

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant failed to mitigate security concerns about his criminal conduct due to three incidents while he was in the Army. Nor has he mitigated concerns about his personal conduct stemming from his deliberate omission from a security clearance application (SF 86) of information about his arrests. Clearance is denied.

CASENO: 04-04214.h1

DATE: 01/31/2006

DATE: January 31, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-04214

**DECISION OF ADMINISTRATIVE JUDGE**

**MATTHEW E. MALONE**

**APPEARANCES**

**FOR GOVERNMENT**

Richard A. Stevens, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

## **SYNOPSIS**

Applicant failed to mitigate security concerns about his criminal conduct due to three incidents while he was in the Army. Nor has he mitigated concerns about his personal conduct stemming from his deliberate omission from a security clearance application (SF 86) of information about his arrests. 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<sup>(1)</sup> it is clearly consistent with the national interest to give Applicant a security clearance. On April 26, 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) and Guideline J (criminal conduct).

Applicant timely submitted a responsive pleading on June 22, 2005, and requested decision without a hearing. On August 31, 2005, Applicant sent by facsimile a request for a hearing. The case was assigned to me on September 12, 2005, and I convened a hearing on October 13, 2005. The parties appeared as scheduled and the government presented six exhibits (GE 1 through 6), which were admitted without objection. Applicant proffered two documents admitted into the record as a single exhibit (AE A) and testified in his own behalf. DOHA received the transcript (Tr) on October 26, 2005.

## **FINDINGS OF FACT**

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

Applicant is 43 years old and employed by a defense contractor as an electronics technician in support of the U.S. Army. He has worked for his current employer since his October 2001 retirement from the Army after 20 years of

enlisted service. In the Army, Applicant worked on forward-looking infrared systems aboard helicopters. He was also an armored vehicle mechanic and combat engineer. In his civilian job, Applicant is regarded as an outstanding employee and a man of good character and reliability. Applicant was first granted a security clearance in 1983 in connection with his military duties.

Applicant has been married twice. His first marriage lasted from 1987 until a divorce in 1994. Applicant re-married in 1997, but the union has been marred by his wife's alcohol abuse. The couple separated from January 2001 until July 2003. Applicant's wife entered treatment for alcohol abuse in August 2005. During the time she was drinking, Applicant and his wife often got into arguments and had confrontations about her behavior. Applicant would try to keep his wife from leaving the house when she was drunk or to go out drinking in the first place. Often times these arguments resulted in visits by the military and/or civilian police.

On July 20, 2000, Applicant was arrested by military police and charged with assault. He and his wife got into a late-night argument that escalated into a physical incident when Applicant slapped his wife in the face and dragged her across their front lawn. Applicant was charged with a violation of Uniform Code of Military Justice (UCMJ) Article 128, Assault Consummated by a Battery. It appears Applicant was formally prosecuted for this charge, but received a reprimand and extra duty from his company commander.

Applicant was again arrested by military police on October 14, 2000. He was charged with several UCMJ violations - Article 92 (Failure to Obey a Lawful Order), Article 95 (a. Resisting Arrest; b. Disorderly Conduct), Article 117 (Provoking Words or Gestures), Article 128 (Assaulting a Military Police Officer), and Article 134 (Communicating a Threat). MPs were called when Applicant and his wife became involved in a physical confrontation. Applicant claims he was trying to stop his wife from driving while she was drunk. He then became belligerent toward the MP's when they arrived, eventually fleeing on foot, then hitting one officer and throwing another to the ground before he was subdued. Applicant continued to make threats against one officer after being transported to a police station. In March 2001, Applicant received field-grade Article 15 non-judicial punishment. He was reduced in rank from E-6 to E-5, and ordered to forfeit one-half his month's pay for one month. This punishment was suspended on condition of good conduct for six months.

On September 16, 2001, Applicant was arrested by civilian authorities and charged with assault. After pleading guilty to a reduced charge of disorderly conduct, he was given a 30-day suspended jail sentence and assessed \$219.45 in fines and court costs. Thereafter, having been barred from re-enlisting, Applicant retired on September 30, 2001 with 20 years good service.

On November 15, 2002, Applicant submitted a security clearance application (SF 86) to renew his clearance for his civilian job. Applicant had completed similar security questionnaires while in the military. In response to Question 25, which asked whether Applicant had been subject to proceedings under the UCMJ, including Article 15 non-judicial punishment, in the preceding seven years. Applicant answered "no." In response to Question 26, which asked for information about any arrests in the preceding seven years not addressed by other SF 86 criminal conduct questions, Applicant again answered "no." Applicant has acknowledged he should have disclosed his Article 15 punishment and

his September 2001 arrest, but claims he rushed through the SF 86 prior to an overseas deployment with his civilian employer.

### **POLICIES AND BURDEN OF PROOF**

The Directive sets forth adjudicative guidelines<sup>(2)</sup> 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.<sup>(3)</sup> 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) and Guideline J (criminal conduct).

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest<sup>(4)</sup> 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.<sup>(5)</sup> 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.<sup>(6)</sup>

### **CONCLUSIONS**

Under Guideline E, a security concern arises when an applicant exhibits 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.<sup>(7)</sup> Here, the government questions Applicant's trustworthiness because it appears he deliberately omitted from his SF 86 the fact he had received non-judicial

punishment less than two years earlier for several UCMJ violations (SOR ¶ 2.a), and that he was convicted of disorderly conduct and given a suspended jail sentence around the time he retired from the Army (SOR ¶ 2.b).

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, and I do not accept as credible his claim his omissions were inadvertent because he was rushing through the questionnaire. Applicant was an accomplished soldier with years of technical training to his credit. He has filled out similar questionnaires before to renew his clearance. Without more information, which Applicant has not provided, his omissions must be interpreted as deliberate attempts to conceal his criminal conduct. Based on the foregoing, Guideline E DC 2-<sup>(8)</sup> applies.

By contrast, I have reviewed the listed mitigating conditions (MC) under Guideline E, and conclude none apply. His falsifications 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 information about his criminal conduct. I conclude Guideline E against the Applicant.

The government also alleged Applicant was arrested three times for assault and other charges stemming from altercations with his wife and which arose after his wife had been drinking. (SOR 1.a - 1.c) 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.<sup>(9)</sup> The criminal activity at issue may consist of a single serious crime or multiple lesser offenses. Department Counsel has submitted sufficient reliable information, which, coupled with Applicant's admissions and testimony, support the government's intent to revoke Applicant's clearance due to his criminal record. His response to his wife's conduct and his own conduct in each instance was excessive. Further, on at least one occasion, his conduct escalated to the point it was directed at law enforcement officers. While it is understandable that passions may run higher than expected in domestic altercations, Applicant's conduct in response to law enforcement intervention cannot be condoned. On the facts presented, Guideline J DC 1-<sup>(10)</sup> and DC 2-<sup>(11)</sup> apply.

A review of the listed mitigating conditions supports consideration of MC 1-<sup>(12)</sup> and MC 4-<sup>(13)</sup> Applicant's conduct was, in part, the result of stressors from his wife's drinking. The last such incident occurred over four years ago and it appears Applicant's wife's drinking is now a manageable factor in his life. However, these mitigators are tempered by the fact of Applicant's deliberate falsification of his SF 86. While not specifically alleged in the SOR as criminal conduct, I cannot

ignore the fact Applicant's falsifications constitute a violation of federal criminal law under 18 U.S.C. § 1001. 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 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. [\(14\)](#) Accordingly, I conclude Guideline J against the Applicant.

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 [\(15\)](#) of Applicant's deliberate falsifications and of his past criminal conduct, 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 J (Criminal Conduct): AGAINST THE APPLICANT

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

Subparagraph 1.c: Against the Applicant

Paragraph 2, 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 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. Directive, Enclosure 2.

3. 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;

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

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

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

7. Directive, E2.A5.1.1.

8. 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;

9. Directive, E2.A10.1.1.

10. Directive, E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was

formally charged;

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

12. Directive, E2.A10.1.3.1. The criminal behavior was not recent;

13. Directive, E2.A10.1.3.4. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur;

14. Directive, E2.A10.1.3.6.

15. Directive, E2.2.3.