

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant is 33 years old and has been employed as a logistics specialist for a defense contractor since January 2003. He was arrested or charged with a variety of criminal offenses on eight occasions from 1993 to May 2003. He failed to disclose any of the incidents on three separate security clearance applications (SF 86) he submitted in 1998, 2000, and 2003. Applicant failed to mitigate the security concerns raised by his criminal and personal conduct. Clearance is denied.

CASENO: 04-03608.h1

DATE: 01/31/2006

DATE: January 31, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-03608

DECISION OF ADMINISTRATIVE JUDGE

DAVID S. BRUCE

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 33 years old and has been employed as a logistics specialist for a defense contractor since January 2003. He was arrested or charged with a variety of criminal offenses on eight occasions from 1993 to May 2003. He failed to disclose any of the incidents on three separate security clearance applications (SF 86) he submitted in 1998, 2000, and 2003. Applicant failed to mitigate the security concerns raised by his criminal and personal conduct. Clearance is denied.

STATEMENT OF THE CASE

On April 7, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Review Program*, dated January 2, 1992, as amended and modified (Directive), issued a Statement of Reasons (SOR) to Applicant alleging facts that raise security concerns addressed in the Directive under Guideline J - Criminal Conduct, and Guideline E - Personal Conduct. The SOR detailed why DOHA could not preliminarily determine under the Directive that it is clearly consistent with the national interest to grant or continue Applicant's request for a security clearance. By his answer to the SOR executed April 26, 2005, Applicant admitted the allegations of subparagraphs 1.a., 1.b., 1.e., 1.g., and 1.h. of the SOR, and denied the allegations of subparagraphs 1.c., 1.d., 1.f., and 2.a. -2.f., and requested a hearing before an administrative judge.

The case was assigned to me on August 24, 2005, and I conducted the hearing on November 9, 2005. The government submitted exhibits (GE) 1 through 11, which were admitted without objection. Applicant testified and offered exhibit

[\(1\)](#)

(AE) A, also admitted without objection. DOHA received the hearing transcript (Tr.) on December 1, 2005.

FINDINGS OF FACT

Applicant's admissions to the allegations of the SOR are incorporated herein by reference. In addition, after a thorough review of the pleadings, transcript, and exhibits, I make the following findings of fact:

Applicant is 33 years old and was married for the second time in April 2005. His first marriage lasted about five years and he has two children with his first wife, ages 8 and 5, for whom he pays child support of \$1500.00 per month. He also has a five month old child with his present wife. [\(2\)](#)

Applicant served four years active duty in the United States Marines from August 1990 until August 1994, and he participated in both Operation Desert Storm and Operation Desert Shield. [\(3\)](#) He was honorably discharged at paygrade E-4. [\(4\)](#) He then served in the Marine Reserve from August 1994 until May 2002, and in the Air Force Reserve from May 2002 until January 2003, being honorably discharged at paygrade E-5. He previously held a clearance while on active duty. [\(5\)](#)

Applicant has been employed by a federal contractor as a logistics specialist since January 2003. He is highly regarded by his supervisor and is considered reliable, trustworthy and dependable, and a valuable employee. [\(6\)](#) He was employed by two other federal contractors respectively from August 1996 until February 1998, and from July 1998 until August 2000. Except for a few brief periods of unemployment, he worked consistently for other private companies when not working for defense contractors since being discharged from active duty. [\(7\)](#) Applicant held a clearance in 2000 while working for a previous contractor. [\(8\)](#)

On July 30, 1993, Applicant receive Non-Judicial Punishment under Articles 92 and 134 of the Uniform Code of Military Justice (UCMJ) for underage drinking and disorderly conduct. He was reduced in rank and placed on suspension for three months as a result of the incident. [\(9\)](#)

In June 1994, Applicant was charged with Burglary, Assault and Battery, and Malicious Injury to Personal Property in a state court. The arrest did not result in a conviction. [\(10\)](#)

Applicant was involved in an incident in May 1997, when he was charged with a state alcohol beverage control violation. He admits he was present when the incident occurred, but denies he was the offending party.

In December 2001, police investigated and filed an incident report concerning a domestic dispute between Applicant and his wife. His wife failed to contact the police following the filing of the report, and no charges were filed as a result of the incident. [\(11\)](#)

On April 20, 2002, Applicant was charged with Driving While Under the Influence of Alcohol and an Open Container violation. The charges were ultimately dismissed.

Applicant was arrested on August 19, 2002, by state officials on fraud charges concerning alleged overpayment of unemployment benefits. He was found guilty of the offense and paid a fine of about \$450.00. [\(12\)](#)

Applicant was arrested on September 14, 2002, and charged with Felony Kidnaping and Sexual Conduct charges initiated by his former wife brought about by the parties' disagreements over custody issues regarding their children. The charges were ultimately dismissed.

On May 26, 2003, Applicant was convicted of Endangering Medical Services Personnel as a result of a motor vehicle incident and was fined \$625.00.

Applicant electronically filed security clearance applications (SF 86) on November 7, 1998, and January 12, 2000. In response to Question 25 concerning his police and military court record for the preceding seven years, Applicant did not disclose the UCMJ Non-Judicial Punishment imposed upon him in July 1993, on either application. In response to Questions 21, 22, 23, 24, and 26 of the applications concerning his police arrest and court records for other criminal matters, Applicant failed to disclose, where applicable, any of the arrests, charges and criminal proceedings or convictions set forth above, and particularly the charges that resulted from the June 1994 and May 1997 incidents.

Applicant signed his most recent Security Clearance Application on January 13, 2003. In response to Question 21 concerning his police record for felony offenses, he did not disclose he had been charged with felony kidnaping and sexual conduct charges in September 2002. In response to Questions 22, 23, 24, 25, and 26 concerning his police arrest and court records for other offenses specified in the questions, Applicant failed to disclose, where applicable, any of the

arrests, charges and criminal court convictions set forth above, and, in particular, the charges that resulted from the May 1997, April 2002, and August 2002 matters.

POLICIES

Enclosure 2 of the Directive, *Adjudicative Guidelines For Determining Eligibility For Access To Classified Information*, sets forth the criteria which must be evaluated when determining security clearance eligibility. The adjudicative guidelines specifically distinguish between those factors that are considered in denying or revoking an employee's request for access to classified information (Disqualifying Conditions), together with those factors that are considered in granting an employee's request for access to classified information (Mitigating Conditions). By acknowledging that individual circumstances of each case are always different, the guidelines provide substantive standards to assist an administrative judge in reaching fair and impartial common sense decisions.

The adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at well-informed decisions. Section E2.2. of Enclosure 2 of the Directive describes the essence of scrutinizing all appropriate variables in a case as the "whole person concept." In evaluating the conduct of the applicant and the circumstances in any case, the factors an administrative judge should consider pursuant to the concept are: (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 the 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.

Protecting national security is the paramount concern in reaching a decision in any case, and is dependent upon the primary standard that issuance of a clearance must be clearly consistent with the interests of national security. Granting an applicant's clearance for access to classified information is predicated on a high degree of trust and confidence in the individual. Accordingly,

decisions under the Directive must include consideration of not just the *actual* risk of disclosure of such information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information in any aspect of his or her life. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information.⁽¹³⁾ The decision to deny a security clearance request to an individual is not necessarily a determination of the loyalty of the applicant.⁽¹⁴⁾ It is merely an indication the applicant has not met the strict guidelines established by the Department of Defense for issuing a clearance.

In accordance with the Directive, the government bears the burden of proof in the adjudicative process to first establish

conditions by substantial evidence which indicate it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information.⁽¹⁵⁾ The legal standard for the burden of proof is something less than a preponderance of the evidence.⁽¹⁶⁾ When the government meets this burden, the corresponding heavy burden of rebuttal then falls on the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the position of the government, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.⁽¹⁷⁾

Upon consideration of all the evidence submitted in this matter, the following adjudicative guidelines are appropriate for evaluation with regard to the facts of this case:

Guideline J - Criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Guideline E - Personal conduct is a security concern because conduct involving questionable judgment, trustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

CONCLUSIONS

I have thoroughly considered all the facts in evidence in this case and the legal standards required by the Directive. The government has established its case for disqualification under Guideline J - Criminal Conduct.

Based upon all the evidence, Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.2. (*A single serious crime or multiple lesser offenses*), and CC DC E2.A10.1.2.1. (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged*), apply in this case.

Applicant had repeated adverse contacts with law enforcement officials since he was about 20 years old. He was disciplined by the military for underage drinking and disorderly conduct in 1993, and, thereafter, charged with burglary and assault and battery in 1994 while he was still in the Marines. Six other criminal matters occurred after he was discharged from active duty. While he was only held responsible or convicted of charges resulting from three of the eight incidents, they qualify as multiple lesser offenses within the meaning of Guideline J, regardless of whether or not

he was actually charged and/or convicted in each matter.

In addition, Title 18 U.S.C. § 1001, provides that knowingly and willfully submitting materially false, fictitious, or fraudulent information in any matter within the jurisdiction of the U.S. government is a crime punishable by a fine and up to five years imprisonment. Applicant's conduct in deliberately omitting essentially all material information about his criminal background on three successive security clearance applications filed from November 1998 to January 2003, qualifies as serious uncharged criminal conduct within the meaning of Guideline J.

I have considered all the Criminal Conduct Mitigating Conditions (CC MC), and specifically CC MC E2.A10.1.3.1. *(The criminal behavior was not recent)*, CC MC E2.A10.1.3.2. *(The crime was an isolated event)*, CC MC E2.A10.1.3.3. *(The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life)*, CC MC E2.A10.1.3.5. *(Acquittal)*, and CC MC E2.A10.1.3.6. *(There is clear evidence of successful rehabilitation)*. I conclude none apply in this case.

While Applicant's last involvement with the law occurred in May 2003, the repeated events that transpired over the preceding ten year period are dynamic, and aggravated by the fact they have involved a variety of different kinds of incidents. While Applicant may be gratified he has been held responsible for only matters he feels are relatively minor, [\(18\)](#) he has permitted himself to be consistently in circumstances where he has been accused of more serious offenses on multiple occasions. [\(19\)](#) The favorable dispositions he received in the more serious cases were a result of prosecutorial discretion in dismissing the charges, rather than from findings of acquittal. Even though serious stress factors concerning arguments with his first wife have apparently diminished over time, I consider Applicant's pattern and history of erratic behavior over the ten year period to still be recent, creating serious doubt about Applicant's judgment and trustworthiness. In the context of this matter, the multiple charges and incidents and their respective dispositions through criminal court cannot be considered isolated or aberrational events.

It is commendable Applicant has remarried and started a new family, and has had no further criminal incidents in his life since 2003. Nonetheless, he offered no justifiable excuse for his conduct while in the military until 2003, except for youthful indiscretions. He failed to conscientiously pursue a positive and law-abiding lifestyle at a time he had increasing responsibilities as father of his two older children. Simply blaming others for the incidents and not accepting genuine responsibility for his own mischief does not meet his heavy burden of persuasion to effectively mitigate the government's concerns. Applicant did not demonstrate a mature commitment to change his lifestyle as he grew older following his discharge from the military, exemplified by the fact he permitted himself to be in positions to be arrested numerous times. The presence or absence of rehabilitative and other pertinent positive behavioral changes are significant factors in the overall adjudicative process. To his credit, Applicant has made recent positive changes in his lifestyle supportive of his efforts to abstain from future criminal behavior. The long-term positive influence of his actions, however, is presently uncertain, and not enough time has passed to be confident Applicant has achieved a full understanding of the significance of his prior acts. He has failed to demonstrate mature personal insight into his actual motivation for his previous behavior, typically illustrated by an extended period of responsible conduct.

The government has also established its case for disqualification under Guideline E - Personal Conduct. Based on all the evidence, Personal Conduct Disqualifying Condition (PC DC) 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*) applies in this case. Applicant was aware when he completed his three security clearance applications in 1998, 2000, and 2003, he had been arrested on several occasions before each was filed. Failure to list any of the incidents on his last application in 2003 is unacceptable. The questions are clearly expressed. His explanation that he did not understand them is not credible. It was the third time he had completed a SF 86 application. More to the point, he admitted he did not include the information because he was afraid it would negatively impact his security clearance application.⁽²⁰⁾ Applicant had an affirmative obligation to determine the true status of all information requested in the three SF 86 questionnaires he submitted over a five year period, and to fully provide and disclose complete and accurate answers to each item. The omissions on his 2003 SF 86 are particularly troublesome, and exacerbate the previous omissions reflected on the applications he submitted three and five years before. The omissions were apparent to Applicant when he prepared his answers and were made intentionally. They were a deliberate and self serving attempt by Applicant to mislead and inappropriately influence the outcome of his security clearance applications. One objective of the security clearance process is to determine all relevant and material information concerning an applicant. It is not necessarily up to the applicant to decide what is relevant.⁽²¹⁾ Based upon truth and honesty, the process requires full and open disclosure by the applicant of all requested information. As sometimes happens, the intentional omission of critical information by applicants can be more detrimental than the underlying facts. Any intentional misrepresentation or omission by an applicant raises serious concerns about the character and overall integrity of the individual. The government's evidence and Applicant's admissions constitute substantial evidence of a disqualifying condition under Guideline E.

I have considered all the Personal Conduct Mitigating Conditions (PC MC), and specifically PC MC E2.A5.1.3.3. (*The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*), and conclude it does not apply. Applicant did not openly disclose the facts related to his criminal background until he was confronted with the information during an interview with a DSS investigator in 2004. Applicant had more than five years to reconsider his responses on his first application in 1998, if for no other item than the UCMJ disciplinary action taken against him in 1993. Considering all the circumstances, Applicant's candor and credibility are questionable given the seriousness and chronology of the events. Accordingly, Applicant has failed to successfully mitigate the personal conduct security concerns raised in this case.

I have further reviewed all the record evidence under the "whole person" concept required by the Directive in evaluating Applicant's vulnerability in protecting our national security. An applicant with a good or even exemplary work history may engage in conduct that has negative security implications. Although Applicant's loyalty to the United States is not in question, I am persuaded by the totality of the evidence that it is not clearly consistent with the national interest to grant Applicant a security clearance. For the reasons stated, Applicant has not met the strict guidelines for issuance of a clearance, and he has failed to mitigate the security concerns regarding his criminal and personal conduct. Accordingly, Guidelines J and E are decided against Applicant.

FORMAL FINDINGS

In accordance with Section E3.1.25 of Enclosure 3 of the Directive, the following are the formal findings as to each allegation in the SOR:

Paragraph 1. Criminal Conduct (Guideline J) 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

Subparagraph 1.e. Against the Applicant

Subparagraph 1.f. Against the Applicant

Subparagraph 1.g. Against the Applicant

Subparagraph 1.h. Against the Applicant

Subparagraph 1.i. Against the Applicant

Paragraph 2. Personal Conduct (Guideline E) AGAINST THE APPLICANT

Subparagraph 2.a. Against the Applicant

Subparagraph 2.b. Against the Applicant

Subparagraph 2.c. Against the Applicant

Subparagraph 2.d. Against the Applicant

Subparagraph 2.e. Against the Applicant

Subparagraph 2.f. Against the Applicant

Subparagraph 2.g. 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. Clearance is denied.

David S. Bruce

Administrative Judge

1. It is noted at pages 72-92 of the transcript, entries of comments made by the Administrative Judge are mistakenly referenced as having been spoken by a third party who is clearly not involved in the case. In reading the passages in the context of the case, it is apparent the comments were, in fact, made by the presiding Administrative Judge.
2. GE 1 (Applicant's Security Clearance Application dated January 13, 2003), at 1 and 3; and Tr. at 37-38.
3. Tr. at 39.
4. GE 1, *supra* note 2, at 4.
5. *Id.* See also Tr. at 39-40.
6. AE A (Employer's memo dated September 22, 2005).
7. GE 1, *supra* note 2, at 1-2.
8. *Id.* at 7.
9. Tr. at 51. See also GE 6 (Non-Judicial Punishment Record dated August 20, 1993), consisting of two pages.
10. *Id.* at 52-54. See also GE 11 (U.S. Naval Criminal Investigation Report dated June 14, 1994), consisting of two pages.
11. GE 9 (Domestic Incident Report dated December 9, 2001), consisting of two pages, and Tr. at 56-63.
12. GE 8 (Incident and arrest records involving false pretense/swindle/scam/flimflam charges for overpayment of unemployment benefits), consisting of six pages.
13. Directive, Enclosure 2, Para. E2.2.2.
14. Executive Order 10865 § 7.
15. ISCR Case No. 96-0277 (July 11, 1007) at p. 2.
16. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

17. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Para. E3.1.15.

18. Underage drinking and disorderly conduct in 1993; receiving overpayment of unemployment benefits in 2002; and a motor vehicle violation in 2003.

19. Burglary, assault and battery and malicious destruction of personal property in 1994; a serious domestic matter with his wife requiring police intervention in 2001; an alcohol -related driving offense in 2002, and felony kidnaping and sexual conduct charges in 2002.

20. GE 5 (Applicant's sworn statement dated January 28, 2004), at 2.

21. *Id.*