

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant failed to successfully explain, extenuate, or mitigate the security concerns raised by: 1) the unfavorable information provided by employers; and 2) his falsification of a security-clearance application wherein he deliberately failed to disclose resigning from federal employment in lieu of being fired in 2001, a drunk driving incident in 1986, and a Chapter 7 bankruptcy case in 1997, all of which were required to be reported. Clearance is denied.

CASENO: 03-23965.h1

DATE: 04/12/2006

DATE: April 12, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-23965

**DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL H. LEONARD**

**APPEARANCES**

**FOR GOVERNMENT**

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant failed to successfully explain, extenuate, or mitigate the security concerns raised by: 1) the unfavorable information provided by employers; and 2) his falsification of a security-clearance application wherein he deliberately failed to disclose resigning from federal employment in lieu of being fired in 2001, a drunk driving incident in 1986, and a Chapter 7 bankruptcy case in 1997, all of which were required to be reported. Clearance is denied.

**STATEMENT OF THE CASE**

This case arose when the Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On December 15, 2004, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. <sup>(1)</sup> The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline E for personal conduct and Guideline J for criminal conduct. Applicant replied to the SOR on December 28, 2004, and he requested a hearing on May 26, 2005. The case was assigned to me July 7, 2005. A notice of hearing was issued scheduling the hearing for September 16, 2005. Applicant appeared without counsel and the hearing took place as scheduled. DOHA received the transcript <sup>(2)</sup> September 29, 2005.

**RULINGS ON PROCEDURE**

Department Counsel moved to amend SOR paragraph 1 by adding the following allegation:

Subparagraph 1.i That information set forth in subparagraph 1.a(1).

The motion was set forth in Appellate Exhibit I. The reason for the amendment was so the matters in subparagraph 1.a(1) may be considered not only as to the falsification allegation, but also as an independent allegation concerning Applicant's history of employment-related misconduct or problems. The motion was explained to Applicant who did not object. Accordingly, the motion to amend the SOR was granted.

### **FINDINGS OF FACT**

Applicant is a 52-year-old married man who is seeking a security clearance for his employment as a security official or guard. He has worked in this capacity since December 2001, and he has worked for his current employer since November 2002. From August 1994 until December 17, 2001, Applicant was a federal employee working as a security guard at a military research installation.

Applicant has a history of unfavorable employment-related misconduct or problems. In March 1995, he was issued a letter of reprimand for falsification of his federal employment application. In February 1996, he was suspended for two days for threatening a fellow security guard. Applicant denies making the threat, but the deciding official found the charge was supported by a preponderance of the evidence (Exhibit 4). In June 1996, he was suspended for five days (mitigated to three days) for not telling the truth to his supervisor about outside employment.

In July 2000, he received notice of his employer's intent to remove (terminate) him from federal service based on a charge of unauthorized possession of government property; namely, several sugar dispensers (Exhibit 8). The deciding official elected to remove Applicant from federal service, but gave him the choice between removal and a 30-day suspension so long as he agreed to the terms and conditions of a Last Chance Agreement (Exhibit 9). Applicant entered into the Last Chance Agreement and was suspended from employment for 30 days, returning to duty in September 2000.

In November 2001, Applicant received notice of his employer's intent to remove him from federal service based on a charge of failure to follow security procedures while on duty on September 11, 2001 and September 14, 2001 (Exhibit 10). After considering Applicant's written and oral response, the deciding official elected to remove or terminate

Applicant from federal service (Exhibit 11). In doing so, the deciding official found that the offenses were serious and that Applicant had no rehabilitative potential for further federal service. The action was taken on December 3, 2001, with an effective date of January 12, 2002. On or about December 17, 2001, Applicant elected to resign from federal service. The notice of personnel action indicated that the reason Applicant resigned was as follows: "I am resigning because of family and personnel reason" (Exhibits 12 and A).

After resigning, he traveled to another state where his mother was living. She was in poor health and Applicant stayed in his mother's home for about two weeks. He returned to his state of residence and started working for a federal contractor as a security officer on or about December 31, 2001. In July 2003, he was suspended for three days of work by his current employer for falling asleep on duty. Despite this three-day suspension, Applicant has performed well in his current duties, and this is evidenced by three letters of reference or appreciation (Exhibit B).

On or about November 21, 2002, Applicant completed a security-clearance application (Exhibit 1). In signing the application, Applicant certified his statements were true, complete, and correct to the best of his knowledge and belief and made in good faith, and that he understood that a false statement could be punished under federal law. Applicant answered all of the questions and did not reveal any derogatory information about his background.

Concerning his employment record, Applicant answered no to Question 20.<sup>(3)</sup> He did not disclose that he had left his job with the federal government in December 2001 after being given notice that he would be removed or terminated from federal service. During the hearing, Applicant explained that he did not report this incident because he never was fired and he was embarrassed about it as well.

Concerning his police record for alcohol or drug offenses, Applicant answered no to Question 24.<sup>(4)</sup> He did not disclose that in 1986 he had been arrested and charged with driving while intoxicated (DWI) and that he had spent the weekend in jail, paid a fine, and had his driver's license suspended for six months. During the hearing, Applicant explained that he did not report the DWI because he thought he did not have to based on his understanding of what the state court judge told him when the DWI offense was adjudicated. He also said he was embarrassed about it and did not want to disclose it. This DWI offense is the same matter he omitted from his employment application in 1995, which led to the reprimand.

Concerning his financial record, Applicant answered no to Question 33.<sup>(5)</sup> He did not disclose that he had filed a Chapter 7 bankruptcy petition in 1997 and obtained a discharge of his indebtedness the same year (Exhibit 3). During the hearing, Applicant explained that he did not report his Chapter 7 bankruptcy case because he was mistaken about the time frame and thought it was beyond the seven-year reporting period. Given that Applicant signed the application in November 2002, the seven-year reporting period extended to November 1995.

## **POLICIES**

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security

clearance is not a determination of an applicant's loyalty.<sup>(6)</sup> Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting a clearance.

## **BURDEN OF PROOF**

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>(7)</sup> There is no presumption in favor of granting or continuing access to classified information.<sup>(8)</sup> The government has the burden of presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted.<sup>(9)</sup> An applicant is responsible for presenting witnesses and other evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>(10)</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(11)</sup>

As noted by the Supreme Court in *Department of Navy v. Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(12)</sup> Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

## **CONCLUSIONS**

Personal conduct under Guideline E-(13) is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the government when applying for a security clearance or in other official matters is a security concern. It is deliberate if it is done knowingly and willfully. An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported.

Here, based on the record evidence as a whole, the government established its case under Guideline E. This case involves two different aspects of the guideline: 1) unfavorable information provided by employers; and 2) falsification of a security-clearance application.

First, DC 1-(14) applies against Applicant based on his history of employment-related misconduct or problems. The record evidence shows a multitude of problems on the job as a security guard or official. Eventually, the pattern of problems led to Applicant's removal from federal service, although he resigned before the effective date. Applicant had another incident in 2003 when he was suspended from work for falling asleep on the job. Taken together, these matters call into question Applicant's judgment, trustworthiness, and reliability.

Second, DC 2-(15) applies against Applicant because he knowingly and willfully made false statements when he completed his security-clearance application. He deliberately provided false and misleading information about his background in response to the three specific questions detailed above. His various explanations, taken together, are not credible. In particular, his explanation for not reporting the DWI offense is rejected as incredible because this is the same matter he was reprimanded for omitting from his federal employment application in 1995. His explanation for not reporting the 1997 Chapter 7 bankruptcy case is rejected as incredible because the bankruptcy was well within the reporting period of November 1995 to November 2002. His explanation for not reporting his departure from federal service is rejected as incredible because it is belied by the fact that he was fired or removed from his employment, but he resigned before the effective date of removal. Under any reading of Question 20, this matter was required to be reported and Applicant did not because he was embarrassed about it and did not want to report it. Viewing the record evidence as a whole, I conclude Applicant did not make an honest and good-faith effort to provide accurate and truthful answers to Questions 20, 24, and 33. His false statements create doubt about his judgment, reliability, and trustworthiness.

I reviewed the mitigating conditions under Guideline E and conclude none apply. Applicant knowingly and willfully made false statements on his security-clearance application. He made no effort to correct the record and tell the government the truth about his background until he was interviewed during his background investigation in August 2003 (Exhibit 2). Given the totality of facts and circumstances, Applicant failed to successfully explain or mitigate the security concern stemming from his false statements. Accordingly, Guideline E is decided against Applicant.

Under Guideline J, <sup>(16)</sup> criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

Here, based on the record evidence as a whole, the government established its case under Guideline J. Applicant engaged in criminal conduct by making false statements about his background in violation of 18 U.S.C. § 1001 (making a false statement within the jurisdiction of a federal agency), which is a felony-level offense. Given these circumstances, both DC 1 <sup>(17)</sup> and DC 2 <sup>(18)</sup> apply against Applicant. His criminal conduct creates doubt about his judgment, reliability, and trustworthiness. No mitigating conditions apply. Accordingly, Guideline J is decided against Applicant.

To conclude, Applicant has not met his ultimate burden of persuasion to obtain a favorable clearance decision. This decision should not be construed as an indictment of Applicant's loyalty and patriotism to the U.S., as those matters are not at issue. Instead, the clearly-consistent standard requires I resolve any doubt against Applicant, and this case presents more than ample doubt. <sup>(19)</sup> In reaching my decision, I considered the whole-person concept, the clearly-consistent standard, and the appropriate factors and guidelines in the Directive.

## **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

SOR ¶ 1-Guideline E: Against Applicant

Subparagraphs a - i: Against Applicant

SOR ¶ 2-Guideline J: Against Applicant

Subparagraphs a - b: Against 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. Clearance is denied.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).
2. I made pen-and-ink corrections to the transcript's index to accurately reflect Applicant's Exhibits and Appellate Exhibit I. I made similar corrections on pages 4 and 14 of the transcript. None of these corrections changed the substance of the transcript.
3. Has any of the following happened to you in the past 7 years? - Fired from job - Quit a job after being told you'd be fired - Left a job by mutual agreement following allegations of misconduct - Left a job by mutual agreement following allegations of unsatisfactory performance - Left a job for other reason under unfavorable circumstances.
4. Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?
5. In the last 7 years, have you filed a petition under any chapter of the bankruptcy code (to include Chapter 13)?
6. Executive Order 10865, § 7.
7. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
8. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
9. Directive, Enclosure 3, Item E3.1.14.
10. Directive, Enclosure 3, Item E3.1.15.
11. Directive, Enclosure 3, Item E3.1.15.
12. 484 U.S. at 528, 531 (1988).
13. Directive, Enclosure 2, Attachment 5.
14. Item E2.A5.1.2.1. Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances.
15. 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.
16. Directive, Enclosure 2, Attachment 10.



17. E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.

18. E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

19. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials").