

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant was charged with various minor crimes between 1994 and 1998. He omitted some of the arrests from his March 2002 security questionnaire (SF 86). Applicant also falsely stated in that SF 86 and on a resume he gave his employer that he holds a masters degree. The record supports a finding that Applicant's omissions were deliberate falsifications. As such, they were also in violation of §18 U.S.C. 1001. Clearance is denied.

CASENO: 02-30080.h1

DATE: 05/05/2005

DATE: May 5, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-30080

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Jason Perry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was charged with various minor crimes between 1994 and 1998. He omitted some of the arrests from his March 2002 security questionnaire (SF 86). Applicant also falsely stated in that SF 86 and on a resume he gave his employer that he holds a masters degree. The record supports a finding that Applicant's omissions were deliberate falsifications. As such, they were also in violation of §18 U.S.C. 1001. Clearance is denied.

STATEMENT OF THE CASE

Having reviewed 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 August 19, 2004, in accordance with DoD Directive 5220.6, as amended (Directive), DOHA issued to Applicant a Statement of Reasons (SOR)⁽²⁾ alleging facts that raise security concerns addressed in the Directive under Guideline E (personal conduct) and Guideline J (criminal conduct). On September 15, 2004, Applicant answered the SOR (Answer), denied all the allegations except for ¶1.e and ¶2.d, and requested his case be decided without a hearing.⁽³⁾

DOHA Department Counsel submitted a file of relevant materials (FORM) in support of the government's preliminary decision, a copy of which Applicant received on November 15, 2004. Applicant did not timely respond to the FORM, and the case was assigned to me on December 20, 2004.

FINDINGS OF FACT

Applicant's aforementioned admissions are incorporated herein as facts. After a thorough review of the pleadings and exhibits, I make the following additional findings of fact:

Applicant is 31 years old and employed by a defense contractor as a mechanical engineer. He graduated in 1992 from a major university with a BS in mechanical engineering. Thereafter, he enrolled at the same university to obtain a MS in architecture, but has yet to actually receive that degree pending completion of his thesis.

On August 11, 1994, Applicant was charged with underage possession of alcohol. He was at a stock car race where he was seen by police as he and a friend were drinking beer; unfortunately, Applicant did not have on a wristband issued to persons age 21 and older. He was ticketed for this offense and fined \$50.

On May 23, 1995, Applicant was arrested and spent a night in jail on a charge of being drunk in public. He appeared in court in October 1995 and was found guilty, fined, and ordered to perform community service.

On September 10, 1995, Applicant was charged with public intoxication after having consumed about six beers. He and a friend who was also arrested were transported to police headquarters. At his court date the following month, Applicant pled guilty, was fined, and was ordered to perform community service. He satisfactorily completed his sentencing requirements on December 5, 1995.

On October 12, 1996, Applicant was charged with providing false identification to another. He had let his younger brother use his driver's license to buy beer illegally. This charge was made in connection with another charge of drinking in public. Police saw Applicant and his brother drinking in the parking lot at a football game. When asked for identification, Applicant's brother produced Applicant's license. Applicant was found guilty of both charges and fined.

On October 10, 1998, Applicant and a friend found a discarded street sign and were carrying it back to their house when a policeman saw them. They put it down and were walking away from it when the officer stopped them and asked where it had come from. After initially denying knowing anything about the sign, Applicant admitted to picking it up and acknowledged it was a stupid thing to do. Applicant and his friend were issued summons' to appear in court the following week. They were found guilty of misdemeanor possession of stolen property, fined, and ordered to perform 250 hours of community service. After completing the terms of his sentence, the charge was dismissed.

Applicant submitted an SF 86 on March 1, 2002. In response to question 24, which asked about drug- or alcohol-related offenses, Applicant listed an October 1995 arrest for being drunk in public. The actual arrest to which he was referring

could either be the May 1995 arrest or the September 1995 arrest. He did not disclose any of his other alcohol-related arrests.

In response to question 26 of the same SF 86, which asked Applicant to list other arrests not addressed elsewhere in the form, Applicant listed the October 1996 charge of providing false identification to another. He did not list the October 1998 misdemeanor possession of stolen property charge.

When he listed his educational background in response to question 5 of the SF 86, Applicant listed his high school diploma and his BS in mechanical engineering awarded in 1996. He also listed that he studied between 1997 and 1999 for an MS in architecture. He left the award date blank and has acknowledged he has not yet completed all the degree requirements. However, when he submitted a resume to his current employer, he represented that he had received an MS in architecture in 1999.

Applicant was interviewed by an agent of the Defense Security Service (DSS) on September 30, 2003. Subsequently, he submitted two signed, sworn statements in which he discussed the aforementioned arrests and his omissions of some of them from his SF 86. He claimed therein to have forgotten the August 1994 charge. Applicant further stated he thought he did not have to disclose the October 1998 stolen property charge because it was "sealed" after he completed the terms of his sentence. There is no indication in the file that this charge or its disposition were "sealed."

The SOR alleges in ¶1.c that Appellant deliberately omitted his August 1994, September 1995, and October 1996 arrests / citations during a March 2002 subject interview. In the first signed, sworn statement after his September 2003 interview, Applicant alluded to "a first interview" and claimed he forgot the August 1994 citation until confronted with the record of that arrest by the DSS agent in the latter interview. There is no other mention of having omitted the other arrests during the first interview; nor is there any documentation available about when "the first interview" was conducted or what was discussed.

Applicant successfully completed a rigorous curriculum at a demanding engineering school to complete his mechanical engineering degree. In pursuit of his masters degree at the same university, Applicant achieved a 3.68 grade point average.

POLICIES

The Directive sets forth adjudicative guidelines⁽⁴⁾ to be considered in evaluating an Applicant's suitability for access to classified information. The Administrative Judge must take into account 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 SOR allegations and having reviewed the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are those conditions listed in the Directive under 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⁽⁵⁾ 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.⁽⁶⁾

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.⁽⁷⁾

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.⁽⁸⁾ Here, the government questions Applicant's trustworthiness because it appears he has deliberately omitted several of his arrests from his SF 86. The

government also alleges Applicant deliberately falsified his SF 86 and a resume by representing he had earned a masters degree when, in fact, he had not.

In response to SOR ¶1.a and ¶1.b, Applicant claims he either forgot about the arrests, thought he did not have to list one of them because it had been "sealed," or did not think he had to list something for which he was not physically detained. As to the issue of whether he was physically detained, Applicant was taken into custody twice - when arrested in May 1995 and in September 1995. Of the two arrests Applicant listed in the SF 86, he listed one for which he was taken into custody and one for which he was merely issued a summons. Regarding his assertion that he did not have to list an arrest (SOR ¶1.b[1]) because he thought it was "sealed," the language of the SF 86 question makes clear that even though an arrest is sealed it must be listed. Further, the charge in question was dismissed, not sealed, after Applicant completed his community service and paid his fine. By the language of the question, Applicant was still obliged to list the charge even though it was eventually dismissed. He was also required to list the other charges that fell within the scope of SF 86 questions 24 and 26.

Generally, a falsification must be deliberate to be disqualifying. Were this a case where Applicant had omitted an arrest because he forgot about it, as he claims relevant to SOR ¶1.a(1), then it might be said he lacked the requisite intent to mislead or deceive. However, Applicant's position with respect to his omissions of arrests from his SF 86 is untenable. He cannot claim he did not list charges because he was not "actually arrested" because he actually listed one arrest for which he was issued a summons. Nor, as already discussed, can he claim he thought one arrest was "sealed." Even allowing that he may have forgotten the August 1994 arrest, the record as a whole supports the SOR allegations in ¶1.a [\(9\)](#) and ¶1.b; that is, I conclude he deliberately omitted the other arrests from his SF 86.

As to the allegations concerning whether he had a masters degree, the fact Applicant left the award date blank in his response to SF 86 question 5 might suffice to show he did not attempt to mislead the government in this regard. However, through the resume he gave his employer, he deliberately held himself out as having a masters degree so that he could get a job. Not only is this a deliberate falsification for personal gain, it undermines his claim with respect to his question 5 answer by suggesting he intended to falsify to the government his educational background. Again, the record as a whole supports the SOR allegations in ¶1.d and ¶1.e.

There is insufficient support in the record, however, for the allegation in SOR ¶1.c. Without more information about the content and circumstances of an earlier subject interview, [\(10\)](#) it is difficult to reasonably conclude that Applicant deliberately withheld or falsified information as alleged. I conclude the government has failed to adequately document this allegation. Nonetheless, the government has established a *prima facie* case for disqualification under Guideline E. Specifically, disqualifying condition (DC) 2 [\(11\)](#) and DC 5 [\(12\)](#) apply here. As already discussed, Applicant's response to all but one of the allegations in SOR 1 is insufficient to mitigate the security concerns arising from these facts. Accordingly, I conclude Guideline E against the Applicant.

The security concern under Guideline J is that someone who willingly disregards the law may also disregard rules and procedures intended to safeguard classified information. Applicant's criminal conduct between 1994 and 1998, without

more would not be disqualifying. He has had no similar problems with law enforcement since he was 24 years old. However, he is now 31 years old and his deliberate falsification of his SF 86 is a violation of 18 U.S.C. §1001, in light of the record as a whole, perpetuates the government's concerns about Applicant's willingness to disregard the law. The government has established a *prima facie* case for disqualification as Guideline J DC 1 [\(13\)](#) and DC 2 [\(14\)](#) apply here. By contrast, none of the listed mitigating conditions apply. The deliberate falsifications in violation of federal law preclude a finding his conduct was not recent; the criminal conduct is multiple in nature, so it cannot be deemed isolated; Applicant did not engage in any of the conduct in question unwillingly or under duress; and he has provided little information to suggest he now sufficiently appreciates the import of his conduct. On balance, I conclude Guideline J 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. This record raises reasonable doubts about Applicant's ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. Doubts persist about Applicant's judgment and reliability. Absent substantial information to mitigate these doubts, which Applicant failed to provide, I cannot conclude he has overcome the government's case.

FORMAL FINDINGS

Formal findings regarding each SOR allegation are as follows:

Paragraph 1, Guideline E (Personal Conduct): AGAINST THE APPLICANT

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

Subparagraph 1.c: For the Applicant

Subparagraph 1.d: Against the Applicant

Subparagraph 1.e: Against the Applicant

Paragraph 2, Guideline J (Criminal Conduct): AGAINST THE APPLICANT

Subparagraph 2.a: Against the Applicant

Subparagraph 2.b: Against the Applicant

Subparagraph 2.c: Against the Applicant

Subparagraph 2.d: 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. Item 1.
3. Item 3.
4. Directive, Enclosure 2.
5. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
6. *See Egan*, 484 U.S. at 528, 531.
7. *See Egan*; Directive E2.2.2.
8. Directive, E2.A5.1.1.
9. With the exception of SOR 1.a(2), which Department Counsel acknowledges Applicant disclosed, albeit with the wrong date.
10. Indeed, there is little substantive discussion of this allegation in the FORM and no direct documentation of an earlier interview attached to the FORM.
11. 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;
12. Directive, E2.A5.1.2.5. A pattern of dishonesty or rule violations, including violation of any written or recorded

agreement made between the individual and the agency;

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

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