DATE: December 30, 2005

In Re:

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SSN: ----------

Applicant for Security Clearance

ISCR Case No. 03-05162

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Kathryn MacKinnon, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

While on active duty in the U.S. Navy, Applicant received non-judicial punishment for using provoking language and making threats toward his chief petty officer. He was evaluated for anger management and alcohol abuse, diagnosed as having a personality disorder, and discharged from the Navy for misconduct. On his security clearance application (SF-86), he intentionally did not disclose his non-judicial punishment and mental health evaluation. In a subsequent interview with a security investigator, he gave false explanations for his omissions from the SF-86 and the reasons for his discharge from the Navy. Security concerns based on personal conduct and criminal conduct are not mitigated. Clearance is denied.

STATEMENT OF THE CASE

On January 13, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to deny Applicant a security clearance. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive). The SOR alleges security concerns under Guidelines E (Personal Conduct) and J (Criminal Conduct).

In an undated document, Applicant answered the SOR, admitting some allegations and denying others, and he requested a hearing. The case was assigned to me on September 15, 2005, and heard on October 28, 2005. DOHA received the transcript (Tr.) on November 9, 2005.[(1)]

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I also make the following findings:

Applicant is a 34-year-old network engineer for a defense contractor. He was born in the United Kingdom and became a naturalized U.S. citizen in March 1990. He served in the U.S. Navy and held a security clearance for almost nine years. (2) He has worked for his current employer for about four years.

Applicant was married in October 1991 and had two children during that marriage. He was divorced in January 1996. He remarried in October 1996,(3) and divorced on a date not reflected in the record. He has remarried again, and has one child from his current marriage.(4)

In December 1993, Applicant was arrested and charged with assault and battery after a mutual affray at a party. Both participants had been drinking.(5) The charges were dismissed after Applicant agreed to pay the victim's medical bills. (6)

In January 1998, Applicant executed a SF-86. He answered "no" to question 23, concerning arrest, charges, or conviction of any offenses not listed elsewhere on the form during the last seven years, and he did not disclose his arrest for assault and battery in December 1993.(7) In a statement to a security investigator in June 1998, Applicant stated he was advised by his attorney that the record would be expunged, and he was advised by an investigator to answer "no" to questions about his criminal record.(8) He offered the same explanation at the hearing.(9)

On December 7, 1998, Applicant received non-judicial punishment under Article 15, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 815, for using provoking speech and communicating a threat to his chief petty officer at an off-duty social event, in violation of Articles 117 and 134, UCMJ, 10 U.S.C. §§ 917 and 934, respectively. Applicant admitted his judgment was impaired by alcohol during this incident.(10) The incident was one of several altercations that occurred between Applicant and his chief petty officer.(11) In addition to imposing non-judicial punishment, his commander ordered him to undergo evaluation for anger management and alcohol abuse.(12) He was evaluated and diagnosed as having a personality disorder. In February 1999, he was discharged from the Navy for misconduct, receiving a general discharge under honorable conditions.(13)

Applicant attended an alcohol awareness class in 1998, and he recognized his alcohol consumption was out of control. He has moderated his drinking and now consumes alcohol "on an occasional basis."(14)

In February 2002, Applicant executed another SF-86. He answered "no" to question 19, asking about mental health consultations, and he did not disclose his evaluation for anger management and alcohol abuse. He also answered "no" to question 25, asking if he had been subject to court-martial or other disciplinary proceedings under the UCMJ during the last seven years, and he did not disclose the non-judicial punishment imposed in December 1998.

On April 20, 2004, Applicant was interviewed by a security investigator and stated he received a general discharge under honorable conditions because he declined to sign a request for extension of service and no longer wanted to be in the Navy. He told the investigator he did not list his non-judicial punishment on the SF-86 because he had forgotten about it.(15)

On April 29, 2004, Applicant was interviewed again by the same investigator, and he admitted he failed to disclose the non-judicial punishment and mental health evaluation because he feared they would adversely affect his ability to hold a clearance. He also admitted he was discharged in lieu of administrative separation for misconduct.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as

amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

The Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[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. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

Guideline E (Personal Conduct)

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

Several disqualifying conditions (DC) apply to this case. DC 1 applies when there is "[r]eliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances." Directive ¶ E2.A5.1.2.1. The information from Applicant's Navy records about his non-judicial punishment and discharge for misconduct establishes DC 1.

DC 2 applies where there has been a deliberate omission or falsification of relevant and material facts from any personal security questionnaire. Directive ¶E2.A5.1.2.2. DC 3 applies when an applicant deliberately provides false or misleading information concerning relevant and material matters to an investigator or security official in connection with a personnel security or trustworthiness determination. Directive ¶E2.A5.11.2.3. Applicant's admission he deliberately concealed his non-judicial punishment and mental health evaluation on his SF-86 establishes DC 2. His admission he made a false statement to the security investigator on April 20, 2004, establishes DC 3.

"Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation, or duress" may raise a disqualifying condition (DC 4). Directive ¶ E.A5.1.2.4. Applicant's non-judicial punishment and command-directed evaluation for anger management and alcohol abuse, which he tried to conceal when he applied for a

security clearance in February 2002, establish DC 4.

A disqualifying condition (DC 5) also may be established by evidence showing a "pattern of dishonesty or rule violations." I conclude DC 5 is established, because Applicant's dishonest responses on his SF-86 and false answers to a security investigator establish a pattern of dishonesty.

Two mitigating conditions (MC) are relevant to this case. MC 2 applies when the falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily. Directive ¶ E2.A5.1.3.2. MC 3 applies when the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts. Directive ¶ E2.A5.1.3.3. Neither condition is established here. Applicant's falsification was recent, and he did not provide correct information promptly or voluntarily. To the contrary, he persisted in the falsification in his statement of April 20, 2004, and did not provide correct information until he was interviewed again on April 29, 2004, and confronted with the facts.

Applicant's falsifications occurred after he had served nine years in responsible Navy positions. He had held a clearance for years and should have understood the importance of candor in the security clearance process. *See* Directive ¶ E2.2.1.4. (age and maturity at time of conduct). Other than testifying he has matured and realizes his mistakes, he produced no evidence of rehabilitation or behavioral changes with respect to these traits. *See* Directive ¶ E2.2.1.6. Whether acts of dishonesty will recur cannot be determined on this record. *See* Directive ¶ E2.2.1.9. Applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). After weighing the disqualifying and mitigating conditions and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concern based on personal conduct.

Guideline J (Criminal Conduct)

A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1. Under this guideline, a single serious offense can raise a security concern (DC 2). A deliberately false answer on a security clearance application or in response to questions by a security investigator is a serious crime within the meaning of Guideline J. It is a felony, punishable by a fine or imprisonment for not more than five years, or both, to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of the executive branch of the government of the United States. 18 U.S.C. § 1001. Security clearances are within the jurisdiction of the executive branch of the government of the United States. *See Egan*, 484 U.S. at 527. Applicant admitted deliberately omitting material facts from his answers to questions 19 and 25 of the SF 86 executed in February 2002, and making a false statement to a security investigator. His admissions establish serious crimes under DC 2.

However, Applicant denied falsifying his earlier SF-86 executed in January 1998 by failing to disclose his December 1993 arrest. When a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent at the time the omission occurred. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)). Applicant's explanation that he omitted this information on the advice of an attorney and a security investigator because it was expunged from his record is plausible. Based on his demeanor and testimony at the hearing and all the other evidence, I find his explanation believable. Accordingly, I conclude Applicant did not intentionally falsify his answer to question 23 when he executed his SF-86 in January 1998, and I resolve SOR ¶ 1.e. in his favor.

Communicating a threat, one of the offenses for which Applicant received non-judicial punishment, carries a heavy penalty under the UCMJ.[(16)] Nevertheless, his command decided to treat it as a minor offense by disposing of it by non-judicial punishment instead of a court-martial. Accordingly, I conclude it was not a serious crime withing the meaning of DC 2. However, when considered along with the affray for which Applicant was arrested in 1993 and the reports of multiple conflicts between Applicant and his chief petty officer, there is sufficient evidence of "multiple lesser offenses" to establish DC 2. Based on Applicant's total criminal history, encompassing serious as well as minor

offenses, I conclude DC 2 is established.

Criminal conduct can be mitigated by showing it was not recent (MC 1) or an isolated event (MC 2). Directive ¶¶ E2.A10.1.3.1., ¶ E2.A10.1.3.2. Applicant's arrest in December 1993 is not recent and was an isolated event. His altercation with his chief petty officer in 1998 is not recent, but it was one of a series of conflicts and not an isolated event.

Criminal conduct also can be mitigated (MC 6) by "clear evidence of successful rehabilitation." Directive ¶ E2.A10.1.3.6. Applicant has not been involved in any alcohol-related affrays since the 1998 incident. He appears to have outgrown his combative behavior and moderated his alcohol consumption. He has remarried, has an infant child, and apparently has been a reliable and responsible employee for the past four years. Based on all the evidence, I conclude Applicant has mitigated the security concern based on his criminal conduct while in the Navy. Accordingly, I resolve SOR ¶¶ 2.b. and 2.c. in his favor.

However, Applicant's falsification of his SF-86 in February 2002 and false statement to a security investigator in April 2004 were recent. They pertained to and tainted the current security clearance process. Thus, I conclude MC 1 is not established. His falsifications were not an "isolated incident" within the meaning of MC 2, because they constituted a continuing course of dishonest conduct intended to undermine the integrity of the security clearance process. MC 6 is not established for Applicant's falsifications, because he has not presented "clear evidence of successful rehabilitation" regarding his lack of honesty and candor.

After weighing the disqualifying and mitigating conditions and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concern based on his multiple violations of 18 U.S.C. § 1001.

FORMAL FINDINGS

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

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

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: For Applicant

Paragraph 2. Guideline J (Criminal Conduct): AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: For 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 Applicant a security clearance. Clearance is denied.

LeRoy F. Foreman

Administrative Judge

1. Although Administrative Judge Foreman introduced himself as the judge who was conducting the hearing (Tr. 3), the transcript erroneously indicates throughout that another administrative judge conducted the hearing.

2. Government Exhibit (GX) 1 at pp. 1, 5, 7; GX 3.

3. GX 2 at p. 5.

4. Tr. 53.

5. Tr. 50.

6. GX 8 at pp. 1-2.

7. GX 2 at p. 7.

8. GX 7.

9. Tr. 28-29.

10. Tr. 47.

11. GX 4 at p. 3.

12. GX 4 at pp. 2-3; GX 5 at pp. 4-5.

13. GX 3.

14. GX 6 at p. 5.

15. GX 5 at pp. 2, 5.

16. Communicating a threat in violation of Article 134, UCMJ, is punishable by a dishonorable discharge and confinement for up to three years. *Manual for Courts-Martial, United States (2005 ed.)*, Part IV, para. 125e.