

KEYWORD: Personal Conduct

DIGEST: Applicant's rule violations began in 1995 when he was counseled to stay away from a former girlfriend for arguments and disagreements with her in the workplace. After several women subordinates complained about his inappropriate touching during work hours in November 1999, he was counseled and indicated in response to the Statement of Reasons (SOR) that he stopped the behavior. The 22 count court-martial filed in February 2002, that he admitted to in April 2002, provides considerable evidence that proves he continued his invasive actions toward women from May 1999 to November 2001. Applicant's rule violations and deliberate omissions of his military and criminal records have not been mitigated. Clearance is denied.

CASENO: 03-19311.h1

DATE: 01/30/2006

DATE: January 30, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-19311

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Nichole L. Noel, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's rule violations began in 1995 when he was counseled to stay away from a former girlfriend for arguments and disagreements with her in the workplace. After several women subordinates complained about his inappropriate touching during work hours in November 1999, he was counseled and indicated in response to the Statement of Reasons (SOR) that he stopped the behavior. The 22 count court-martial filed in February 2002, that he admitted to in April 2002, provides considerable evidence that proves he continued his invasive actions toward women from May 1999 to November 2001. Applicant's rule violations and deliberate omissions of his military and criminal records have not been mitigated. Clearance is denied.

STATEMENT OF CASE

On October 15, 2004, 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 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. In Applicant's undated response to the SOR, received on October 25, 2004, he requested a hearing before an Administrative Judge.

The case was assigned to me on April 22, 2005. On April 26, 2005, this case was set for hearing on May 24, 2005. The Government submitted four exhibits (GE 1-4), and Applicant submitted none. Testimony was taken from Applicant and his supervisor. The transcript (Tr.) was received on June 2, 2005.

The transcript table of contents of the above captioned case contains two errors. The first error is that the supervisor's testimony was not identified in the table. The supervisor's testimony appears at pp. 92-99. The following words "Letter A" appear at the bottom of the table underneath "Applicant's Exhibits." Applicant proffered no exhibits (p.99).

FINDINGS OF FACT

The SOR alleges falsifications and rule violations. Applicant's position regarding allegations 1.a. through 1.d. is that he admits the arrests or letters of counsel, but denies the underlying charges. Concerning allegations 1.e. and 1.f., Applicant denies he deliberately falsified the security clearance application (SCA). Applicant is 33 years old and employed as a computer programmer with a defense contractor. He seeks a top secret security clearance.

Applicant was stationed at a United States (U.S.) Naval base in 1995 when he began having problems and disagreements with his former girlfriend at work. His supervisor instructed Applicant orally and by a letter of counseling to stay away and not talk to her.⁽¹⁾ In November 1999 (1.a.), Applicant was supervisor of a group of men and women during the night shift. He stated:

I used to walk by, especially when we would go on the night shift roughly eleven o'clock at night to seven o'clock in the morning, it would be tired, sleepy. I understand that. So I would get up and make sure my people was awake. Make sure they was busy. Had something to do. And I would get up and I would touch a guy on the shoulder and say, "Hey, how are you doing? Everything's okay?" I would do the females the same way. Nothing that I would consider inappropriate. Touch them on the shoulder. But obviously that made someone - - the female uncomfortable. And I wasn't aware of that until the - - they spoke up and told my supervisor that my touching them on the shoulder and things like touching them on the shoulder was inappropriate and they didn't like that (Tr. 31)

Applicant was counseled by his command for inappropriate behavior, touching, and staring after his women subordinates complained of his behavior in the workplace. Though Applicant claimed in his response to the SOR he stopped touching the women on the shoulder, the same or similar inappropriate conduct continued.

In August 2000 (1.b. of the SOR), Applicant was called before a Captain's Mast for inappropriate contact with a minor when Applicant was accused of touching the minor's legs and breasts during a basketball game. Applicant stated he pushed the alleged victim on the leg, shoulder and arm but did not recall pushing her on the breasts. Applicant was told the alleged victim admitted she was lying (Tr. 37). The charge was dismissed but Applicant was given a letter of caution.

On October 2001 (1.c. of the SOR), Applicant had been arguing with his girlfriend at her home. When the police arrived, they ordered him not to contact her. Some time later his girlfriend's cousin, who was at his girlfriend's home, called Applicant's pager from his girlfriend's cell phone. After Applicant called his girlfriend, she called the police, who they arrested Applicant for disobeying their order to stay away from his girlfriend.

On February 27, 2002, Applicant was charged with (1) violating of the Uniform Code of Military Justice (UCMJ), Article 92, by wrongfully touching and requesting dates of 10 different coworkers, and creating a hostile work environment, (2) violating the UCMJ, Article 120, rape and carnal knowledge, and violation of the UCMJ, Article 134, by exhibiting inappropriate behavior with intent to satisfy lust or sexual desires on 11 occasions. The 22 offenses occurred between May 1999 and November 2, 2001 (GE 3). Based on his request, Applicant received a separation from the U.S. Navy in lieu of a court-martial, and was awarded an Other than Honorable Discharge. On April 1, 2002, Applicant admitted to all charges except the rape (GE 3), but believes he is really innocent. In denying all charges, Applicant explained that his only transgression was having an extra-marital affair (GE 2). Applicant stated one of the complainants of the court martial apologized to him and explained she was upset when she filed the charges (Tr. 56). Most of the victims told Applicant the charges should not have been filed (Tr. 57).

Applicant did not provide an answer to allegation 1.e. in his original response to the SOR. At the hearing, the testimony in response to 1.e. (question 25 of the SCA) ⁽²⁾ is as follows:

Q Allegation 1 (e), Falsification of Question 25. In th last seven years, have you been subject to court-martial or other disciplinary proceedings under the Uniform Code of Military Justice? And to that question you answered "no;" is that correct?

A Yes

Q So that's not true; is that correct?

A I've never been court-martialed.

Q Including Captain's [Mast], et cetera.

A Yes, that'[s] true.

Q So you responded "no" to the question on the F[S]86; that's correct, right?

A Yes.

Q But you had been subject to a Captain's Mast?

A To Captain's Mast, yes. (Tr. 71-72)

After a careful review of the foregoing testimony, I do not believe Applicant admitted he deliberately tried to conceal

information from question 25 of the SCA. Rather, he appears to be confirming the fact he was subject to the Captain's Mast. The two "Yes" answers cannot be interpreted as an acknowledgment by Applicant that he was trying to hide the Captain's Mast or the court-martial.

However, GE 3 (sworn statement, January 2004) provides sufficient evidence to make a factual finding. When Applicant was explaining in GE 3 the background that led to the military charges being filed in February 2002 (allegation 1.d.), he stated when that the investigation concluded, he was assigned legal counsel who advised him to accept separation from the Navy under Other than Honorable Conditions in lieu of a court-martial. While Applicant is correct in stating he was never court-martialed, question 25 of the SCA does not ask whether the applicant has ever been court-martialed; the question asks whether the applicant has ever been "subject" to a court-martial. Applicant's reason for not mentioning the court martial in response to question 25 is the advice he received from a security official who supposedly told him military charges that had been dropped did not have to be reported. I find Applicant's reason for not providing information in response to question 25 (also one of the reasons selected under question 26) is unpersuasive.

Applicant's various explanations to allegation 1.f. (question 26 of the SCA dated October 18, 2002), which occurred according to his testimony, because he added more detail in one statement than he did in another (Tr. 81), shall be listed in chronological order. In his sworn statement (January 2004), Applicant did not address the reason for his failure to disclose the October 2001 arrest. In his response to the SOR, Applicant explained he relied on the advice of the arresting officers in October 2001 (allegation 1.c.) that if there was no appearance before a judge, then the offense never took place (Tr. 73). Applicant's second explanation provided in his response to the SOR is that he misinterpreted question 26, believing that information had to be provided only if you were convicted of the offense. In the third explanation in his response to the SOR, Applicant asks himself why would he make a false statement when he knew everything was going to be investigated. At the hearing, Applicant recalled there were problems with the computer program that would not allow him to insert "yes" in the appropriate locations (Tr. 73) Then, Applicant stated:

That's when I was told that just [go] ahead and say no, because your court martial was dropped and you never went before a judge or anything like that. So that's when I was told that because I kept getting an error doing my EPSQ. And then, the investigator finally came around. I did bring that up. He said, "Oh, that's no problem." And just kept going on with his questioning and everything else. Then like I said, a month to a year went by where I had to come back to the investigator; and then, we had to do this scene all over again (Tr. 74).

Character evidence. Applicant's supervisor hired Applicant about three years ago. The supervisor commended Applicant's reliability and attendance record. Applicant told the supervisor the reason for his Other than Honorable Discharge was having an affair with a subordinate. Applicant's DD Form 214-⁽³⁾ reflects he received the Good Conduct Medal and the Overseas Service Medals on three occasions. He also received the Navy Achievement Medal.

Applicant's credibility is seriously damaged by his contradictory and inconsistent explanations for not disclosing the military and criminal offenses in his SCA. His suspect credibility also casts a cloud over his guiltless explanations to allegations 1.a. through 1.d. of the SOR.

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.

Personal Conduct (Guideline E)

Deliberately omitting material information during the security investigation or demonstrating an unwillingness to comply with rules and regulations could indicate a person may not properly safeguard classified information.

CONCLUSIONS

The personal conduct (PC) guideline involves dishonesty and a lack of candor indicated in the sworn statement, SCA, response to the SOR, or some other part of the security investigation, including the hearing. The PC guideline also addresses rule violations that may demonstrate poor judgment and unreliability.

PC disqualifying condition (DC) E2.A5.1.2.5. (*a pattern of dishonesty or rule violations, including violation of any written or recorded agreement between the individual and the agency*) applies to allegations 1.a., 1.b., 1.c., and 1.d. Though the SOR lists the first rule violation as occurring in November 1999, Applicant's rule violations began in 1995 when Applicant received his first letter of counseling to stop talking and stay away from a former girlfriend he had been having disagreements with at work. In November 1999, Applicant received his second letter of counseling for inappropriate touching and/or encroaching in the personal space of women subordinates. In August 2000, Applicant was investigated for having inappropriate contact with a minor and received his third letter of caution. In October 2001, Applicant was told by police not to contact his girlfriend. Yet, he did and he was arrested. Though no charges were filed, he disobeyed a lawful order designed to defuse a situation that could have led to serious injury or worse.

In February 2002, Applicant was cited for 22 violations of the UCMJ. Before he signed the request for separation in lieu of court-martial, Applicant indicated he fully understood the elements of the offenses, the charges, and a summary of the evidence. He admitted he was guilty of all the charges except for rape. The Government has established a case of rule violations under the PC guideline. Applicant is estopped from claiming he did not engage in the conduct for which he pled guilty. Applicant's defense that he did nothing wrong in 1.a., 1.b., 1.c. and 1.d. except have an extra-marital affair does not satisfy his ultimate burden of overcoming the adverse evidence under PC DC E2.A5.1.2.5.

PC DC E2.A5.1.2..2. (*the deliberate omission or falsification of relevant and material facts from any personnel security questionnaire to determine security clearance eligibility or trustworthiness*) applies to allegations 1.e. and 1.f. as there was an omission of material facts from a security clearance form that is used by the Department of Defense (DoD) to determine security clearance suitability. ⁽⁴⁾ Facts are considered relevant and material when they are capable of influencing DoD's decision whether to grant or deny Applicant's security clearance. Applicant offered more than four explanations for omitting military charges and civilian arrest in October 2001. If, as Applicant avers, he did not disclose the information based on advice from the police security officials, then it does not seem reasonable that he would have a problem in inserting information in to the computer program of his SCA. The inconsistent explanations convince me Applicant deliberately omitted material information from the SCA, and he did not tell the truth about omissions at the hearing.

Though there are four mitigating conditions (MC) that have potential application to these circumstances, none apply to aid Applicant in overcoming the adverse evidence under PC DC E2.A5.1.2.2. PC MC E2.A5.1.3.1. (*the information was*

unsubstantiated or not pertinent to a determination of judgement and reliability) does not apply because Applicant's prior military and criminal record (substantiated by military and criminal records) is germane to whether he has the judgment necessary to safeguard classified information. PC MC E.2.A.5.1.3.2. *(the falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily)* must also be removed from consideration for mitigation because of the number of explanations Applicant provided for deliberately omitting information from his SCA. In addition, the falsifications occurred less than four years ago, and Applicant has not provided correct information voluntarily.

PC MC E2.A5.1.3.3. *(the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts)* is inapplicable because of Applicant's ongoing efforts to conceal his deliberate omissions of the SCA. PC MC E2.A5.1.3.4. *(omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided)* is not helpful to Applicant either. If Applicant omitted the information based on advice of police or security personnel, then his explanation of having difficulties with the computer program does not appear credible. Even if Applicant relied on the advice of the police and security personnel, he failed to provide truthful information in a prompt manner. Applicant's military achievements and good job performance since October 2002 have been carefully evaluated, however, the favorable character evidence does not satisfactorily rebut the negative evidence under PC DC E2.A5.1.2.2., PC DC E2.A5.1.2.5. and the general factors of the whole person concept. Applicant's inability of furnishing the truthful reason for his deliberate falsifications of the SCA, and his failure to comprehend the inappropriateness of his treatment of women subordinates in the workplace, raise security concerns that he may exhibit similar misconduct in the future. *See, E2.2.6 (the presence or absence of rehabilitation and other pertinent behavioral changes) and E.2.2.9. (the likelihood of continuation or recurrence).*

FORMAL FINDINGS

Formal Findings required by Paragraph 25 of Enclosure 3 are:

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

Subparagraph a. Against the Applicant.

Subparagraph b. Against the Applicant.

Subparagraph c. Against the Applicant.

Subparagraph d. Against the Applicant.

Subparagraph e. Against the Applicant.

Subparagraph f. 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 Applicant.

Paul J. Mason

Administrative Judge

1. Even though the incident is not alleged in the SOR, it constitutes conduct circumstances strikingly similar to the offenses listed in the SOR.
2. Applicant signed the SCA on October 18, 2002 (GE 2).
3. Module 28 indicates the reason for Applicant's separation was "IN LIEU OF TRIAL BY COURT MARTIAL."
4. Allegations 1.e. and 1.f. shall be addressed together as Applicant essentially uses the same explanations for both allegations.