DATE: November 27, 2006

In re:

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

Applicant for Security Clearance

ISCR Case No. 05-04311

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Sabrina E. Redd, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant received nonjudicial punishment under Article 15, UCMJ, for making false official statements and attempting to steal pain medication. He subsequently falsified his security clearance application by denying he had been so punished. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan. 2, 1960), as amended, DOHA issued a Statement of Reasons (SOR) on 9 February 2006 detailing the basis for its decision-security concerns raised under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on 13 February 2006 and elected to have a hearing before an administrative judge. The case was assigned to another judge on 18 May 2006 and reassigned to me on 19 July 2006. On 17 August 2006, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on 6 September 2006.

FINDINGS OF FACT

Applicant is a 47-year-old senior staff analyst for a defense contractor. He retired from the U.S. Air Force as a senior master sergeant (E-8) after 24 years of service. He has held a security clearance since 1980. His performance reports show he was an outstanding noncommissioned officer.[(1)] Nevertheless, he admits he was convicted by court-martial in 1988 of shoplifting from a military exchange that resulted in him serving a couple of months in confinement. Tr. 22.

Applicant injured his ankle while on active duty. He had operations on the ankle in 1993 and 1999. He also suffered from low back pain. After 1998, his back pain became progressively more severe. The Air Force referred him to a pain clinic. He was prescribed Zydone and hydrocodone, which he was to take twice daily. After a while, he was no longer

getting much relief from the medications so he started taking more than the prescribed dosage.

In 2003, Applicant was the maintenance superintendent of a combat logistics squad that was tasked to be deployed within 48 hours notice. On 3 February 2003, Applicant obtained Hydrocodone from a civilian pharmacy. Because TRICARE, the military medical benefit, would only pay for a 30-day supply, Applicant only obtained 120 of the 150-pill prescription. On 17 February 2003, Applicant went to his pharmacist to get the remaining 30 pills. The pharmacist told him he would have to pay for the additional 30 pills. Applicant told the pharmacist that his girlfriend had accidentally taken some of the pills with her to another state and he was running short of medication.

Applicant visited the pain clinic on 21 February 2003. He asked the pharmacy technician there for another prescription for pain medication because his wife or girlfriend had mistakenly taken his pills to another state. He claimed he only had five pills left and that his wife tried to mail back the other pills, but was arrested at the post office for trying to mail narcotics via mail. A prescription was issued for 90 pills of Zydone. Applicant took the prescription to the civilian pharmacist. While the pharmacist was talking to Applicant, he received a telephone call from the pain clinic telling him not to fill any new prescriptions for Applicant.

On 24 February 2003, Applicant went to the base clinic and requested a refill for his prescription for Zydone. He asked a physician for a 180-day supply for a "possible deployment for 179+ days to leave this week." He told the physician that the civilian pharmacy did not understand military deployments and would not give him a six-month supply. The military physician told him that she could not prescribe pain medication for every 4 hours for 180 days, but could prescribe medication to be taken three times a day for 180 days. She wrote the prescription.

An hour later, the military physician received a telephone call from the civilian pharmacist. He informed her that a civilian provider from the pain clinic had told him not to fill any new prescriptions for Applicant. The military physician told the pharmacist to hold the prescription until she could talk to the civilian provider at the pain clinic. The military physician talked to a staff member at the pain clinic who informed her Applicant had claimed his girlfriend had taken some of his pills out of town and he needed another prescription. As this story did not match what Applicant told her, the military physician contacted Applicant's squadron. She learned that Applicant was neither scheduled to deploy nor was he standby. The military physician contacted the pharmacist and told him to dispose of the prescription rather than fill it.

Applicant was interviewed by a special agent of the Air Force Office of Special Investigations (AFOSI). In a signed, sworn statement, Applicant admitted misleading the civilian provider and the military physician in his attempts to obtain prescription medication. He admitted he was wrong, but claims he made the request for additional medications because he "did perceive the potential to go [on temporary duty] and was doing at that time what [he] rationalized to be correct." Ex. 2 at 2. Applicant was given nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ) for making false official statements and attempting to steal a Schedule III narcotic. Applicant's commander found him guilty of the offense and fined him between $300-$500. Ex. 3 at 6.

Applicant consulted with the base Life Skills Support Center about his misuse of prescription medication. Applicant asserts that the staff of the Center determined he did not have a drug abuse problem.

On 20 August 2004, Applicant completed a security clearance application (SCA) by certifying that his statements were true, complete, and correct to the best of his knowledge and belief, and by acknowledging that a knowing and willful false statement could be punished by fine and/or imprisonment under 18 U.S.C. § 1001. Question 19 asked whether in, in the previous seven years, Applicant had consulted a mental health professional (psychiatrist, psychologist, counselor, etc.) or consulted with another health care provider about a mental health related condition. Question 25 asked if, in the previous seven years, Applicant had been subject to court martial or other disciplinary proceedings under the Uniform Code of Military Justice, including nonjudicial. Applicant answered "no" to both questions.

Question 21 of the SCA asked if Applicant had ever been convicted of a felony, to include offenses under the UCMJ. Applicant answered "yes," and listed his 1988 shoplifting conviction. Question 27 asked if, in the previous seven years, Applicant had illegally used any controlled substances or prescription drugs. Applicant answered "yes," and listed misuse of hydrocodone from August 1988 until 20 August 2004, the date he completed the SCA.

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 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). Each security clearance decision "must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy." Directive ¶ 6.3. 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.

Enclosure 2 of the Directive sets forth personnel 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 the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

Personal Conduct

In the SOR, DOHA alleged Applicant falsified material facts in his SCA by deliberately denying he had consulted a mental health professional or a health care provider about a mental health related condition (¶ 1.a) and by deliberately denying he had received non-judicial punishment in the previous seven years for making false statements and attempting to steal a Schedule III narcotic (¶ 1.b). In his Answer, Applicant denied both allegations with explanation.

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate the applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1. The deliberate falsification of relevant and material facts from any SCA is a security concern and may be disqualifying. DC E2.A5.1.2.2. Information is material if it would affect a final agency decision or, if incorrect, would impede a thorough and complete investigation of an applicant's background. ISCR Case No. 01-06870, 2002 WL 32114535 at *6 (App. Bd. Sep. 13, 2002). An applicant's mental health record and criminal history are matters that could affect a final agency decision on whether to grant the applicant a clearance, and his failure to disclose them would impede a thorough investigation of the applicant's background.

Applicant argues that he did not intentionally try to falsify or conceal matters on his SCA. He asserts he did not "make the connection" between consulting with the Life Skills Support Center about his misusing prescription drugs and the fact that the person he consulted was a mental health professional. He points out that he correctly answered the question 27, admitting that, even on the day he signed the SCA, he was still abusing prescription drugs.

Applicant claims he was not trying to hide his nonjudicial punishment. He indicates he had no reason to lie about it as he had correctly reported in question 21 that he had a 1988 court-martial conviction for shoplifting.

After carefully listening to his testimony and observing his demeanor, I conclude Applicant did not deliberately fail to record his consultation with a mental health practitioner in answer to question 19. I accept his explanation that he did not connect a drug abuse counselor in a Life Skills Support Center as being a mental health practitioner. I am convinced Applicant deliberately failed to list his nonjudicial punishment in answer to question 25. Question 25 is clear on its face. But Applicant is just not ready to accept responsibility for his actions. In his Answer, he insists that he never intended to be dishonest and only tried to get the medications to be ready to deploy. The evidence does not support him.

The deliberate omission, concealment, or falsification of relevant and material facts from a personnel security questionnaire is a potentially disqualifying condition. DC E2.A5.1.2.2. Applicant's failure to disclose his nonjudicial

punishment in answer to question 25 establishes DC E2.A5.1.2.2.

An applicant may mitigate personal conduct security concerns by establishing the information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability (MC E2.A5.1.3.1); the falsification was an isolated incident, was not recent, and the applicant has subsequently provided correct information voluntarily (MC E2.A5.1.3.2); the applicant made prompt, good-faith efforts to correct the falsification before being confronted with the facts (MC E2.A5.1.3.3); the omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided (MC E2.A5.1.3.4); the individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress (MC E2.A5.1.3.5); the refusal to cooperate was based on advice from legal counsel or other officials that the individual was not required to comply with security processing requirements and, upon being made aware of the requirement, fully and truthfully provided the requested information (MC E2.A5.1.3.6); association with persons involved in criminal activities has ceased (MC E2.A5.1.3.7).

I have considered all of the mitigating conditions and determined that none of them apply. The falsification is substantiated and is pertinent to a determination of Applicant's judgment, trustworthiness, and reliability. The falsification was not isolated. He made false statements to the pharmacist, his military physician, and a pharmacy technician at the pain center. Applicant did not make any effort to correct the falsification before being confronted by the facts, and the falsification was not caused by improper advice. Applicant has taken some steps to reduce his vulnerability to coercion, although his failure to totally accept responsibility for his actions detracts from those steps. The final two mitigating conditions are just not applicable to an individual in Applicant's situation.

Criminal Conduct

In the SOR, DOHA alleged Applicant violated 18 U.S.C. § 1001 by deliberately falsifying answer on his SCA. In his Answer, Applicant failed to specifically admit or deny this allegation. However, based on his answers to the allegations in ¶ 1, I understood him to deny the allegation.

A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1. It is a criminal offense to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation or knowingly make or use a false writing in any matter within the jurisdiction of the executive branch of the Government of the United States. 18 U.S.C. § 1001. Security clearances are within the jurisdiction of the executive branch of the Government of the United States. *See Egan*, 484 U.S. at 527. Information is material if it would affect a final agency decision or, if incorrect, would impede a thorough and complete investigation of an applicant's background. ISCR Case No. 01-06870, 2002 WL 32114535 (App. Bd. Sep. 13, 2002). An applicant's mental health history and military disciplinary record are matters that would affect an agency's clearance decision. A violation of 18 U.S.C. § 1001 is a serious offense-it carries a maximum sentence that includes confinement for up to five years.

A potentially disqualifying condition may arise when an applicant commits a single serious offense. DC E2.A10.1.2.2. The evidence established that Applicant violated 18 U.S.C. § 1001, a serious offense, by deliberately falsifying his SCA.

An applicant may mitigate criminal conduct security concerns by establishing that the criminal behavior was not recent (MC E2.A10.1.3.1); the crime was an isolated incident (MC E2.A10.1.3.2); he was pressured or coerced into committing the act and those pressures are no longer present in his life (MC E2.A10.1.3.3); he did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur (MC E2.A10.1.3.4); he was acquitted (MC E2.A10.1.3.5); or there is clear evidence of successful rehabilitation (MC E2.A10.1.3.6).

The criminal behavior was recent--falsifying the application that is the basis of the current adjudication--and the crime was not an isolated incident--he lied to his physician, a pharmacist, and the pharmacy technician at the pain center. Applicant was not pressured into committing the offenses and he was not acquitted. Thus, the only arguably applicable mitigating conditions are that the pressures are no longer present in his life, the factors leading to the violation are not likely to recur, and there is clear evidence of successful rehabilitation. Applicant failed to establish any of them. It appears Applicant still takes pain medication, and he still hasn't accepted his wrongdoing.

Whole Person Analysis

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk." Directive ¶ E2.2.1. It involves "the careful weighing of a number of variables known as the "whole person concept." *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.*

Applicant falsified his SCA when he was a mature adult with many years of dedicated public service to the nation. He is obviously a man of great potential. But he just cannot accept responsibility for his actions. He constructed a story to get extra pain medication and lied about the resulting nonjudicial punishment when completing his SCA. Under the circumstances, I am unable to conclude it is in the national interest to grant him a clearance.

FORMAL FINDINGS

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

Paragraph 1. Guideline E: AGAINST APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: Against Applicant

Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

James A. Young

Administrative Judge

1. The last performance report Applicant submitted closed out in May 2002. There is no report for the period between May 2002 and Applicant's retirement in August 2003, when the events that are the subject of this adjudication occurred.