KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant deliberately falsified his August 2002 security clearance application by failing to report a juvenile felony drug conviction, a 1998 arrest for possession of marijuana and interfering with the police, and any financial delinquencies. He also falsely certified to his employer that he had no criminal violations. His demonstrated tendency to act in self-interest raises security significant personal conduct and criminal conduct concerns that remain unmitigated. Clearance is denied.

CASENO: 04-06520.h1

DATE: 01/18/2005

DATE: January 18, 2005

In Re:

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

Applicant for Security Clearance

ISCR Case No. 04-06520

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant deliberately falsified his August 2002 security clearance application by failing to report a juvenile felony drug conviction, a 1998 arrest for possession of marijuana and interfering with the police, and any financial delinquencies. He also falsely certified to his employer that he had no criminal violations. His demonstrated tendency to act in self-interest raises security significant personal conduct and criminal conduct concerns that remain unmitigated. Clearance is denied.

STATEMENT OF THE CASE

On July 8, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.[(1)] DOHA recommended referral to an administrative judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked. The SOR was based on personal conduct (Guideline E) and criminal conduct (Guideline J).

On July 26, 2004, Applicant executed an Answer to the SOR, and requested a hearing before a DOHA administrative judge. The case was assigned to me on November 4, 2004, to conduct a hearing. Pursuant to formal notice of November 5, 2004, a hearing was held as scheduled on November 23, 2004. The Government submitted eight exhibits that were entered in the record, exhibit 2 over Applicant's objection. Applicant and his mother testified, as reflected in a transcript received December 3, 2004.

FINDINGS OF FACT

The SOR alleges personal conduct (Guideline E) and criminal conduct (Guideline J) concerns due to Applicant having deliberately omitted from his August 2002 security clearance application a 1996 or 1997 felony drug conviction, a 1998 arrest for possession of marijuana, and four delinquent financial accounts. Also alleged were personal conduct concerns related to Applicant failing to list his criminal offenses on his July 2002 application for employment with a defense contractor, and falsely certifying in August 2002 that he had not been convicted of violations other than previously indicated on his application for employment with the company. In his answer, Applicant admitted the allegations. After a complete and thorough review of the evidence of record, I make the following findings of fact:

Applicant is a 25-year-old male who was employed as a painter by a defense contractor (company A) from September 2002 until the SOR was issued. After his clearance was revoked, he was allowed to work for an outside unit, needing an escort to perform work in the shipyard.

As a youth, Applicant got involved with gang members who were selling drugs. When he was 17, he agreed to act as a courier of illegal drugs in return for $1,000 or $2,000. He accompanied a female acquaintance to a major metropolitan city where he was given 100 bundles of heroin with an estimated street value of $10,000. His companion returned in her vehicle while he went to the bus station with the drugs where he was arrested by the police. Arrested for felony possession of narcotics with intent to sell, Applicant was subsequently convicted and placed on supervised probation for five years. His record was sealed under a youthful offender law.

In May 1997, Applicant moved with his mother to another city, removing him from the local gang influence that had led to his felony offense. After three years of vocational technical studies in electronics, Applicant attended the local public high school for his senior year and was awarded his diploma from that school in August 1998.

In June 1998, Applicant agreed to accompany a close family friend to a local market. En route this friend stopped at a private residence where he obtained about a half pound of marijuana with an approximate street value of $1,000. Still on probation for the felony narcotics possession offense, Applicant was unaware beforehand that his friend planned to pick up the marijuana. After driving a short distance, Applicant's companion noticed local police behind his vehicle. He led the local and then state police on a high speed chase that ended when the police managed to box-in the vehicle. Neither Applicant's friend nor Applicant complied with initial commands to exit the vehicle. Applicant continued to resist arrest after being pulled from the vehicle and was wrestled to the ground and cap-stunned.[(2)] A search of the vehicle yielded a knife belonging to Applicant's companion and a small amount of marijuana, as Applicant's friend had thrown most of the substance from the car during the police pursuit. Applicant and his companion were both charged with possession of marijuana and interfering with police. Applicant's companion was also charged with carrying a dangerous weapon and

carrying a weapon (knife) in a motor vehicle. The illegal possession charge was nolle prossed as to Applicant, but he was fined $200 for interfering with the police. Applicant was not charged with any probation violation for the 1998 incident.

After graduating from high school, Applicant worked as a painter until April 2001 when his employer went out of business. On hourly earnings of about $13.55, Applicant paid the rent and helped out his disabled mother with her car payments. He fell behind on some consumer credit card accounts opened over the 1999/2000 time frame. As of August 2002, a jewelry debt of $67 incurred in March 1999 was past due and rated as a bad debt. A $1,747 past due balance on a department store charge account opened in December 1999 had been written off to profit and loss. Two credit card accounts opened in January 2000 had also been written off with balances owed of $1,479 and $3,813. An unpaid wireless communications debt of $838 had been in collection since December 2000.

On the advice of his cousin's father-in-law (a 30-year employee of the defense contractor), Applicant applied to work as an electronic mechanic or painter with company A in July 2001. On his application for employment executed on July 25, 2002, Applicant responded "No" to any criminal convictions ["Have you ever been convicted of a crime (include any military, courts-martial, and convictions currently on appeal)? Do not include any convictions occurring before your 16th birthday or minor traffic violations (e.g., speeding tickets) for which the only penalty imposed was a fine of $100.00 or less."]. On August 6, 2002, he added to the form that he had "No Priors."

On August 9, 2002, Applicant, who was then 22 years old, signed a security clearance application (SF 86) attesting that his answers were "true, complete, and correct to the best of [his] knowledge and belief." He acknowledged understanding that "a knowing and willful false statement could be punished by fine, imprisonment, or both" under 18 U.S.C. § 1001. Question 21 on the SF 86 asked whether Applicant had ever been charged with or convicted of any felony offense. Advised to report information regardless of whether the record in his case had been sealed or otherwise stricken from the record, Applicant responded, "NO." Question 24 asked if he had ever been charged with or convicted of any offense related to drugs or alcohol. Applicant answered, "NO."[(3)] Questions 38 and 39 respectively inquired into any financial delinquencies over 180 days in the last 7 years, and any delinquency currently over 90 days. Applicant responded "NO" to both. On August 19, 2002, Applicant certified to company A that he had not been convicted on any violations other than previously indicated on his application. Applicant was hired as a painter and started to work in September 2002.

A check of Applicant's credit by the Defense Security Service on November 11, 2003, revealed as still outstanding four of the five debts (all but the $3,813 credit card debt that was not listed) that had been reported past due or written off in August 2002. On January 22, 2004, Applicant was interviewed by a Defense Security Service (DSS) agent about his unlisted arrests and financial delinquencies. Surprised that the DSS agent knew of his 1998 arrest for possession of marijuana and interfering with a police officer because he thought the offenses would not appear on his record, Applicant volunteered that his "cousin" had stopped at a private residence and returned to the car with a half pound of marijuana having a street value of approximately $1,000. Applicant claimed he was taken into custody by the police with no resistance and had been "punched and maced" by the officers. Applicant also revealed that he had been placed on five years probation in 1996/97 for his role as a heroin "runner" on one occasion for a female acquaintance involved in the resale of the drug. He had completed his probation before his hire at company A. Applicant denied any use of illegal drugs whatsoever, any other involvement in drug trafficking, and any intent to use or traffic in illegal drugs in the

future. Applicant reviewed his credit report, and indicated he thought he had paid the $838 wireless communications debt listed as in collection. Applicant denied any deliberate omission of his criminal arrests or his debts from his security clearance application. He claimed to have been unaware of, or have forgotten about, his financial data and attributed the omission of his offenses to legal advice; his attorney had told him he was not required to disclose his arrests since all charges had been dismissed, erased, or handled as juvenile matters.

On July 8, 2004, DOHA issued an SOR to Applicant, alleging he had deliberately falsified his SF 86 in not disclosing his criminal arrests and financial delinquencies, and had twice falsely denied any criminal convictions on documents submitted to his employer. In his Answer, Applicant responded "I Admit" to each of the allegations.

At his hearing held on November 23, 2004, Applicant testified he did not list his juvenile felony drug conviction because the records of his case had been sealed and it would not appear on his record (". . . that was youthful offender, something I did when I was a minor and it don't go on your record, I don't see why that should show up on your record." Tr. 34) He did not list his 1998 arrest for marijuana possession and interfering with police because he understood the charges had been dismissed on payment of the fine and his attorney told him it would never affect his future if he went for a job (". . . he said it won't, you know, it won't affect my record and it won't show up." Tr. 31) Applicant gave no reason for not listing his financial delinquencies on his SF 86 other than "I just didn't, because I thought, it was like I just didn't put it down." (Tr. 32)

Applicant had been led to believe back in 1997/98 that he did not have to report offenses that did not appear on his record when he completed future employment or related applications,[(4)] so while he did not list his felony juvenile felony conviction on his application for employment with company A, it was due to mistaken understanding based on legal advice provided him years before.[(5)] Applicant was subsequently given reason to question whether he could legally omit such criminal record information when he completed his SF 86 on August 9, 2002, however. Unlike the application for employment with company A which is silent on the issue of sealed records, the applicant for security clearance is specifically directed to report any felony or illegal drug charges, regardless of whether the record in his case has been sealed or stricken from the court record. This unambiguous requirement to list felony and any illegal drug charges, irrespective of disposition, would have given him reason to question this understanding. Applicant made no effort to contact company A security officials or even his attorney to determine whether the SF 86 was an exception to non disclosure. Applicant's claim of good faith is further undermined by his failure to disclose any financial delinquencies on his SF 86. With five of the seven accounts listed on his August 2002 credit report rated as bad debts and written off or placed for collection, it is not credible that Applicant was unaware of, or had forgotten about, several accounts that were seriously delinquent. Applicant is found to have intentionally falsified his SF 86 by failing to disclose his criminal record and financial delinquencies, likely because he did not want the information to negatively affect his chances of employment with company A. His certification of August 19, 2002, that he had not been convicted of any violations other than previously indicated on his application, is likewise considered to have been knowingly false.

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 restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. 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 that 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 that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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 (App. Bd. Dec. 19, 2002); *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.

Considering the evidence as a whole, I find the following adjudicative guidelines to be most pertinent to this case:

Guideline E

Personal Conduct

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or

unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. (E2.A5.1.1.)

Conditions that could raise a security concern and may be disqualifying also include: (E2.A5.1.2.)

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. (E2.A5.1.2.2.)

Conditions that could mitigate security concerns include: (E2.A5.1.3.)

The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts. (E2.A5.1.3.3.)

Guideline J

Criminal Conduct

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. (E2.A10.1.1.)

Conditions that could raise a security concern and may be disqualifying include: (E2.A10.1.2.)

a. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged. (E2.A10.1.2.1.)

Conditions that could mitigate security concerns include: (E2.A10.1.3.)

None.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, I conclude the Government established its case with respect to guidelines E and J. Security significant personal conduct concerns are raised when an applicant has not been completely candid with the Government about matters relevant and material to his or her personnel security application and investigation. (*See* DC E2.A5.1.2.2.) On his SF 86 executed on August 9, 2002, Applicant deliberately did not list his felony conviction for heroin possession with intent to sell when he was 17, or his arrest at age 19 for possession of marijuana and interfering with police. Applicant was still required to list his felony conviction despite the fact that records had been sealed, as well as his marijuana possession charge regardless it was ultimately nolle prossed. He also did not report known financial delinquencies on his SF 86, and certified to his employer in August 2002 that he had no violations other than had been reported. Since he had disclosed no offenses, this was tantamount to a false denial of any criminal record. The knowing and willful concealment of relevant and material information from the Government is a felony offense under 18 U.S.C. § 1001, so the SF 86 omissions raise security significant criminal conduct concerns as well. (*see* DC a. *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*).

The concerns for Applicant's judgment, reliability, and trustworthiness engendered by his failure to candidly report his criminal arrests and financial problems may be overcome if there are prompt good-faith efforts to correct the falsification before being confronted (E2.A5.1.3.3.) or the omission of material facts was caused or significantly contributed to by the improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided (E2.A5.1.3.4.) A private attorney is not an authorized person within the meaning of E2.A5.1.3.4.[(6)] Even if Applicant had sought the advice of his attorney with respect to whether he could legally omit his offenses from his SF 86, it would not have been sufficient for mitigation under E2.A5.1.3.4. Applicant is credited with providing details of his criminal offenses when questioned by the DSS agent in January 2004. His effort at rectification, coming some 16 months after he completed his SF 86, was not reasonably prompt.

Applicant's rehabilitation is not considered complete. Applicant provided incriminating information during his DSS interview, especially regarding his actions as a heroin "runner" that led to his felony conviction, but he also denied that he had resisted arrest in June 1998. Two different state troopers reported Applicant refused to submit to police commands and had to be cap-stunned. Applicant did not meet his burden of showing that the officers misrepresented the facts. Furthermore, Applicant was not forthright with the DSS agent or at the hearing about the reasons why he omitted his arrests and financial delinquencies from his SF 86. As noted above, it is simply not credible that he did not know he had several accounts that were seriously overdue. The Government cannot allow individuals to decide for themselves the timing and extent of disclosure, however benign the motive (such as a desire to retain one's job) for the falsification. SOR subparagraphs 1.a., 1.b., 1.c., 1.e. and 2.a. are resolved against him. Subparagraph 1.d. is found in his favor as Applicant had been given no reason to doubt at that time the advice of legal counsel that he did not have to report his

juvenile conviction on future applications for employment.

FORMAL FINDINGS

Formal Findings as required by Section 3. Paragraph 7 of Enclosure 1 to the Directive are hereby rendered as follows:

Paragraph 1. Guideline E: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

Subparagraph 1.d.: For the Applicant

Subparagraph 1.e.: Against the Applicant

Paragraph 2. Guideline J: AGAINST THE APPLICANT

Subparagraph 2.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 Applicant. Clearance is denied.

Elizabeth M. Matchinski

Administrative Judge

1. The SOR was issued under the authority of Executive Order 10865 (as amended by Executive Orders 10909, 11328, and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4).

2. Applicant testified at his hearing that the police removed him from the vehicle and beat him up, that he never had a chance to exit the vehicle before the police pulled him out. (Tr. 33) However, there is ample evidence showing he resisted arrest. He was fined $200 on the charge of interfering with police. oreover, the police report indicates Applicant was told several times to exit the vehicle which he refused to do. As the trooper reached in the car to grab Applicant's arm, Applicant tightened it making it stiff. According to the state police report, the trooper then pulled Applicant out of the vehicle where he refused to be handcuffed. The trooper wrestled Applicant to the ground, causing abrasions to Applicant's face, and then cap-stunned him.

3. Although not alleged specifically by the Government, Applicant's arrest for interfering with the police in June 1998 should have been disclosed in response to question 26 (other offenses in the last 7 years).

4. Applicant related to the DSS agent that his attorney told him he was not required to disclose his arrests. It is not clear whether Applicant was advised specifically by a lawyer that he would not have to list the offenses on future employment applications or whether he was instead told there would be no record of the offenses, from which Applicant then inferred he would not have to report them on future applications. In any event, there is no evidence that Applicant was ever told by an attorney that he was not legally required to disclose the offenses on an application for security clearance.

5. Applicant testified he paid the $200 for the marijuana charge which was then dismissed in 1998. It is not clear that he understood the fine was paid for interfering with police.

6. In DOHA Appeal Board Decision and Reversal Order in ISCR Case No. 01-05593 (August 5, 2002), the Board indicated personal conduct mitigating factor 4 (E2.A5.1.3.4.) should not be construed or interpreted in a manner that would have the practical effect of leading applicants to believe that the Government approves of them seeking advice or guidance from unauthorized persons concerning their obligations in security clearance investigations or adjudications.