

DATE: June 8, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-28562

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Juan J. Rivera, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

While in the Army, Applicant was arrested for driving under the influence (DUI) in 1990, and used cocaine once in 2000. He tested positive for cocaine through urinalysis and was punished through an Article 15 hearing in December 2000. In his most recent security clearance questionnaire, Applicant listed his DUI and one-time drug use, but deliberately omitted his Article 15 punishment. He has failed to mitigate security concerns under Guideline E (personal conduct), and, because his falsification violates federal law, Guideline J (criminal conduct). Clearance is denied.

STATEMENT OF THE CASE

After reviewing the results of Applicant's background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding⁽¹⁾ it is clearly consistent with the national interest to give Applicant a security clearance. On February 12, 2004, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed in the Directive under Guideline E (personal conduct) and Guideline J (criminal conduct). Applicant timely answered the SOR (Answer), denied all but one of the five⁽²⁾ SOR allegations, and requested a hearing.

The case was assigned to me on September 7, 2004, and I convened a hearing October 20, 2004. The parties appeared as scheduled and the government presented seven exhibits (GE 1 through 7), which were admitted without objection. Applicant testified in his own behalf and presented eight exhibits (AE A through H), all of which were admitted. DOHA received the transcript (Tr) on November 3, 2004.

FINDINGS OF FACT

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant is 44 years old and employed by a defense contractor as an engineer. After retiring from the Army as a Sergeant First Class (paygrade E-7) in May 2001, Applicant was hired to work in an unclassified setting. When his

company was later purchased by a large, nationally-known defense contractor, he was asked to apply for a security clearance so he would be available for work on classified contracts. Applicant had submitted a security clearance application (SF 86) in October 2000, while he was still in the Army.⁽³⁾ However, when he retired seven months later, the processing of that request for clearance apparently ended. He submitted a new SF 86 in March 2002.⁽⁴⁾

Applicant received a bachelor's degree in computer science in 2000, and has completed all requirements for his master's degree except for the final certification. He studied for these degrees while in the Army and while working full time after his retirement, and has maintained a 3.0 grade point average throughout. He and his wife have been married for more than 20 years and have two teenage children. In the civilian workplace, Applicant has established a solid record of performance and reliability.⁽⁵⁾

Applicant was arrested for DUI in 1990 after attending a party celebrating his own promotion as well as that of some of his fellow soldiers. He was pulled over on the way home for making an illegal turn and was found to be legally intoxicated with a blood alcohol content of .11%. He eventually pled guilty to a lesser charge of reckless driving, received a suspended 12 month jail sentence, and was assessed a \$1,500 fine. Applicant also lost his on-base driving privileges for one year after his command was notified of this offense. (SOR ¶1.a)

Applicant served 22 years in the Army. When he retired, he was a senior non-commissioned officer (NCO) with such qualifications as drill instructor and battalion master gunner. He had also completed the senior enlisted course and his last assignment was as the NCO-in-charge (NCOIC) at a major command regimental headquarters, a leadership position in which he attended to the management of enlisted personnel and acted as liaison between the troops and the chain of command. Among his many assigned duties was the management of disciplinary actions when required; for example, he was experienced in processing charges for non-judicial punishment as outlined in the Uniform Code of Military Justice (UCMJ) Article 15.⁽⁶⁾

Applicant did not plan to retire when he did. However, he was charged with and convicted of wrongful possession of cocaine and wrongful use of cocaine. His case was disposed of at an Article 15 hearing and Applicant was ordered to forfeit one-half of his monthly pay for two months, was restricted to the base for 45 days and assigned extra duty for 45 days. Applicant was allowed to retain his rank and to retire at the end of his enlistment in May 2001. (SOR ¶1.b)

Applicant claims he only used cocaine once. In October 2000, Applicant was in town running errands and was approached by a man he knew to be an acquaintance of his brother-in-law. The man asked Applicant for a ride home and, along the way, offered Applicant a glass pipe used for smoking cocaine. Applicant claims he did not know exactly what was in the pipe, only that it was a drug of some kind. He tried only one taste of the drug. A few days later, Applicant was subjected to a random drug screening through urinalysis. His results were positive for cocaine, and the aforementioned disciplinary measures were taken.

When Applicant submitted his first SF 86 in October 2000, he listed his 1990 arrest for DUI, but did not list his drug use or his Article 15 hearing, ostensibly because they had not yet occurred. However, when he submitted a new SF 86 in March 2002, he again listed his 1990 DUI arrest. He also disclosed a one time use of cocaine in October 1990. He did not list the fact he was charged by the Army with two UCMJ violations. In response to the government's allegation he deliberately falsified his March 2002 SF 86 (SOR ¶¶2.a and 2.b), Applicant alternatively claims he did not understand the applicable questions,⁽⁷⁾ and that he did disclose his UCMJ prosecution, but either his company's security office mishandled his electronically submitted questionnaire or the Defense Security Service (DSS) somehow altered his submission.⁽⁸⁾ I specifically find there is no support in this record for his claim of error by either DSS or company security based on the information Applicant has presented in support of his claims.⁽⁹⁾

POLICIES

The Directive sets forth adjudicative guidelines⁽¹⁰⁾ for consideration when evaluating an Applicant's suitability for access to classified information. Security clearance decisions must reflect consideration of both disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the

Directive. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having considered the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are Guideline E (personal conduct) and Guideline J (criminal conduct).

BURDEN OF PROOF

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁽¹¹⁾ for an Applicant to either receive or continue to have access to classified information. The government bears the initial burden of proving, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If the government meets its burden it establishes a *prima facie* case that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden then shifts to the Applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, the Applicant bears a heavy burden of persuasion.⁽¹²⁾ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.⁽¹³⁾

CONCLUSIONS

Under Guideline E, a security concern arises where it is shown an applicant has exhibited questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Such conduct may indicate the person may not properly safeguard classified information.⁽¹⁴⁾ Here, the government questions Applicant's trustworthiness because it appears he deliberately omitted from his SF 86 facts about his arrest record. While he properly disclosed his 1990 DUI and his October 2000 drug use in his most recent SF 86, he should also have listed his December 2000 Article 15 prosecution in response to question 25, which specifically addresses military criminal matters. At the very least, he should have listed it (along with his 1990 DUI) in response to question 24 as it was a drug-related offense.

For Applicant's omissions from his SF 86 to be disqualifying, they must have been a deliberate attempt to mislead the government. Simple error due to forgetfulness or inability to understand the question asked does not present a security concern. Applicant has testified he misunderstood or misread the question; however, as a senior NCO with more than 20 years of service, I do not accept his explanations as they pertain to question 25. He had direct experience in administering Article 15 and other disciplinary actions while in leadership positions in the Army. Applicant also acknowledged he agreed to accept the Article 15 punishment and retire rather than face a special court martial. It is simply not plausible, therefore, that Applicant did not understand what was expected of him in response to that question. As for his response to question 24, his failure to list the Article 15 proceedings in response thereto only further supports a conclusion he intended to withhold this information from the government.

In light of the foregoing, the government has established a *prima facie* case for disqualification based on Applicant's personal conduct. Applicant deliberately omitted relevant information from his SF 86. Accordingly, Guideline E disqualifying condition (DC) 2⁽¹⁵⁾ applies. By contrast, the information Applicant has submitted is not sufficient to support application of any of the listed mitigating conditions (MC) under Guideline E. I conclude this guideline against the Applicant.

Criminal conduct, as addressed under Guideline J, is a security concern because it may indicate an unwillingness to abide by rules and regulations, and may show the applicant to be lacking in reliability and trustworthiness.⁽¹⁶⁾ Here, the government has established a *prima facie* case for disqualification by showing that Applicant was arrested for DUI in 1990 and that he was prosecuted under the UCMJ for drug-related offenses. The government has also established that Applicant deliberately falsified his SF 86, which is a violation of federal law.⁽¹⁷⁾ (SOR ¶1.c) Guideline J DC 1⁽¹⁸⁾ and DC 2⁽¹⁹⁾ apply. Standing alone, the DUI and the drug offenses might be mitigated by the passage of time, and would no

longer be of security significance. However, his 2002 falsification, a violation of federal law, adds to a history of criminal conduct and sustains the government's concerns about Applicant's willingness to follow rules and regulations for protecting classified information. Further, the record does not support application of any of the Guideline J mitigating conditions, and I conclude this guideline against the Applicant.

I have carefully weighed all of the available evidence, and I have applied the appropriate disqualifying and mitigating conditions. Further, I have tried to make a fair and commonsense assessment of the record before me as required by Directive Section E2.2.3. I have specifically considered Applicant's accomplishments as a career soldier, as a student, and as a defense contractor employee, all of which work in his favor. However, not only has Applicant failed to satisfactorily explain why he omitted important background information from his March 2002 SF 86, he has attempted to obfuscate the issue with unsubstantiated and convoluted claims that it was someone else's fault. Accordingly, reasonable doubts persist about his ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. Given the record before me, I cannot conclude Applicant has overcome the government's case.

FORMAL FINDINGS

Formal findings regarding each SOR allegation are as follows:

Paragraph 1, Guideline J (Criminal Conduct): AGAINST THE APPLICANT

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

Subparagraph 1.c: Against the Applicant

Paragraph 2, Guideline E (Personal Conduct): AGAINST THE APPLICANT

Subparagraph 2.a: Against the Applicant

Subparagraph 2.a: Against the Applicant

DECISION

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 a security clearance for the Applicant. Clearance is denied.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. Applicant admitted the allegation in SOR ¶1.a. that he was arrested in February 1990 for driving under the influence (DUI) of alcohol.
3. AE A.
4. GE 1.
5. AE F and AE G.
6. Tr., p. 39 - 41.
7. SOR ¶2.a alleges a falsification of SF 86 question "24. Your Police Record - Alcohol/Drug Offenses. Have you ever

been charged with or convicted of any offense(s) related to alcohol or drugs? For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the 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." SOR ¶2.b alleges a falsification of SF 86 question "25. Your Police Record - ilitary Court. In the last 7 years, have you been subject to court martial or other disciplinary proceedings under the Uniform Code of Military Justice? (Include non-judicial, Captain's mast, etc.) For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the 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."

8. Applicant's somewhat convoluted explanation may be found at Tr., p. 36 - 38.

9. In addition to his testimony, Applicant submitted AE A and AE B to address this issue.

10. Directive, Enclosure 2.

11. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).

12. *See Egan*, 484 U.S. at 528, 531.

13. *See Egan*; Directive E2.2.2.

14. Directive, E2.A5.1.1.

15. Directive, E2.A5.1.2.2. 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; (emphasis added)

16. Directive, E2.A10.1.1.

17. 18 U.S.C. §1001.

18. Directive, E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;

19. Directive, E2.A10.1.2.2. A single serious crime or multiple lesser offenses.