered the evidence in the record, I make the following findings of fact:

Applicant is a 32-year-old installation technician employed by a defense contractor. He is seeking a security clearance.

On June 26, 1992, Applicant was arrested and charged with forgery of private documents, a felony, following an unsuccessful attempt to forge a check at a bank. On August 6, 1992<sup>(3)</sup>, he pled guilty and was sentenced to probation for one year and ordered to pay a fine and costs of approximately \$150.00. (SOR ¶ 1.b.)

On July 5, 1992, Applicant was arrested and charged with carrying a pistol without a license. The charge was dismissed on August 18, 1992. (SOR ¶ 1.a.)

On October 21, 1997, a state tax lien in the amount of \$1,354.00 was filed against Applicant. (SOR ¶ 2.d.) There is no evidence of record as to whether the lien was satisfied and, if so, when the lien was satisfied.

In July and or August 1998, Applicant used marijuana on two occasions. (SOR ¶ 1.c.)

On November 16, 1998, Applicant executed a security clearance application (SF 86). In response to question 21,<sup>(4)</sup> he answered, "no." He failed to disclose that he had been charged with a felony in June 1992. (SOR ¶ 2.b.)

In response to question 22<sup>(5)</sup> on the same SF 86, Applicant answered, "no." He failed to disclose he had been charged with a firearms offense in July 1992. (SOR ¶ 2.a.)

In response to question 27<sup>(6)</sup> on the same SF 86, Applicant answered, "no." He failed to disclose he had used marijuana as recently as August 1998. (SOR ¶ 2.c.)

In response to question 36<sup>(7)</sup> on the same SF 86, Applicant answered, "no." He failed to disclose he had a state tax lien filed against him on October 21, 1997. (SOR ¶ 2.d.)

On February 13, 2002, Applicant was interviewed by a special agent of the Defense Security Service (DSS) and provided a sworn statement. He admitted his criminal arrests addressed by SOR ¶ 2.a and 2.b. He also admitted he had used marijuana on a couple of occasions "in the Jul/Aug 98 time frame."

## POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander-in-Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information Within Industry* § 2 (February 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions and mitigating conditions for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the conditions listed in the Directive's guidelines and the applicant's security worthiness. *See* ISCR Case No. 95-0611 at 2 (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. ISCR Case No. 01-20700 at 3 (December 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3. Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of national security. Directive ¶ E2.2.2.

## CONCLUSIONS

### Guideline E: Personal Conduct

The concern under Guideline E is conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. ¶ E2.A5.1.1. Conditions that could raise a security concern and may be disqualifying under Guideline E include ¶ E2.A5.1.2.2 (Disqualifying Condition 2). Disqualifying Condition 2 addresses *the deliberate omission, concealment, or falsification of relevant and material 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.*

The record reveals that Applicant provided false answers to four separate questions on his SF 86. This establishes Disqualifying Condition 2.

Applicant has failed to mitigate the security concern raised by his false answers on his SF 86. In his answer to the SOR, he said he did not know why he failed to report his forgery conviction. Applicant testified he was not aware that his forgery conviction was for a felony. His explanation would be credible had he disclosed his conviction in response to question 26 of the SF 86.<sup>(8)</sup> However, Applicant answered, "no," to that question as well. He has also failed to mitigate his failure to disclose being charged for a firearms offense. In this case, Applicant attempted to emphasize the disposition of the case dismissal rather than addressing how he could have omitted the information from his SF 86.

Applicant said in his answer that he never had a tax lien placed against him. He testified he was unaware of the tax lien he failed to report because he had not checked his credit report. Applicant's statements concerning his marijuana use are difficult to reconcile. He testified he may not have known the substance he smoked the summer before he submitted his SF 86 was marijuana. His sworn statement to a DSS investigator reflects no such uncertainty. In addition, his answer to the SOR acknowledges that it was not until his second interview by a DSS investigator that he admitted his marijuana use.

When the record establishes a disqualifying condition, an applicant has the burden of mitigating it. Applicant's inconsistent explanations for multiple false answers on his SF 86 fails to satisfy his burden. Therefore, I find against Applicant with regard to SOR ¶ 2.

#### Guideline J: Criminal Conduct

The concern under Guideline J is that a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. The Directive ¶ E2.A10.1.1. Conditions that could raise a security concern and may be disqualifying under Guideline J include ¶ E2.A10.1.2.1 (Disqualifying Condition 1), *allegations or admission of criminal conduct, regardless of whether the person was formally charged*. They also include ¶ E2.A10.1.2.2 (Disqualifying Condition 2), *a single serious crime or multiple lesser offenses*. Applicant's conviction for forgery, arrest for a firearms offense, and falsifications on his SF 86 raise both Disqualifying Condition 1 and Disqualifying Condition 2.

Mitigating conditions include ¶ E2.A10.1.3.1 (Mitigating Condition 1), *the criminal behavior was not recent*. Applicant's forgery conviction and firearms charge occurred over 12 years ago. He was still a teenager at the time of the offenses. Therefore, these offenses are mitigated in accordance with Mitigating Condition 1. I find in favor of Applicant with regard to SOR ¶ 1.a. and 1.b.

Based on the record, however, Applicant knowingly and willfully committed multiple falsifications on his SF 86. His actions constitute violations of 18 U.S.C. 1001. Applicant's actions are not mitigated in accordance with Mitigating

Condition because they were recent. Moreover, none of the other conditions that could mitigate a security concern under Guideline J are applicable. Applicant has engaged in multiple offenses.<sup>(9)</sup> There is no evidence of pressure or coercion.<sup>(10)</sup> There is also no evidence Applicant did not voluntarily commit the offenses<sup>(11)</sup> or of *acquittal*.<sup>(12)</sup> Therefore, I find against Applicant with regard to SOR ¶ 1.c.

## FORMAL FINDINGS

Formal findings, as required by section E3.1.25 of Enclosure 3 of the Directive, are as follows:

### Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: Against Applicant

### Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: Against Applicant

Subparagraph 2.d: Against Applicant

## DECISION

In light of the evidence of 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.

*Signed*

**Roger E. Willmeth**

**Administrative Judge**

1. Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified.
3. See Govt Ex 5 for actual date of sentencing.
4. "Have you ever been charged with or convicted of any felony offense?"
5. "Have you ever been charged with or convicted of a firearms or explosives offense?"
6. "Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.) or prescription drugs?"
7. "In the last 7 years, have you had a lien placed against your property for failing to pay taxes or other debts?"
8. "In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25?"
9. ¶ E2A10.1.3.2, *the crime was an isolated incident* (Mitigating Condition 2).
10. ¶ E2A10.1.3.3, *the person was pressured or coerced into committing the act and those pressures are no longer present in that person's life* (Mitigating Condition 3).
11. ¶ E2A10.1.3.4, *the person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur* (Mitigating Condition 4).
12. ¶ E2A10.1.3.5 (Mitigating Condition 5).