

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant is a 34-year-old tradesman for a defense contractor. While in the Navy, he received alcohol-related Non-Judicial Punishment in 1993, and again in 2000/2001, for fraud and theft of Government property involving the submission of false invoices. As a result of the latter, he lost his Navy security clearance in 2001. He then deliberately omitted any mention of his loss of clearance on his February 2003 DoD security clearance application. Mitigation has not been demonstrated. Clearance is denied.

CASENO: 03-16950.h1

DATE: 08/04/2005

DATE: August 4, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-16950

**DECISION OF ADMINISTRATIVE JUDGE**

**BARRY M. SAX**

**APPEARANCES**

**FOR GOVERNMENT**

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant is a 34-year-old tradesman for a defense contractor. While in the Navy, he received alcohol-related Non-Judicial Punishment in 1993, and again in 2000/2001, for fraud and theft of Government property involving the submission of false invoices. As a result of the latter, he lost his Navy security clearance in 2001. He then deliberately omitted any mention of his loss of clearance on his February 2003 DoD security clearance application. Mitigation has not been demonstrated. Clearance is denied.

**HISTORY OF THE CASE**

On September 30, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding required under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether a clearance should be granted, denied or revoked.

On December 15, 2004 and January 25, 2005, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made by a DOHA Administrative Judge on the written record, i.e., without a hearing. Department Counsel issued a File of Relevant Material (FORM) on March 31, 2005. The Form instructed Applicant that any response to the FORM had to be submitted within 30 days of its receipt by Applicant. Any response was due by May 12, 2005, but Applicant did not submit a response to the FORM. The matter was assigned to me for resolution on May 13, 2005.

## PROCEDURAL MATTERS

As part of the FORM, the Government moved to amend the SOR by modifying the language of SOR 1.b. The proposed language is supported by language in the record, and no objection was submitted by Applicant. I accept the proposed language and have amended the SOR accordingly, as cited below under Findings of Fact.

## FINDINGS OF FACT

Applicant is a 34-year-old tradesman for a defense contractor. The SOR contains two allegations under Guideline J (Criminal Conduct) and two allegations under Guideline E (Personal Conduct). In his response, Applicant admits all four allegations, with explanations. Applicant's factual admissions, as cited above, are adopted as Findings of Fact.

After considering the totality of the evidence derived from Applicant's testimony and all exhibits, I make the following additional FINDINGS OF FACT as to each SOR allegation:

### *Guideline J (Criminal Conduct):*

1.a. - Applicant had Non-Judicial Punishment imposed on him on January 20, 1993, under Article 15 of the Uniform Code of Military Justice (UCMJ), for the offenses of (1) Willful Destruction of Government Property, and (2) Breach of the Peace. He was sentenced to an Oral Reprimand, restricted for 14 days, suspended for six months, and ordered to attend an Alcohol and Drug Abuse Program. This incident was alcohol-related.

1.b. - Applicant was convicted and had punishment imposed on him by a Special Court-Martial on December 3, 2001, under the UCMJ, for the offense of Larceny. He was sentenced to reduction in grade to E-4 and 60 days restriction. He was found not guilty of the charges of fraud and conspiracy.

### *Guideline E (Personal Conduct)*

2.a. - Applicant falsified material facts on a security clearance application (SF 86), dated February 14, 2003, in responding to Question "**32. Your Investigative record - Clearance Actions** - To Your knowledge, have you ever had a clearance or access authorization denied, suspended, or revoked, or have you ever been debarred from government employment?" He answered "No" and deliberately failed to mention that his Security Clearance had been revoked by the Department of the Navy on August 16, 2001 (Items 5 and 9).

2.b. - Applicant submitted fraudulent price quotes and purchase requests from 1997 to at least 2000, through the United States Navy Command Supply System. As a result, \$15,706.19 in unauthorized supplies were purchased. Applicant had Non-Judicial Punishment imposed on him in December 3, 2001 under Article 15 of the UCMJ, as set forth in 2.a., above (Item 9).

### **POLICIES**

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing participation; (3) the frequency and recency of the conduct; (4) the individual'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, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Because each security case presents its own facts and circumstances, it should not be assumed that the factors cited above exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior.

Eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination based on the Directive's "whole person" concept, I am not permitted to speculate, but can only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses.

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted on to safeguard classified information and material twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an applicant for a security clearance, in his or her private or work life, may be involved in conduct that demonstrates poor judgment, untrustworthiness, or unreliability. These concerns include consideration of the potential, as well as the actual, risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either by an applicant's admissions or by other evidence) and establishes conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended, at E2.2.2., "any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

### CONCLUSIONS

Applicant served in the U.S. Navy from 1990 to February 2002. His final grade was a Petty Officer Second Class (E5).

I have considered the evidence in light of the appropriate legal standards and factors, and have assessed Applicant's credibility based on the entire record. I conclude the totality of the evidence establishes a *prima facie* or initial case as to all SOR allegations, and the proven misconduct in turn establishes a nexus or connection with Applicant's security clearance eligibility. The issue remains whether Applicant had established mitigation of all or any of the allegations. Since Applicant did not submit a response to the FORM, the most recent information in the case file is that supplied by Applicant in response to the SOR (Item 3) and in his earlier sworn statement (Item 6). For the reasons stated below, I conclude that mitigation has not been established as to either Guideline.

## *Criminal Conduct*

Applicant admits, and the record evidence independently shows, that he had Non-Judicial Punishment imposed on him twice while in the Navy, first in 1993 (Item 8), and again in 2001 (Item 9). The details of the two offenses are cited in SOR 1.a and 1.b., and found in Items 5, 6, 8, and 9. Applicant's explanations do not help his position. As to 1.a., he admits the omission and adds that to say he simply forgot would "sound like an excuse," is correct, but he does not provide an alternative explanation. As to 2.b., his explanation appears to be that he took the Government property home because he was concerned about pilferage at the base, and always intended to return the items (Item 2). This explanation is neither compelling nor credible. There is no basis in the record for questioning the court-martial findings.

Disqualification and Mitigation - *The Concern* - A history or pattern of criminal conduct created doubt about a person's judgment, reliability, and trustworthiness.

Condition that could raise a security concern and may be disqualifying:

1. any criminal conduct, regardless of whether the person is formally charged.
2. a single serious crime or multiple lesser offenses

Conditions that may mitigate security concerns include:

None that are established by the facts of this case.

## *Personal Conduct*

2.a. - There is no question that Applicant did have his security clearance suspended by the Navy. He acknowledged being so informed by the Navy on October 3, 2001, in a document that also contains a report of the underlying offense (Item 9). Applicant's explanation (Item 2) is that he had not been "convicted" but was awarded "Non-Judicial Punishment" and that his "security clearance had gone back into effect. To the best of my knowledge, this is how I

understood the situation when I signed the letter." "The letter" appears to be a reference to what is page 2 of Item 9, which contains an acknowledgment by Applicant that he had been "denied a security clearance" and "no longer qualified for submarine duty." Applicant's contention that he thought his clearance had been returned is not supported by any documentation, and is simply not credible.

2.b. - The Navy Report of Investigation of February 20, 2001, quotes Applicant as admitting he "routinely obtained fraudulent quotes" and submitted them along with purchase requests (Item 9 at page 35). This was the basis for the loss of clearance, and it was not refuted by Applicant when he had an opportunity to do so when his clearance was revoked. I conclude that Applicant had thought about his actions and acted deliberately.

Disqualification and Mitigation - *The Concern* - Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information;

Conditions that could raise a security concern and may be disqualifying include:

2. Deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, or similar forms used to conduct investigations (as to 2.a.).

5. A pattern of dishonesty or rule violation (as to 2.b. ).

Conditions that could mitigate security concerns:

None that are established under the facts of this case.

Overall, his criminal conduct in 1993 and again in 2000/2001 indicate that Applicant cannot be relied upon to act with sound judgment in protecting U.S. security interests. He has acted irresponsibly, as described in 1.a (1993) and 1.b. (2000), the latter involving fraud and theft of Government property. He then compounded his misconduct by lying about it on his SF 86. He has not provided evidence of mitigation or extenuation. It is fundamental to the security adjudication process that doubts must be resolved against the granting of a clearance. Applicant's conduct contains too many recent examples of the exercise of poor judgment, unreliability, and untrustworthiness under the two cited guidelines to permit a finding that he is currently eligible for access to the nation's secrets.

## **FORMAL FINDINGS**

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

### Guideline F (Criminal Conduct) Against the Applicant

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. Against the Applicant

### Guideline E (Personal Conduct) Against the Applicant

Subparagraph 2.a. Against the Applicant

Subparagraph 2.b. 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.

**BARRY M. SAX**  
**ADMINISTRATIVE JUDGE**