KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant's history of criminal conduct includes three arrests resulting in two convictions for Reckless Driving and Defrauding an Innkeeper. He later falsified his response to a question on his Security Clearance Application concerning his criminal history, in violation of 10 U.S.C. § 1001. Applicant failed to mitigate the security concerns arising from his falsification or his criminal conduct. Clearance is denied.

CASE NO. 04-03398.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. 04-03398

**DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL J. BRESLIN**

**APPEARANCES**

**FOR GOVERNMENT**

Richard Stevens, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

## SYNOPSIS

Applicant's history of criminal conduct includes three arrests resulting in two convictions for Reckless Driving and Defrauding an Innkeeper. He later falsified his response to a question on his Security Clearance Application concerning his criminal history, in violation of 10 U.S.C. § 1001. Applicant failed to mitigate the security concerns arising from his falsification or his criminal conduct. Clearance is denied.

## STATEMENT OF THE CASE

On April 30, 2003, Applicant submitted a security clearance application. The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant under Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended (the "Directive"). On April 25, 2005, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. The SOR alleges security concerns under Guideline E, Personal Conduct, and Guideline J, Criminal Conduct of the Directive.

Applicant answered the SOR in writing by letter dated May 23, 2005. He elected to have a hearing before an administrative judge.

I received the case assignment on January 3, 2006. With the concurrence of Applicant and Department Counsel, I convened the hearing on February 8, 2006. The government introduced Exhibits 1 through 6. Applicant provided Exhibit A and testified on his own behalf. Department Counsel moved to amend ¶ 1.b of the SOR by amending the phrase "arrests and convictions" to read "arrest," and further amending the phrase "subparagraphs 2.c and 2.d below" to read, "subparagraph 2.c below." There being no objection, I granted the motion. DOHA received the final transcript of the hearing (Tr.) on February 16, 2006.

## FINDINGS OF FACT

Applicant admitted the factual allegations in the SOR. (Applicant's Answer to SOR, May 23, 2005.) Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, I make the following additional findings of fact.

Applicant was born in October 1961. (Ex. 1 at 1.) He enlisted in the U.S. Navy in October 1980. (Ex. 1 at 5.) The government awarded Applicant a Secret security clearance in 1981. (Ex. 1 at 7.) He worked as a Hull Technician. (Tr. at 39.)

In February 1982, local police arrested Applicant for carrying in his car an ax handle larger than allowed by state law. (Ex. 3 at 4.) In March 1982, a state court convicted Applicant of disorderly conduct, and sentenced him to a $100.00 fine and payment of a court fee. (Ex. 2 at 3.)

While on active duty in the U.S. Navy, Applicant received nonjudicial punishment (Article 15, UCMJ; 10 U.S.C. § 815) on three occasions. (Ex. 3 at 4.) Applicant asserts he was not certain but believed they were related to unauthorized absences. (Ex. 3 at 5; Tr. at 53-54.) The Navy administratively discharged Applicant as an E-2 in February 1989, with a General (Under Honorable Conditions) discharge. (Ex. 1 at 5.)

Local police arrested Applicant in November 1995 for Defrauding an Innkeeper. According to Applicant, a restaurant attempted to charge him more than he owed, he refused to pay, and they called the police. (Ex. 3 at 3.) Witnesses provided sworn statements to the police that Applicant drank $58.00 worth of alcohol, became intoxicated, and refused to pay his bill. (Ex. 4 at 1.) A court found him guilty of the offense and sentenced him to pay a fine, $115.00 in court costs, and $59.00 in restitution. (Ex. 2 at 4.)

Applicant lived with his wife in a Western state that was his legal domicile. Applicant's wife was on active-duty and was not domiciled in that state; her home state did not require out-of-state military members to pay state income taxes. The couple filed a joint federal income tax return, but Applicant filed his state tax return as a single person. In February 1996, after they moved to another state, the Western state authorities filed an $822.00 lien against Applicant for failure to pay taxes. (Ex. 6 at 6.) Applicant was able to pay off the lien in July 2001. (*Id.*; Tr. at 51; Ex. A.)

In May 1996, city police arrested Applicant for Driving Under the Influence of Alcohol (DUI), a misdemeanor. (Ex. 2 at 4.) At trial in August 1996, he pled not guilty and was acquitted.

In March 1997, Applicant and his wife became involved in an altercation and she called the police. (Ex. 3 at 2; Ex. 5 at 1.) The local police arrested Applicant on charges of Domestic Battery, a misdemeanor. (Ex. 2 at 5; Ex. 5 at 2.) The

prosecutors later dropped the charge. (Ex. 2 at 5; Ex. 5 at 5.)

In February 1999, police arrested Applicant for DUI. At trial, the court found him guilty, contrary to his plea, of Reckless Driving. (Tr. at 32; Ex. 3 at 2.) The court sentenced him to pay a $191.00 fine and court costs. (Answer to SOR, *supra*, at 1.) Applicant paid the fine and completed the required alcohol awareness class. (Ex. 3 at 2.)

In December 2002, Applicant began working as a welder for a federal contractor. (Ex. 1 at 2; Tr. at 27.) The position required a security clearance. Applicant completed an SF 86, Security Clearance Application by filling out a form by hand and returning it to his employer's security personnel in late December 2002. (Tr. at 28, 41; Ex. 1.) According to Applicant, his wife helped him fill out the application over a three-day period. (Tr. at 44-45; Ex. 3 at 5.) The employer's representatives entered the information into a computer database, printed it out, and gave it to Applicant to review. (Tr. at 28-29, 29-30.) Applicant reviewed the document and signed it on April 30, 2003. (Ex. 1 at 1, 8, 12.) He asserts he could not remember making changes to the printed version. (Tr. at 29, 41.)

Question 24 on the SF 86 asked whether Applicant had ever been charged with or convicted of any offense related to alcohol or drugs. (Ex. 1 at 6.) Applicant answered, "No." He did not report his arrest for DUI in May 1996, or that he was charged with DUI in February 1999 and convicted of Reckless Driving. (*Id.*)

Question 26 on the SF 86 inquired whether Applicant had been arrested for, charged with, or convicted of any other offenses within the preceding seven years. (Ex. 1 at 7.) Applicant answered "No." (*Id.*) He did not list any of his prior arrests or convictions.

Question 36 on the SF 86 asked whether Applicant had any liens placed against his property within the previous seven years for failing to pay taxes. (Ex. 1 at 10.) Applicant answered "No." (*Id.*) He did not report the tax lien filed against him in February 1996, which he paid in July 2001.

At the hearing Applicant claimed no memory of whether he included his arrests on the hand-written version of his security clearance application. (Tr. at 42.) He indicated he did not report his February 1999 arrest for DUI because he understood the question to relate only to convictions; he was acquitted of the DUI and only convicted of Reckless Driving. (Tr. at 43-44.) Applicant also asserted that, in response to Question 26, he denied any other arrests, charges, or conviction within the preceding seven years because he did not understand the question and could not recall the dates of the arrests. (Tr. at 48.) Applicant admitted he did not report the tax lien in response to Question 36, either in his initial hand-written application or the later typed version, because the lien was not placed against any property. (Tr. at 51.)

## POLICIES

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." (*Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).) In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch. The President 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. Ord. 10865, § 2.)

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. The adjudicative guidelines at issue in this case are:

Guideline E, Personal Conduct: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the applicant may not properly safeguard classified information. (Directive, ¶ E2.A5.1.1.)

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.)

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to these adjudicative guidelines, are set forth and discussed in the conclusions below.

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." (Directive, ¶ E2.2.1.) An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. (*Id.*) An administrative judge should consider the following factors: (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 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. (*Id.*)

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. (Directive, ¶ E3.1.14.) Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. (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).) "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." (Directive, ¶ E2.2.2.)

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. (Exec. Ord. 10865, § 7.) It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

## CONCLUSIONS

I considered carefully all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

**Guideline E, Personal Conduct**

The Directive sets out various factors relevant to an applicant's personal conduct that may be potentially disqualifying. Under ¶ E2.A5.1.2.2 of the Directive, "[t]he deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire" may be disqualifying. Applicant's answers to Questions 24 and 26 on the Security Clearance Application were not accurate. The only issue is whether Applicant provided the inaccurate information inadvertently or deliberately, with an intent to mislead the government.

After serving in the military and working for a defense contractor, Applicant knew the significance of a security clearance. He also knew that his record of criminal involvement was a potential obstacle to receiving a clearance; therefore, questions about his criminal record would have had a special significance. During questioning by Department Counsel, Applicant admitted taking three days to complete the form, and that he went over the questions with his wife. Questions 24 and 26 are straightforward and clearly worded. Under the circumstances, it is simply not credible that he misunderstood the plain language of the questions. I conclude Applicant deliberately provided false information in response to Question 24 by failing to list his arrests for DUI in May 1996 and February 1999. This potentially disqualifying condition applies.

Paragraph 1.b of the SOR, as amended, alleges Applicant deliberately falsified his response to Question 26 by failing to report his arrest for Domestic Battery in arch 1997. The question inquired about arrests, charges or convictions within the preceding seven years. The arrest at issue occurred less than seven years from the December 27, 2002 date of the SF 86, but more than seven years before Applicant signed the form in April 2003. Even if Applicant deliberately provided false information to his company in December 2002, his answer to Question 26 was not false when he signed and certified the document in April 2003, contrary to the allegation in the SOR.

Paragraph 1.c of the SOR alleges Applicant deliberately falsified his response to question 36 by concealing the state tax lien filed against him in February 1996. There are two problems with the allegation, however. First, the question specifically asks about liens "placed" within the preceding seven years-the lien in this case was filed more than seven years before Applicant signed the SF 86. More significantly, the question refers only to liens placed "against your property"; Applicant notes he had moved from the state in question and had no property there. Under the circumstances, I conclude Applicant did not intend to mislead the government by his response to Question 36.

Under the Directive, ¶ E2.A5.1.3, an applicant may mitigate the security concerns arising from questionable personal conduct. Under ¶ E2.A5.1.3.1, it may be mitigating where "[t]he information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability." The incidents about which Applicant was untruthful are substantiated by documentary evidence and his later admissions. His record of criminal conduct reflects on his character and stability, and is pertinent to a determination of his judgment and reliability. I find this mitigating factor does not apply.

The potentially mitigating condition in ¶ E2.A5.1.3.2 of the Directive arises where "the falsification was an isolated incident, was not recent, and the individual subsequently provided correct information voluntarily." Applicant's falsifications were recent, and Applicant did not provide correct information until confronted by investigators. I conclude this potentially mitigating condition does not apply. I also considered carefully the other potentially mitigating conditions and conclude they do not apply.

I considered carefully all the facts and circumstances in this case in light of the "whole person" concept. I conclude Applicant has not mitigated the security concerns arising from his falsification of his security clearance application.

**Guideline J, Criminal Conduct**

Paragraph E2.A10.1.2.1 of the Directive provides that "allegations or admission of criminal conduct" may be disqualifying. Similarly, under ¶ E2.A10.1.2.2 of the Directive, it may be disqualifying where an applicant committed "a single serious crime or multiple lesser offenses." Applicant's record includes three arrests and two convictions: Reckless Driving in February 1999 and Defrauding an Innkeeper in 1995. More significantly, Applicant deliberately provided false or misleading information in his SF 86, Security Clearance Application, in violation of 18 U.S.C. § 1001. I find

both these potentially disqualifying conditions raised in this case.

Under the Directive, the security concerns arising from a history of criminal conduct may be mitigated. Applicant has the burden of showing that potentially mitigating conditions apply.

Under ¶ E2.A10.1.3.1 of the Directive, it may be mitigating when "the criminal behavior was not recent." The Directive does not define the term "recent"; the recency of an incident is determined by considering all the circumstances, including the applicant's age, his pattern of behavior over a period of time, and the number of years since the last incident relative to the entire course of conduct. Applicant's history of criminal involvement extends from 1982 (his first conviction) through 2003 (his falsification of the SF 86), a period of about 21 years. By contrast, he had no arrests or criminal conduct for about the last three years. Considering all the circumstances, I conclude Applicant's criminal conduct is recent and this potentially mitigating condition does not apply.

The Directive, ¶ E2.A10.1.3.2, also provides that it may be mitigating where "the crime was an isolated incident." As noted above, Applicant has a long history of criminal conduct; his crimes are not isolated incidents. This potentially mitigating condition does not apply.

Paragraph E2.A10.1.3.4 of the Directive states it may be mitigating where "the factors leading to the violation are not likely to recur." Similarly, under ¶ E2.A10.1.3.6 of the Directive, it may be mitigating where "there is clear evidence of successful rehabilitation." Applicant failed to present evidence to prove these potentially mitigating conditions. I conclude they do not apply.

I carefully considered the disqualifying and mitigating conditions in this case, in light of the "whole person"concept. I conclude Applicant has not mitigated the security concerns arising from his history of criminal conduct.

## FORMAL FINDINGS

My conclusions as to each allegation in the SOR are:

Paragraph 1, Guideline E: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Paragraph 2, Guideline J: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: Against Applicant

Subparagraph 2.d: Against Applicant

## DECISION

In light of all of 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 J. Breslin

Administrative Judge