

KEYWORD: Personal Conduct; Criminal Conduct; Alcohol

DIGEST: Applicant mitigated the security concerns about his alcohol abuse. However, he failed to mitigate the security concerns about his personal and criminal conduct stemming from his deliberate and multiple falsifications of answers to questions in his most recent security clearance application (SF 86). Clearance is denied.

CASENO: 03-26156.h1

DATE: 01/23/2006

DATE: January 23, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-26156

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Richard A. Stevens, Esquire, Department Counsel

FOR APPLICANT

Michael F. Fasanaro, Jr., Esquire

SYNOPSIS

Applicant mitigated the security concerns about his alcohol abuse. However, he failed to mitigate the security concerns about his personal and criminal conduct stemming from his deliberate and multiple falsifications of answers to questions in his most recent security clearance application (SF 86). Clearance is denied.

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 ⁽¹⁾ it is clearly consistent with the national interest to give Applicant a security clearance. On January 31, 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), Guideline G (alcohol consumption), and Guideline J (criminal conduct). Applicant timely submitted a responsive pleading, and requested a hearing.

The case was assigned to me on August 24, 2005, and I convened a hearing on September 20, 2005. The parties appeared as scheduled and the government presented nine exhibits (GE 1 through 9), which were admitted without objection. Applicant proffered no documents but testified in his own behalf, and presented the testimony of five witnesses. DOHA received the transcript (Tr) on October 6, 2005.

FINDINGS OF FACT

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

Applicant is 34 years old and employed by a defense contractor as local area network (LAN) technician. He has worked for his current employer since September 2000. When he was 18 years old, Applicant enlisted in the United States Navy. In September 2000, he was discharged as an operations specialist third class (OS3; paygrade E-4); however, he had previously attained the rank of OS2 and was in line for promotion to OS1 before being twice reduced in rank for alcohol-related disciplinary reasons.

Applicant was convicted in 1992 of driving under the influence of alcohol (DUI). After going to nightclubs, he pulled over to the side of the road and went to sleep. Police discovered him and administered a blood alcohol test that showed a blood alcohol content (BAC) of .14%.

In May 1994, Applicant was convicted of DUI, second offense. He was home on leave and was stopped for speeding. His BAC was .10%, the result of drinking five or six beers earlier that day. He also had an open container of beer in the car when he was stopped. He was convicted in absentia and fined.

In May 1996, Applicant appeared at Captain's Mast and received non-judicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ) for being drunk and disorderly, and for communicating a threat. He was reduced in rank from OS2 to OS3. In September 1996, Applicant again appeared at Captain's Mast and was found guilty of being drunk on duty. He was further reduced in rank from OS3 to OSSN (paygrade E-3).

After his May 1996 Article 15 punishment, Applicant was checked into a Navy inpatient alcohol treatment program. In February 1997, he was diagnosed by a Navy drug and alcohol counselor as alcohol dependent. In March 1998, Applicant successfully completed his treatment program and aftercare plan, and was released from the Navy's drug and alcohol abuse program.

In May 1997, Applicant was a passenger in a vehicle involved in an accident. The driver was intoxicated and had fallen asleep. Applicant moved him out of the driver's seat to check on him. When the police arrived they determined that Applicant had been at the wheel when the accident happened and charged him with reckless driving. Applicant admits he had consumed alcohol before the accident but that he was not intoxicated. He was ultimately found guilty of obstructing justice and fined. In May 1998, Applicant was charged with domestic assault and battery. He and his girlfriend had argued and she called the police to get him to leave their home. He had not been drinking before the argument. His girlfriend later dropped the charges.

Applicant was arrested in May 2000 and charged with DUI. He had three or four beers before he was stopped for speeding. His BAC was .14%. He was convicted of DUI, fined, placed on 18 months probation, and ordered to complete alcohol counseling. Applicant successfully completed the terms of his sentence and has abstained from alcohol since this arrest. The court-ordered counseling took almost one year to complete because Applicant had to switch programs in

order to comply with the court's requirements. The counselor center he initially used could not reliably see him on a weekly basis as required by the court. [\(2\)](#)

As a result of Applicant's last arrest in May 2000, he was away from his ship without authorization. When he returned to the ship, he appeared at Captain's ast and was found guilty of unauthorized absence and driving while intoxicated. He had regained his earlier rank of IT2 by this time, but was reduced in rank to IT3 as part of his punishment. He left the Navy four months later with an honorable discharge.

Applicant has held a clearance since he joined the Navy in 1990. In January 2001, he submitted a security clearance application (SF 86) to begin a periodic re-investigation of his suitability for clearance. In response to question 24, which asked if he had "ever been charged with or convicted of any offense(s) related to alcohol...", Applicant answered "no." In response to question 25, which asked if Applicant, "in the last 7 years, [had] been subject to court martial or other disciplinary proceedings under the Uniform Code of Military Justice (include non-judicial, Captain's Mast, etc.)," he answered "no." In response to question 26, which asked if Applicant, in "the last 7 years, [had] been arrested for, charged with, or convicted of any offense(s)" not addressed by other questions about criminal conduct, he answered "no." In response to question 30, which asked if, in "the last 7 years, [Applicant's] use of alcoholic beverages (such as liquor, beer, wine) [had] resulted in any alcohol-related treatment or counseling (such as for alcohol abuse or alcoholism), he answered "no." [\(3\)](#)

Applicant has completed similar security questionnaires before and was already familiar with the questions when he completed his 2001 SF 86. [\(4\)](#) He told a Defense Security Service (DSS) agent in December 2001 that he had disclosed his then-existing arrests in a 1996 security questionnaire while in the Navy, but that he answered the aforementioned questions as he had in 2001 because he "considered that it would adversely affect [his] clearance and [his] job." [\(5\)](#)

Applicant is highly regarded by his co-workers and friends as dedicated, reliable, and talented. He has made several trips on temporary duty orders (TDY) in support of the contract to which he is assigned. These TDYs have been made without incident and there are no known problems with how he handles classified information. Applicant and his wife have known each other for ten years and have been married for four. They are both active as deacons in their church and perform a great deal of community volunteer work, including teen mentoring programs. Applicant and his wife do not drink alcohol at any time because it is inconsistent with their values and their lifestyle.

POLICIES AND BURDEN OF PROOF

The Directive sets forth adjudicative guidelines [\(6\)](#) to be considered in evaluating an Applicant's suitability for access to

classified information. Security clearance decisions must reflect consideration of both 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.⁽⁷⁾ 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), Guideline G (alcohol), and Guideline J (criminal conduct).

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁽⁸⁾ 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.⁽⁹⁾ 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.⁽¹⁰⁾

CONCLUSIONS

Under Guideline E, a security concern arises where 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.⁽¹¹⁾ Here, the government questions Applicant's trustworthiness because it appears he deliberately omitted from his SF 86 six alcohol-related criminal offenses between 1992 and 2000 (SOR ¶ 1.a), the fact that three of those offenses were charged under the UCMJ (SOR ¶ 1.b), the fact he was also charged with two other criminal offenses (SOR ¶ 1.c), and that he twice completed treatment and counseling for alcohol abuse (SOR ¶ 1.d). Department Counsel submitted sufficient information to support these allegations. Applicant has denied any intent to falsify his answers to the SF 86 questions; however, available information establishes Applicant should have answered "yes" to the questions at issue here, but that he deliberately omitted the information about his drinking and his arrests because he was concerned about the adverse impact it would have on his ability to keep his clearance, which he needs to do his job. Based on all of the foregoing, Guideline E DC 2 ⁽¹²⁾ applies.

By contrast, I have reviewed the listed mitigating conditions (MC) under Guideline E, and conclude none apply. This case is somewhat unusual in that more than four years have elapsed since Applicant submitted his security questionnaire

and he was interviewed by DSS about his omissions. Nonetheless, his falsification must be viewed as recent, because the SF 86 at issue is the basis for the current adjudication of his clearance, and his decision to omit that information, without any attempt to promptly correct his omissions, precludes any claims of mitigation or lack of intent. Further, the facts Applicant omitted are directly probative of his judgment, reliability, and overall character.

The Applicant's completion of a security questionnaire is the initial step in requesting a security clearance. Because false or incomplete information given in the questionnaire is capable of affecting the way government investigators obtain complete and accurate information about an applicant, it is material. Moreover, a false answer is material even if there is no proof it actually influenced Applicant's background investigation. Applicant knowingly submitted a questionnaire devoid of any adverse information from his background. Further, he did so to protect his own interests, conduct which is directly at odds with the government's need to rely on the clearance holder to look after the national interest as his own. In light of the foregoing, I conclude Guideline E against the Applicant.

The government also alleged Applicant's deliberate falsification of his SF 86 constituted a knowing and willful false statement to a government agency concerning a matter within its jurisdiction, thereby violating federal criminal law expressed in 18 U.S.C. § 1001 (SOR ¶ 3.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.⁽¹³⁾ The criminal activity at issue may consist of a single serious crime or multiple lesser offenses. Available information supports the government's allegation in SOR ¶ 3. Here, Applicant committed a single serious crime, but was not charged. Guideline J DC 1⁽¹⁴⁾ and DC 2⁽¹⁵⁾ apply.

Further, a review of the listed mitigating conditions shows none apply here. For the same reasons Applicant's falsification is recent under Guideline E, it must be considered recent under Guideline J as well. Also, this crime is isolated only in the sense it is the only one alleged in the SOR. Just as I would have to at least consider as part of the entire record other instances of dishonesty even if they were not alleged, I cannot ignore the other criminal conduct in Applicant's background. Combined with his deliberate falsifications about that conduct, I cannot conclude there is "clear evidence of rehabilitation" as contemplated under Guideline J.⁽¹⁶⁾ Accordingly, I conclude Guideline J against the Applicant.

Finally, the government alleged Applicant abused alcohol from 1990 until October 2000 (SOR ¶ 2.a), and that he was involved in several alcohol-related criminal offenses (SOR ¶ 2.b). The government also alleged Applicant underwent a three-month inpatient alcohol treatment program in 1997, and was diagnosed as alcohol dependent (SOR ¶ 2.c), and that he entered but failed to complete court-ordered alcohol treatment from August 2000 to August 2001 (SOR ¶ 2.d). As expressed in Guideline G, excessive alcohol consumption is a security concern because it often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness.⁽¹⁷⁾ The government submitted sufficient information to support the allegations in SOR ¶¶ 2.a, 2.b and 2.c. However, available information indicates Applicant actually completed the outpatient treatment referred to in SOR ¶ 2.d. Based on the facts established by the government's information, Guideline G DC 1,⁽¹⁸⁾ DC 3,⁽¹⁹⁾ and DC 6⁽²⁰⁾ apply.

Having reviewed the available mitigating conditions under Guideline G, I conclude MC 2 [\(21\)](#) and MC 3 [\(22\)](#) apply as well. Applicant has been sober for more than five years, and has made significant, long-lasting changes in his lifestyle that are conducive to continued sobriety. It is unlikely he will return to drinking at all, much less in a manner that might raise a question about his suitability for clearance. I conclude Guideline G for the Applicant.

Applicant has successfully demonstrated his alcohol problems are behind him. However, doubts about Applicant's suitability for continued access to classified information persist because of his deliberate and multiple falsifications of his SF 86, made in knowing violation of federal criminal law. I am mindful of the unusually long time that has passed and the positive changes in Applicant's life since he submitted that form. Nonetheless, a person's candor and trustworthiness are such fundamental facets of the industrial personnel security program as to require more than the passage of time and a demonstration of clean living and reliable work performance to overcome concerns about deliberate false statements. 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 [\(23\)](#) of Applicant's deliberate falsifications motivated by concern for personal interests, taken in the context of all of the information before me shows that reasonable doubts persist about Applicant's ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. Absent substantial information to mitigate these doubts, which Applicant failed to provide, I cannot conclude he has otherwise overcome the government's case.

FORMAL FINDINGS

Formal findings regarding each SOR allegation are as follows:

Paragraph 1, Guideline E (Personal 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

Paragraph 2, Guideline G (Alcohol): FOR THE APPLICANT

Subparagraph 2.a: For the Applicant

Subparagraph 2.b: For the Applicant

Subparagraph 2.c: For the Applicant

Subparagraph 2.d: For the Applicant

Paragraph 3, Guideline J (Criminal Conduct): AGAINST THE APPLICANT

Subparagraph 3.a: 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 the Applicant. Clearance is denied.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. Tr., 32 - 34.
3. GE 1.
4. Tr., 35.
5. GE 2.
6. Directive, Enclosure 2.
7. 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;

8. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).

9. *See Egan*, 484 U.S. at 528, 531.

10. *See Egan*; Directive E2.2.2.

11. Directive, E2.A5.1.1.

12. 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;

13. Directive, E2.A10.1.1.

14. Directive, E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;

15. Directive, E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

16. Directive, E2.A10.1.3.6.

17. Directive, E2.A7.1.1.

18. Directive, E2.A7.1.2.1. Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use;

19. Directive, E2.A7.1.2.3. Diagnosis by a credentialed medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence;

20. Directive, E2.A7.1.2.6. Consumption of alcohol, subsequent to a diagnosis of alcoholism by a credentialed medical professional and following completion of an alcohol rehabilitation program.

21. Directive, E2.A7.1.3.2. The problem occurred a number of years ago and there is no indication of a recent problem;

22. Directive, E2.A7.1.3.3. Positive changes in behavior supportive of sobriety;

23. Directive, E2.2.3.