

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant mitigated the personal and criminal conduct concerns raised by his falsification of information submitted to the government in a recent security clearance application (SF 86) and through a subject interview during his background investigation. Clearance is granted.

CASENO: 03-04653.h1

DATE: 03/31/2006

DATE: March 31, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-04653

**DECISION OF ADMINISTRATIVE JUDGE**

**MATTHEW E. MALONE**

**APPEARANCES**

**FOR GOVERNMENT**

Richard A. Stevens, Esquire, Department Counsel

## **FOR APPLICANT**

David P. Price, Esquire

### **SYNOPSIS**

Applicant mitigated the personal and criminal conduct concerns raised by his falsification of information submitted to the government in a recent security clearance application (SF 86) and through a subject interview during his background investigation. Clearance is granted.

### **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 <sup>(1)</sup> it is clearly consistent with the national interest to give Applicant a security clearance. On January 10, 2005, 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 submitted a responsive pleading, and requested a hearing.

The case was assigned to me on October 3, 2005, and I convened a hearing on November 17, 2005. The parties appeared as scheduled and the government presented two exhibits, which were admitted without objection. Applicant presented 19 exhibits, which were admitted without objection. He also testified in his own behalf and presented the testimony of four other witnesses. DOHA received the transcript (Tr) on December 1, 2005.

### **FINDINGS OF FACT**

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

Applicant is 50 years old and has been employed by a major defense contractor in support of various military aviation initiatives since October 1995. He has been married and divorced twice, most recently in 2001 from his second wife

whom he married in 1979. They had three children together, all of whom are now in their 20s. Applicant served in the U.S. Navy from 1973 until his honorable discharge as a petty officer second class (paygrade E-5) in 1979. Thereafter he earned his graduate equivalent degree, having dropped out of high school to join the service. He went on to earn a bachelor's degree and a masters degree.

Applicant has held a security clearance without interruption or incident since 1973. He submitted a security clearance application (SF 86) on May 16, 2002, to initiate a periodic review of his suitability for clearance and a possible increase of his level of access from secret to top secret.

Prior to assuming his current position, Applicant worked for a defense contractor that eventually merged with his current employer, and was assigned to the U.S. Navy's Kuwaiti Air Force support program. His duties required he travel to Kuwait for long assignments. He had previously been assigned to a similar position in support of the Royal Saudi Air Force and spent over two years in Saudi Arabia. In March 1995, while assigned to Kuwait, Applicant and a fellow contractor were illegally seized at the Kuwait/Iraq border by Iraqi troops and detained until July 1995 in Iraq at various locations, including Abu Ghraib prison. He was interrogated several times each day, lost 40 pounds, contracted hepatitis from various injections Iraqi guards gave him, and was in fear of his life most of the time he was held there. On being debriefed after his release, it was determined Applicant had not divulged any classified information to his captors.

When Applicant returned to the United States, he was lauded in his hometown and in the national press as a hero. The attention he received in the months following his return, his medical problems, and what was eventually diagnosed as post-traumatic stress syndrome all took a toll on his personal life. Applicant began to drink more than he had in the past, and his relationship with his wife and children suffered. He and his wife separated in 1999, and their divorce became final in 2001.

Applicant has been charged with and/or arrested for three alcohol-related criminal offenses. In May 1977, while in the Navy, he was arrested for being drunk in public. He was held in jail overnight and eventually paid a \$30 fine. In December 1978, Applicant was charged with driving under the influence (DUI) and two related moving violations. There is no definitive information available about the disposition of this charge. In September 1999, Applicant was pulled over while on business-related travel. He had been drinking earlier in the evening, but refused to take a breathalyser test. He was arrested and charged with DUI, but did not have to appear in court and paid a \$500 court-ordered contribution to a charitable organization.

When Applicant submitted his SF 86 in May 2002, Applicant disclosed his 1978 DUI charge, but omitted both his 1977 drunk in public charge and his 1999 DUI charge. As to the 1977 offense, Applicant asserts he forgot about that arrest, but also averred he had disclosed this incident in previous security clearance applications and had discussed it with government investigators. Applicant has admitted he deliberately omitted his 1999 arrest because he was embarrassed that he should have engaged in such conduct after being treated as a hero following his return from Iraq.

Applicant was interviewed by government investigators in June 2002 as part of his background investigation. He did not disclose his 1999 DUI during this interview. He was re-interviewed in November 2003 and discussed his 1999 arrest as well as his past and current drinking habits. Among the details he disclosed in this interview was the fact he had been treated for hepatitis beginning around November 2001 and was unable to drink alcohol until September 2002. Since then, Applicant has greatly moderated his drinking.

Having personally assessed his demeanor and response to questioning at his hearing, I find his testimony was credible and devoid of any attempt to evade responsibility for his actions or to minimize the full impact of his actions. He is regarded as a solid, honest, and thoroughly professional employee and neighbor. He submitted extensive recommendations from several fellow employees who have an average of at least 20 years experience in the defense industry and in the military. Included in these recommendations is a letter from the U.S. diplomat who negotiated Applicant's release from Iraq and who is now a state governor. But perhaps the most salient document presented is the results of a survey completed by Applicant's subordinates as periodic feedback on how well Applicant performs his job as a site manager. The results were very positive, but significantly so in terms of his subordinates' trust in Applicant.

### **POLICIES AND BURDEN OF PROOF**

The Directive sets forth adjudicative guidelines<sup>(2)</sup> for consideration in evaluating an applicant's suitability for access to classified information. Further, security clearance decisions must reflect consideration of 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.<sup>(3)</sup> 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).

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest<sup>(4)</sup> for an applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for the Applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it establishes 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.<sup>(5)</sup> 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.<sup>(6)</sup>

## CONCLUSIONS

Under Guideline E, a security concern may arise if 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.<sup>(7)</sup> Here, the government questioned Applicant's trustworthiness by alleging he deliberately omitted from his SF 86 his September 1999 DUI arrest (SOR ¶ 1.a(1)) and his March 1977 public drunkenness arrest (SOR ¶ 1.a(2)). The government also alleged Applicant deliberately lied to a government investigator during a June 17, 2002, subject interview by failing to disclose his September 1999 DUI (SOR ¶ 1.b), and by claiming he had abstained from alcohol since 1995, whereas he stated in a subsequent interview that he had continued to drink after 1995 (SOR ¶ 1.c).

I find for the Applicant as to SOR ¶¶ 1.a(2) and 1.c. To be disqualifying, these omissions must have been made with intent to mislead or deceive the government in its investigation of Applicant's background. Applicant's explanation that he forgot about his 1977 arrest is plausible and it is uncontroverted that this information had also been disclosed during previous background investigations. Regarding his statement in a June 2002 interview about abstinence from alcohol, Applicant denies this allegation, thus keeping the burden on the government to support this charge. Apart from Applicant's admission to SOR ¶ 1.b, and his signed statement from a November 2003 interview, there is no record of what he did or did not say in the first interview. Again, Applicant provides a plausible explanation. Specifically, he claims he told the investigator that he had suffered from hepatitis after his 1995 release, that the treatment from November 2001 until September 2002 required he abstain from alcohol, and that, at the time of the June 2002 interview he was not drinking.

As to the allegations in SOR ¶¶ 1.a(1), and 1.b, the record shows, through the government's exhibits and Applicant's admissions and testimony, that he deliberately made two false statements to the government through his SF 86 and at his June 2002 interview. Based on available information, Guideline E disqualifying condition (DC) 2<sup>(8)</sup> and DC 3<sup>(9)</sup> apply. By contrast, none of the listed mitigating conditions (MC) apply. The information about his 1999 DUI was material to the government's assessment of his background, especially as it appears his drinking had been examined in previous background checks. Further, Applicant's falsifications were recent as they occurred during his current background investigation. Nor were they isolated in that he deliberately omitted information from his SF 86, and repeated his falsification when he was interviewed by government investigators the first time. On this issue, it should be noted that there was no direct question asked about his 1999 DUI, but Applicant apparently knew he should have discussed it with the investigator and admittedly withheld that information anyway. The fact he did not admit to his 1999 DUI until his second interview also precludes a finding he made any prompt, good-faith effort to correct his falsification before being confronted with the facts. There is no indication his answers to the SF 86 or his discussions during interviews were influenced by anyone or that he received any counsel to make such representations. Lastly, this is not a case where Applicant is possibly vulnerable to coercion, blackmail, or pressure because of his conduct. This case is strictly about Applicant's judgment and trustworthiness.

While none of the listed mitigating conditions apply here, I note that the adjudicative guidelines are just that - guidelines. They need not be applied in a rigid manner that does not allow for consideration of other factors or that would produce an inequitable result. Often times the government's security concerns are not about underlying adverse

conduct, but about a person's willingness to protect the national interests by telling the truth even at the expense of one's own interests. Here, we have a clear case of an applicant who withheld information the government needed because he was embarrassed. Balanced against that conduct is information that demonstrates Applicant can be relied on to protect the national interests under the most dire personal circumstances one can imagine. The record also contains recommendations and testimonials from as broad, reliable, and experienced a cross-section of professional and personal references as could be encountered in these proceedings. That information suggests this is an Applicant whose falsifications are an aberrational error in judgment that, when examined in light of his years of service and excellence to the defense industry at home and abroad, is not likely to recur. I conclude Guideline E in favor of the Applicant.

The government also alleged Applicant's deliberate falsifications constituted criminal conduct insofar as they violated federal law under 10 U.S.C. 1001 (SOR ¶ 2.a). Criminal conduct is a security concern because a person who is willing to disregard the law and risk fines or incarceration may also be willing to disregard rules and regulations governing the protection of classified information.<sup>(10)</sup> Available information is sufficient to support this allegation as it relates back to SOR 1.a(1) and 1.b. Based on these allegations, Guideline J DC 1<sup>(11)</sup> and DC 2<sup>(12)</sup> apply.

By contrast, the record also supports application of Guideline J MC 6.<sup>(13)</sup> For the same reasons discussed under Guideline E, above, it is apparent that Applicant's decisions regarding his SF 86 and his first subject interview will not be repeated. Through the many testimonials presented about his record over the past 30 years, and the fact he has accepted full responsibility for his actions, Applicant has presented clear evidence of rehabilitation. When examined in light of all the information that bears on this issue, Applicant has overcome the government's concerns and I conclude Guideline J for Applicant.

I have carefully weighed all of the evidence, and I have applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guideline. A fair and commonsense assessment<sup>(14)</sup> of information about Applicant's personal conduct and the criminal aspects of that conduct, taken in the context of all of the information before me shows that he has overcome any reasonable doubts about his judgment and reliability. His falsifications of his SF 86 and his statements to investigators raise legitimate questions about his judgment and trustworthiness; however, he has answered satisfactorily those questions through significant and sufficient information that indicates his transgressions are unlikely to recur. Accordingly, Applicant has overcome the government's case for disqualification.

## **FORMAL FINDINGS**

Formal findings regarding each SOR allegation are as follows:

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

Subparagraph 1.a: For the Applicant

Subparagraph 1.b: For the Applicant

Subparagraph 1.c: For the Applicant

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

Subparagraph 2.a: For the Applicant

### **DECISION**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. Clearance is granted.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. Directive, Enclosure 2.
3. Commonly referred to as the "whole person" concept, these factor are as follows:

1. Nature and seriousness of the conduct and surrounding circumstances.
2. Frequency and recency of the conduct.
3. Age of the applicant.
4. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved.

5. Absence or presence of rehabilitation.
6. Probability that the circumstances or conduct will continue or recur in the future;
4. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
5. *See Egan*, 484 U.S. at 528, 531.
6. *See Egan*; Directive E2.2.2.
7. Directive, E2.A5.1.1.
8. 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.
9. Directive, E2.A5.1.2.3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination.
10. Directive, E2.A10.1.1.
11. Directive, E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged.
12. Directive, E2.A10.1.2.2. A single serious crime or multiple lesser offenses.
13. Directive, E2.A10.1.3.6. There is clear evidence of successful rehabilitation.
14. Directive, E2.2.3.