

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: In November 1985, Applicant intentionally falsified an employment application by claiming he received a technical college and a university degree; he also intentionally furnished false information in the application to support a reasonable conclusion he had in fact received the degrees when he had not. The discovery of this false information in April/May 1988 prompted his immediate resignation in lieu of termination from his employer. While Applicant continues to deny that he falsified parts of his November 1985 application as well as his May 1988 resignation in lieu of termination from a subsequent employment application, his explanations for the denials are not credible. Although the positive evidence of Applicant's job performance over the years provides significant weight in his favor, it does not overcome the intentional falsifications under the personal conduct guideline or the whole person concept. Clearance is denied.

CASENO: 02-22421.h1

DATE: 01/26/2006

DATE: January 26, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-22421

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Gary L. Rigney, Esq.

SYNOPSIS

In November 1985, Applicant intentionally falsified an employment application by claiming he received a technical college and a university degree; he also intentionally furnished false information in the application to support a reasonable conclusion he had in fact received the degrees when he had not. The discovery of this false information in April/May 1988 prompted his immediate resignation in lieu of termination from his employer. While Applicant continues to deny that he falsified parts of his November 1985 application as well as his May 1988 resignation in lieu of termination from a subsequent employment application, his explanations for the denials are not credible. Although the positive evidence of Applicant's job performance over the years provides significant weight in his favor, it does not overcome the intentional falsifications under the personal conduct guideline or the whole person concept. Clearance is denied.

STATEMENT OF CASE

On November 17, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6, dated January 2, 1992, as reissued through Change 4 thereto, dated April 20, 1999, issued a Statement of Reasons (SOR) to the Applicant which 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 Applicant. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. On August 22, 2004, Applicant responded to the SOR and requested a hearing before an Administrative Judge.

On April 22, 2005, this case was assigned to me. On June 14, 2005, this case was scheduled for hearing on June 30, 2005. The Government submitted 21 exhibits (GE), and Applicant submitted 11 exhibits (AE) that have been admitted in evidence. Testimony was taken from Applicant and six witnesses. The transcript (Tr.) was received on July 19, 2005.

FINDINGS OF FACT

The SOR alleges criminal conduct and personal conduct. Applicant denied he had been found in contempt of court (subparagraph 1.a.) and admitted the five other allegations under paragraph 1. He denied all allegations under personal conduct. Applicant is 42 years old and has been employed as a chief scientist with a defense contractor since January 2005. He seeks a secret level security clearance.

Criminal Conduct.

Subparagraph 1.a. alleges Applicant was found in contempt of court on July 30, 2002. In view of the lack of evidence to support this allegation, including Applicant's denial (Tr. 85), a finding in Applicant's favor is warranted. A temporary restraining, protective order (subparagraph 1.b.) was filed against Applicant on June 28, 2002. The order was dismissed on November 5, 2002 with Applicant and his former wife agreeing on visitation, custody, and support rights. The parties also agreed the petition for protection from domestic abuse (subparagraph 1.c., filed June 14, 2002) ⁽¹⁾ be dismissed (GE 16, 17, 18). Before the hearing concerning the domestic abuse petition, Applicant was considered by the investigator of human resources department to be the responsible parent to protect his children because "there are no indicated reports on this father, and he has cooperated with [human resources department] and law enforcement." (AE K) ⁽²⁾

Subparagraph 1.d. describes an arrest of Applicant on December 15, 1984 for aggravated assault with a gun, felony. For unexplained reasons, the charge became sexual abuse of a child. The charges were dismissed with prejudice based on Applicant's successful passing of a polygraph examination (Tr. 85; AE H). The original charges of felonious theft and theft by deception (subparagraph 1.e.) were dismissed for insufficient evidence. Applicant also denied taking anything of value. Applicant pled guilty to a misdemeanor charge of theft (subparagraph 1.f.) in receiving a gemstone. He was fined \$500.00 and placed on probation for one year.

Personal Conduct.

Subparagraph 2.a. Applicant filled out a security clearance application (SCA) on March 19, 2002 (GE 2), and responded to question 21 (asking for information of ever being charged or convicted of any felony offense) by furnishing three explanations for the three offenses set forth in subparagraphs 1.d., 1.e., and 1.f. (GE 2, Tr. 90). Applicant used the words "did not steal from this or any other shop" in his description of the subparagraph 1.e. offenses that were ultimately dismissed. He admitted pleading guilty to the subparagraph 1.f. charge because he pilfered the gemstone.

The four remaining allegations under the personal conduct guideline are based on information Applicant provided to a Special Agent from the Federal Investigative Service (FIS) (formerly known as the Defense Investigative Service (DIS)) in January 1992 (GE 5), regarding information Applicant provided in his employment applications (GE 7, GE 12) for: (1) his employer (E1) from November 1985 to May 1988; (2) a second employer (E2) from May 1988 to May 1989; and, (3) a third employer (E3) from August 1991 to about January 1994.

Subparagraph 2.b. In his sworn statement (GE 5) dated January 22, 1992, Applicant indicated he had not falsified any information on "my resumes or forms of applications" since his employment with E1, however, in a subsequent application (GE 12) for E3 (as alleged), Applicant falsely stated he left employment with E1 because he had received an "offer from E2," rather than disclosing the truthful reason that he had to resign or be terminated.

Also included in subparagraph 2.b. is the allegation Applicant did not provide a complete history of his educational background in July 1991 when he filled out the application (GE 12) to E3. The first page of the application (GE 12) requests educational information, and then in parentheses identifies "High School, Junior College, Vocational Institute). In the four lines of space provided in the education block, Applicant listed his high school diploma and three nontraditional degrees from three universities.⁽³⁾ In a subsequent statement within GE 12, Applicant noted the lack of space in the employment application block as the reason for his additional, written remarks. However, there is no reference to attendance at the technical school or the university (listed in GE 7) in the additional remarks or resume portions of GE 12.

Subparagraph 2.c. On the second page of GE 12 (employment application with E3), Applicant noted his reason for leaving E1 as "an offer from E2," instead of resignation or termination for providing false information in his application to E1 that he had earned two college degrees. Concerning the issue of why he left E1 for E2 in May 1988, Applicant was asked by management of E1 whether he lied on his application (GE 7) about receiving the two degrees from the technical institute and the university, and Applicant replied that he had lied (Tr. 126). Applicant then read a portion of his sworn statement (GE 5):

At this time, [manager] asked the room [other management personnel] what needs to be done. They discussed it and cited company policy; that immediate termination was required. I indicated that I was giving notice in two days and asked if I could stay until Friday; they said, no. We are going to allow you to resign effective immediately. If you don't, we will terminate you with cause. I agreed to resign; then they asked for it in writing and told me that this letter would remain in my personnel file. The adverse description would remain in a sealed envelope unless I charged them in Court. I agreed and was escorted out (Tr. 127).

Then, Applicant testified he did not lie in the foregoing response, rather the response does not contain the explanations that (1) he really did not know whether the manager had authority to fire him since Applicant's supervisor was not present, and (2) he had already received an offer his next employment (Tr. 130).

Subparagraph 2.d. When he was 22 years old, Applicant completed an application for employment (GE 7), dated November 25, 1985, with E1. In that application, Applicant stated he had earned two degrees. The second page of GE 7 requests Applicant's educational record. In the educational module on page two of GE 7 (in the row titled "College"), Applicant furnished the name "[] Tech. College." In the next box to the right, he indicated the course of study as "Math/Physics." In the next box he circled the grade number as "2," though he claimed he was unsure how to translate grades into appropriate units of measure for college and universities on the application (Tr. 123). In the next box (same row), Applicant checked "No" that he did not graduate, yet, in the next box asking for diploma, Applicant wrote in "A.S. degree." In the "College or University" row located underneath the "College" row, Applicant entered "University of []", followed by course of study "Physics." In the next box (same row), Applicant circled "4" as the last grade completed. In the next box requesting whether the applicant graduated, most of the letter "X" is located in the "Yes" box although Applicant strenuously claims the letter "X" appears in the "No" box (Tr. 100, 113). In the next box listing diploma or degree, Applicant inserted "Bach. S." The two rows appear as follows:

School	Name and Location	Course of Study	Circle Last Grade Completed	Did You Graduate	Last Diploma or Degree
College	[] Tech. College.	Physics	"2" is circled	Y_N X (an "X" is placed in the "No box")	"A.S. degree"
College or Univ	University of []	Physics	"4" is circled	Y_X (most of "X" appears in the right hand portion of the "Yes box"). ⁽⁴⁾	Bach.S.

After being employed for about 2 ½ years with E1, Applicant made a request for educational reimbursement (GE 8) with E1 for costs in attending educational institutions. In GE 5, Applicant explained his request for educational assistance (GE 8) prompted the management of E1 to investigate Applicant's educational qualifications (GE 9).⁽⁵⁾ After discovering Applicant's request for reimbursement included the two schools he claimed he had received degrees from in his employment application (GE 7), the manager asked applicant whether he had obtained the two degrees as indicated in GE 7. Applicant replied "No" (GE 5). The manager then asked Applicant whether he lied on his application for employment at E1 (regarding the two schools) to which Applicant responded "Yes" (*id.*).

Subparagraph 2.e. On the first page of Applicant's application for employment (G7) with E1, Applicant was asked whether he had ever been granted a security clearance. Applicant replied "Yes." Applicant testified his rationale for answering affirmatively to the clearance question was that he had been authorized to work with secret procedures of several companies that coworkers were not authorized to see (Tr. 47-48). Before beginning his employment at E1, Applicant was unfamiliar with government agencies responsible for the security clearance program or security clearance

procedures for safeguarding classified information (Tr. 49; 124).

Character evidence.

Character statements from at least eight former supervisors or coworkers (including a member of the technical staff during Applicant's employment at E1) believe Applicant is a knowledgeable scientist with excellent work ethics. Applicant's supervisor from April 2003 to January 2005 considers him to be a conscientious worker with topnotch technical skills. A coworker who has observed Applicant for 12 years in various positions, considers Applicant an expert in radar analysis. The third witness, the director of programs and a personal friend of Applicant, has received reports from user agencies that Applicant's work product has been excellent. The fourth witness, a chief technical consultant, considers Applicant has demonstrated a high level of integrity based on their collaboration on publications and presentations at conferences. The fifth witness, who has known Applicant for about 14 years since they were employed at E3, and who is Applicant's best friend, never saw him exhibit any deceptive behavior. When Applicant had custody of his three children in 2000, he was able to improve their school attendance and scholastic records while encouraging them to become more involved in church activities (Tr. 94).

Considering the evidence as whole, I find Applicant's credibility is undermined by his intentional falsifications of (1) his sworn statement, and (2) his employment applications with E1 and E3.

POLICIES

Enclosure 2 of the Directive sets forth guidelines containing disqualifying conditions (DC) and mitigating conditions (MC) that should be given binding consideration in making security clearance determinations. These conditions must be considered in every case along with the general factors of the whole person concept. However, the conditions are not automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense.

Burden of Proof

Initially, the government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualifies, or may disqualify, the applicant from being eligible for access to classified information. *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988) "[T]he Directive presumes there is a nexus

or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. 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. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *See Egan*, 481 U.S. at 531; *see* Directive E2.2.2.

Criminal Conduct

A history or pattern of criminal law violations demonstrates poor judgment, untrustworthiness and unreliability.

Personal Conduct

Dishonest conduct could indicate the individual may not properly safeguard classified information.

CONCLUSIONS

Criminal Conduct.

When a person engages in criminal conduct (CC), he exercises poor judgment. The first three criminal allegations (subparagraphs 1.a., 1.b., 1.c.) relate to domestic relations matters that either lack documentary support or were dismissed. The presence of CC allegations invokes the application of CC disqualifying condition (DC) E2.A10.1.2.1. (*allegations or admission of criminal conduct, regardless of whether the person was formally charged*). Subparagraph 1.a. lacks any documentation showing that it was filed. In addition, Applicant testified he was never found in contempt for failure to provide child support information. The temporary restraining order was filed but was dismissed in November 2002. Finally, although allegations of domestic abuse were lodged against Applicant, the petition was

dismissed on November 5, 2002, based on an agreement between the petitioner (Applicant's former wife) and Applicant (respondent) regarding custody, visitation and child support. Subparagraph 1.d. alleges sexual abuse of a child that was dismissed following Applicant's successful passing of a polygraph examination. Because a dismissal does not constitute an acquittal of the charges, CC mitigating condition (MC) E2.A10.1.3.5. (*acquittal*) is not available to dispel the security concerns associated with Applicant's arrest for sexual child abuse. Rather, there is insufficient evidence to infer he engaged in criminal conduct under subparagraph 1.d. Accordingly, subparagraphs 1.a., 1.b., 1.c., and 1.d. are found for Applicant.

Subparagraphs 1.e. and 1.f. allege theft of gemstones. The charges in subparagraph 1.e. were dismissed. Applicant pled to the misdemeanor theft of the gemstone, paid the fine and completed probation. Having weighed and balanced all the evidence under subparagraphs 1.e. and 1.f., a commonsense finding in Applicant's favor is based on CC MC E2.A10.1.3.1. (*the behavior was not recent*) and CC MC E2.A10.1.3.2. (*the crime was an isolated incident*) as the two theft arrests occurred over 23 years ago. In addition, the conduct was isolated. I find for Applicant under subparagraphs 1.d., 1.e., and 1.f.

Personal Conduct.

The focus of the personal conduct (PC) guideline is honesty and candor. Security concerns under the PC guideline are raised because of the incorrect information Applicant supplied in his sworn statement to the government and in employment applications and other forms with E1 and E3. Subparagraph 2.a. is found in Applicant's favor as there was no falsification of his GE 2 as alleged. Applicant's specific explanations for his denials to subparagraphs 2.b. and 2.c. are that he did not falsify either the sworn statement or the application for employment with E3. Rather, he did not include the lack of authority explanation and the offer from E2 in the sworn statement. In response to subparagraph 2.d., the only discernable explanation for his denial is that he disputed the interpretation of several entries on the application, including the location of where he located his "No" answer in GE 7 (FINDINGS OF FACT, chart) to receiving a degree from the university. Applicant's denial of subparagraph 2.e. is based on his lack of knowledge of what a security clearance was in 1985. Finally, he claims the incomplete and/or incorrect information appearing in the sworn statement and in the employment forms resulted from confusion and indiscretions of a young man that should be mitigated by the lack of intent to deceive, the passage of time, and Applicant's positive performance record since these occurrences. The record does support Applicant's positions.

Subparagraphs 2.b., 2.c., 2.d. The incorrect information in the January 1992-sworn statement invokes the application of PC DC E2.A5.1.2.3. (*deliberately providing false information concerning material and relevant matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination*). In his sworn statement (subparagraph 2.b.), Applicant indicated he provided no false information on any resumes or forms to any employers after E1. The confrontation between Applicant and management (quoted in FINDINGS OF FACT) appearing in GE 5 (January 1992-sworn statement) establishes unequivocally Applicant resigned in lieu of being terminated in May 1988, and was immediately escorted out of the room. Yet, the employment application about three years later in July 1991 to E3 indicates "offer from E2." In addition, Applicant intentionally concealed material information under subparagraph 2.b. when he did not disclose his attendance at the two schools in the educational record block on the first page of GE 12 (employment application with E3) or at any other location of the exhibit. Applicant's intentional falsifications of the reason for his termination from E1 and his intentional omission of his academic record from the application (GE 12) to E3, warrants an ultimate finding against

Applicant under subparagraph 2.b. of the SOR.

The intentional falsification under subparagraph 2.c. meets the elements of PC DC E2.A5.1.2.2. (*the deliberate concealment or falsification of relevant and material facts from any personnel security questionnaire, personal history statement or similar form used for used to determine employment qualifications, or determine security clearance eligibility or trustworthiness*). Though Applicant stated he intended to provide notice that he was going to another job, the words of the manager offering resignation or termination, coupled with the unambiguous actions by management of escorting Applicant out of the office, leave no doubt the manager at E1 had the authority to force resignation in lieu of termination. In sum, the chronology of events reflects Applicant resigned in lieu of termination and ahead of receiving the purported offer of other employment. Even if he had received the offer in advance of his termination, Applicant still concealed material information in the application to E3 regarding the reason for leaving E1's employ.

Subparagraph 2.d. addresses the employment application (GE 7, November 1985) to E1 listing the two degrees Applicant did not receive. The amount of false information on the E1 application goes beyond a desire to inflate one's academic credentials. Applicant falsely indicated he had an associate's science degree and bachelors in science degree when he had not received the degrees. While Applicant claimed he struggled with the numbers when answering the "Circle the last grade attended" block applicable to the technical school and the university, grades translate to years more readily than any other unit of measure in describing how far along one has progressed at a college or university. The number "2" that was encircled by Applicant on the application, coupled with the representation of receiving a degree as indicated in GE 7, even though he placed an "X" in the "No box" indicating he did not receive a degree, would influence the reasonable person that Applicant was at the technical school for two years (not three quarters as the investigation uncovered) and at least had enough credits to justify an associates science degree. A reading of the number "4" that was encircled by Applicant, and weighed with the representation of receiving a degree would persuade the reasonable person Applicant had attended the university for four years and obtained a bachelor's degree in science. The record reflects Applicant's deliberate falsification of his credentials may never have been detected had management of E1 not investigated his request for educational reimbursement, listing the same two schools he had previously indicated he graduated from. Taking all the misinformation Applicant provided in his employment application to E1, and his admission to management of E1 that he provided false information, Applicant's conduct falls within the scope of PC DC E2.A5.1.2.2.

One additional issue warrants discussion under subparagraph 2.d. Applicant's ongoing refusal to acknowledge he placed an "X" in the "Yes" box in the "Did You Graduate" column (university) suggests Applicant still believes the information he supplied in the employment application should not be interpreted as demonstrating he did not graduate from the university. Applicant's disagreement over the location of the "X" in the "Did You Graduate?" column of GE 7 does not make Applicant's intentional falsification any less false because of the unambiguous entry of receiving a bachelor's degree.

Subparagraph 2.e. refers to Applicant's indication in his employment application with E1 he had received a security clearance. The Government has not established this allegation. In addition, Applicant's testimony infers he probably was working with proprietary information with previous employers before his employment with E1 at age 22.

Of the seven mitigating conditions under the PC guideline, the first four may be potentially applicable to Applicant's intentional falsifications under subparagraphs 2.b., 2.c., and 2.d. PC MC E.2.1.3.1. (*the information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness or reliability*) does not apply as an applicant's educational qualifications are material information for the determination of whether he possesses the background for the job. Lying about background information carries a negative impact on Applicant's judgment and reliability. PC MC E2.A.5.1.3.2. (*the falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*) may apply when the falsification occurred only one or two times, was not recent, and the individual subsequently provided information voluntarily. Applicant's falsification of his employment application in November 1985, together with his continuing refusal to fully acknowledge he falsified parts of the application while sticking to his unsupported claim that the manager may not have had the authority to terminate him, coupled with his pending job offer claim, removes PC MC E2.A5.1.3.2. from applicability. PC MC E2.A5.1.3.3. (*the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*) does not apply to these facts as Applicant's intentional falsifications may never have been discovered had there been no investigation conducted by E1. Applicant made no effort to rectify the false information until more than two years later when he was confronted by his manager at E1. He made no effort to correct misinformation in the sworn statement before being confronted by the agent. Applicant's unfounded claim regarding the manager's lack of authority to terminate him and Applicant's standing offer for employment at E2 represent *post hoc* explanations of his resignation that are not persuasive.

Applicant's job performance record over the past 20 years demonstrates he is a very talented, professional person with many achievements. He has earned the respect of his colleagues for his professionalism and integrity. In view of his intentional falsifications however, he has failed to overcome the adverse evidence under the PC guideline. I reach the same adverse conclusion even after review of this case under the whole person concept. Had Applicant simply admitted his falsifications of the employment applications and the sworn statement, there may have been sufficient reasons under E2.2.1.6. (*the presence or absence of rehabilitation and other pertinent behavioral changes*) and E2.2.1.9. (*the likelihood of continuation or recurrence*) to find in Applicant's favor. Instead, Applicant's efforts at the hearing to misrepresent the plain meaning of his January 1992 sworn statement and employment applications also bolster a finding against Applicant under the whole person concept.

FORMAL FINDINGS

Formal Findings required by Paragraph 25 of Enclosure 3 are:

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

Subparagraph 1. a. For the Applicant.

Subparagraph 1.b. For the Applicant.

Subparagraph 1.c. For the Applicant.

Subparagraph 1.d. For the Applicant.

Subparagraph 1.e. For the Applicant.

Subparagraph 1.f. For the Applicant.

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

Subparagraph 2.a. For the Applicant.

Subparagraph 2.b. Against the Applicant.

Subparagraph 2.c. Against the Applicant.

Subparagraph 2.d. Against the Applicant.

Subparagraph 2.e. For 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 Applicant.

Paul J. Mason

Administrative Judge

1. GE 21 is a transcript of the proceedings to determine whether there had been abuse of the children based on allegations of bazaar discipline and exposing them to pornography. The judge issued no findings.
2. The "B" portion of the exhibit, where the risk assessment is determined, was not submitted.
3. Applicant defined the nontraditional degrees as a state authorized degree granting institution but not regionally accredited. There was course work involved but no residency requirement. A large portion of it was either home study or there was credit given for resume and life experience (Tr. 97).

4. The full line that appears in the "Yes" box, ending over the letter "N" of the "No" box, appears to be a check as if the "Yes" box was checked first. Then, another line that starts over the "Yes" box, clearly intersects the other line over the right portion of the "Yes" box, and extends over the letter "N" of the "No" box, almost to the end of the "No" box.

5. The investigation (GE 9) disclosed Applicant had attended the technical school for only for three quarters in 1984 with general education as the course of study. The investigation revealed he attended the university from September 1980 to June 1981 for 3 quarters. Applicant received no degree from either institution.