KEYWORD: Personal Conduct

DIGEST: Applicant falsified his security clearance application (SF 86) by failing to disclose nonjudicial punishment he received in the Army for filing a false claim, making a false official statement, and attempting to steal $1,000 from the government. He also failed to disclose a delinquent debt on his SF 86. He refuted the allegation of falsification regarding the debt, but did not refute or mitigate the intentional omission of his nonjudicial punishment. Clearance is denied.

CASE NO: 04-04550.h1

DATE: 05/25/2006

DATE: May 25, 2006

In re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 04-04550

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Francisco Mendez, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant falsified his security clearance application (SF 86) by failing to disclose nonjudicial punishment he received in the Army for filing a false claim, making a false official statement, and attempting to steal $1,000 from the government. He also failed to disclose a delinquent debt on his SF 86. He refuted the allegation of falsification regarding the debt, but did not refute or mitigate the intentional omission of his nonjudicial punishment. Clearance is denied.

STATEMENT OF THE CASE

On May 6, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. The SOR alleges security concerns under Guideline E (Personal Conduct), in that Applicant falsified his security clearance application by failing to list nonjudicial punishment he received while a member of the U.S. Army.

Applicant answered the SOR in writing on May 13, 2005, denied the allegations, and requested a hearing. Scheduling of the case was delayed by Applicant's deployment to Iraq until December 18, 2005.[(1)] The case was assigned to an administrative judge on January 19, 2006, and reassigned to me on February 6, 2006. On February 13, 2006, DOHA issued a notice of hearing setting the case for March 30, 2006. The case was heard as scheduled. I kept the record open until April 10, 2006, to permit Applicant to submit character evidence. His post-hearing evidence was timely submitted and incorporated in the record as Applicant's Exhibit (AX) A. DOHA received the transcript (Tr.) on April 10, 2006.

PROCEDURAL RULINGS

Request for Continuance

When the hearing convened, Applicant requested a 30-day continuance to hire a lawyer.[(2)] He had not previously notified anyone he needed more time to find a lawyer. As of the time of the hearing, he had made several inquiries, but he had not hired a lawyer and did not have any particular lawyer in mind as of the time and date of the hearing.[(3)]

Applicant returned from Iraq on December 18, 2005.[(4)] Department Counsel mailed the "discovery letter" to Applicant on January 13, 2006, transmitting copies of all documentary evidence he intended to present at the hearing.[(5)] The discovery letter, its enclosures, and the Notice of Hearing were mailed to Applicant's employer on February 13, 2006, and signed for by Applicant on February 21, 2006. Applicant denied receiving the discovery letter or the Notice of Hearing.[(6)]

At the hearing, I examined the packet of documents Applicant had in front of him, and determined that the document on top of his packet was the discovery letter he denied receiving.[(7)] I made a specific finding that Applicant received the discovery letter dated January 13, 2006.[(8)] I also examined the file of e-mail correspondence between Department Counsel and Applicant reflecting that Applicant had specifically agreed to the hearing date and made no mention of his desire to retain counsel.

Applicant claimed he believed Department Counsel would be representing him at the hearing, notwithstanding that Department Counsel told him in the second paragraph of the discovery letter that he would be representing the government. The third paragraph of the discovery letter advised Applicant:

You may represent yourself, retain an attorney, obtain the help of anyone else. In making this decision, you should consider that the Government is represented by an attorney and that any adverse information could adversely affect your current employment and your future employability. If you choose to be represented by an attorney, you should retain one promptly.

I determined Applicant was aware that Department Counsel would be representing the government, and he knew he needed to decide promptly whether to retain counsel.[(9)] In spite of ample notification, Applicant took no significant steps to retain counsel, and as of the date of the hearing he had not identified a specific lawyer or lawyers he wished to hire. I concluded he had not demonstrated good cause for a continuance, as required by the Directive ¶ E3.1.8.

Accordingly, I denied his request for a continuance.

Amendment of SOR

At the hearing, Department Counsel moved to amend the SOR by adding paragraph 1.b, alleging Applicant falsified his SF 86 by answering "no" to question 38, asking if he had been more than 180 days delinquent in the last seven years, and question 39, asking if he was currently more than 90 days delinquent on any debt.[(10)] The discovery letter of January 13, 2006, also included the motion to amend the SOR, and informed Applicant of the requirement to respond to the amendment.[(11)] Department Counsel followed up with an e-mail dated March 23, 2006, confirming the hearing date and reminding Applicant he had not responded to the motion to amend the SOR.[(12)]

On the morning of the hearing, Applicant asked Department Counsel if he would be providing any further information to him on the "additional charge."[(13)] At the hearing, Applicant maintained he had not received a copy of the motion to amend the SOR.[(14)] Based on my examination of documents in the Applicant's possession, I determined he had received a copy of the motion to amend the SOR when he received the discovery letter.[(15)] I also determined he had received the credit report on which the amendment to the SOR was based.[(16)] Accordingly, I granted the motion to amend the SOR.[(17)] However, at the hearing, I gave both parties 10 days to produce copies of any additional e-mails regarding the motion to amend the SOR. In post-hearing submissions, both parties submitted a copy of an e-mail from Applicant to Department Counsel, stating he had received no paperwork on "the amended charge," and asking "what is this about?" The e-mail also asserts, "I was mis- lead (sic) on who was to help me on this matter."[(18)] Applicant's post-hearing submission was incorporated in the record as Applicant's Exhibit (AX) B, and Department Counsel's response was incorporated as Government Exhibit (GX) 9. After reviewing all the evidence of record, including the post-hearing submissions, I am satisfied Applicant received a copy of the motion to amend the SOR.[(19)]

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is a 42-year-old data monitor for a defense contractor. He has worked for his present employer since October 2002. He served on active duty in the U.S. Army for 20 years, retiring as a staff sergeant (E-6) on July 31, 2002. He held a security clearance while in the Army.

Applicant submitted his SF 86 on December 17, 2002. He answered "no" to question 25, asking if he had been subject to court-martial or other disciplinary proceedings under the Uniform Code of Military Justice (UCMJ) in the last seven years.[(20)] He also answered "no" to question 38, asking if he had been more than 180 days delinquent on any debts in the last seven years, and question 39, asking if he was currently more than 90 days delinquent on any debt.

On February 18, 1999, while Applicant was in the Army, he received nonjudicial punishment under the provisions of Article 15, UCMJ, 10 U.S.C. § 815, for filing a false claim against the U.S. for damage to private property in the amount of $1,335, in violation of Article 132, UCMJ, 10 U.S.C. § 932; making a false official statement in violation of Article 107, UCMJ, 10 U.S.C. § 907; and attempting to steal government funds, in violation of Article 80, UCMJ, 10 U.S.C. § 880.[(21)] All three offenses were committed by altering a repair estimate to change the estimated cost of repairs from $335 to $1,335.[(22)] Applicant testified he was in financial difficulty and made a "bad judgment" when he filed the fraudulent claim.[(23)]

On cross-examination, Applicant admitted he also received nonjudicial punishment for stealing two towels from a hotel.[(24)] He was uncertain whether he was punished for this offense in 1993 or around 1996.[(25)] Applicant did not disclose either of his nonjudicial punishments on his SF 86. In an interview with a security investigator in July 2004, he denied intentional falsification. He stated he did not know nonjudicial punishment was required to be disclosed because it was not a court-martial conviction.[(26)] At the hearing, he adhered to his assertion that he misunderstood the question.[(27)]

Applicant's credit report dated December 28, 2002, reflected a debt of $4,565, delinquent since May 1999 and written off as a bad debt.[(28)] In his July 2004 interview with the security investigator, he stated the debt resulted from an auto repossession and was paid off in 2001 with the proceeds of a loan from Army Emergency Relief (AER).[(29)] However, his credit report dated January 10, 2006, still reflected the delinquent debt.[(30)] At the hearing, he testified he had paid off his delinquent debts and did not know anything about the debt alleged in the amendment to the SOR.[(31)] He testified he thought the debt on his December 2002 credit report pertained to his repossessed auto, but he had done nothing to verify the debt or challenge the credit report.[(32)]

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, 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." *Id.* at 527. The President has 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. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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).

The Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1. through 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (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 applicant'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 ¶¶ E2.2.1.1. through E2.2.1.9.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in persons with access to classified information. However, the decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3; *see* 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). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

Under Guideline E, conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

A disqualifying condition (DC 2) under this guideline may be established by "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." Directive ¶ E2.A5.1.2.2. When a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time the omission occurred. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004).

I conclude DC 2 is established. On its face, question 25 is clear. The instructions following the question specifically tell an applicant to list nonjudicial punishment. Applicant served in the Army for 20 years and retired as an experienced noncomissioned officer. I have no doubt he knew his nonjudicial punishment was encompassed in question 25. I found his claim that he misunderstood the question 25 on the SF 86 implausible and not credible. His false answer to question 25 establishes DC 2.

Applicant's failure to disclose the delinquent $4,565 debt is a closer call. In July 2004, he surmised the debt arose from an auto repossession he had settled with an AER loan. When confronted at the hearing with a more recent credit report, he had no idea what the debt represented. He seemed truly puzzled by it at the hearing. While he was negligent in not verifying or disputing the debt when first learned it raised security concerns, negligence does not equate to intentional falsification. I resolve SOR ¶ 1.b in his favor.

Since the government produced substantial evidence to establish DC 2, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. Applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Two mitigating conditions (MC) are relevant to this case. MC 2 applies when the falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily. Directive ¶ E2.A5.1.3.2. MC 3 applies when the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts. Directive ¶ E2.A5.1.3.3. Neither MC 2 nor MC 3 are established because the falsification was recent, pertaining to the current security application, and Applicant did not provide correct information until confronted with

the evidence by a security investigator.

Under the general adjudicative guidelines, I have considered that Applicant concealed conduct directly related to trustworthiness and reliability. Directive ¶ E2.2.1.1 (nature, extent, and seriousness of conduct). While the record reflects only one instance of falsification of a SF 86, the falsification was compounded by Applicant's implausible and incredible justifications for his conduct during a security interview, his answer to the SOR, and at the hearing. While the underlying nonjudicial punishment was not for a recent offense, the falsification involved Applicant's current security clearance application, which is recent. Directive ¶ E2.2.1.3 (frequency and recency of conduct). His conduct underlying the nonjudicial punishment, as well as his falsification of the SF 86, were not youthful indiscretions, but calculated acts of a mature and experienced adult. Directive ¶ E2.2.1.4 (age and maturity). He has not accepted responsibility or demonstrated remorse for his conduct. Directive ¶¶ E2.2.1.6 (rehabilitation and behavioral changes), E2.2.1.9 (likelihood of recurrence.).

After weighing the disqualifying conditions and the absence of mitigating conditions, and evaluating the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concern based on his personal conduct.

FORMAL FINDINGS

The following are my findings as to each allegation in the SOR:

Paragraph 1. Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: For 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 Applicant a security clearance. Clearance is denied.

LeRoy F. Foreman

Administrative Judge

1. Tr. 10.

2. Tr. 7.

3. Tr. 6-7.

4. Tr. 10.

5. Hearing Exhibit (HX) I.

6. Tr. 10.

7. Tr. 16-18.

8. Tr. 18.

9. During his testimony on the merits of the case, Applicant admitted he received the discovery letter (Tr. 62-65).

10. HX IV.

11. HX I at 4.

12. HX III.

13. Tr. 11.

14. Tr. 32.

15. Tr. 30. After Applicant's testimony on the merits of the case, I again examined his packet of documents and verified he had received the discovery letter and the motion to amend the SOR (Tr. 67).

16. Tr. 31.

17. Tr. 31.

18. Tr. 33.

19. My finding in favor of Applicant on SOR ¶1.b moots the issue unless the government appeals my favorable finding.

20. Government Exhibit (GX) 4 at 7.

21. GX 1; GX 2 at 1.

22. GX 2 at 2.

23. Tr. 46.

24. Tr. 46.

25. *Id.*; Tr. 71.

26. GX 5 at 1.

27. Tr. 50.

28. GX 7 at 4.

29. GX 5 at 2.

30. GX 8 at 2.

31. Tr. 61.

32. Tr. 62.