

DATE: March 29, 2007

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 06-04415

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

David P. Price, Esq.

SYNOPSIS

Applicant falsified materials facts about his history of illegal drug involvement when he completed security-clearance applications in 1988 and 1993. It is not mitigated by passage of time because he perpetuated his falsehood by asserting a disingenuous explanation during the hearing in 2007. Clearance is denied.

STATEMENT OF THE CASE

Applicant contests the Defense Department's intent to deny or revoke his eligibility for a security clearance. Acting under the relevant Executive Order and DoD Directive, [\(1\)](#) the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on June 16, 2006. The SOR--which is the administrative complaint--details the factual basis for the action and alleges security concerns under Guideline E for personal conduct, Guideline J for criminal conduct, and Guideline B for foreign influence. Applicant timely replied to the SOR and requested a hearing.

The case was assigned to an administrative judge on September 26, 2006, and then reassigned to me October 18, 2006. Scheduling the hearing was delayed due to communication problems associated with Applicant's work location in the country of Columbia. With agreement of counsel, a notice of hearing was issued in December 2006, scheduling the hearing for January 19, 2007. The hearing took place as scheduled. DOHA received the transcript February 5, 2007.

RULINGS ON PROCEDURE

The government moved to amend the SOR by adding clarifying language to subparagraphs 2.c, 2.d, and 2.e. The details of the motion are set forth in Appellate Exhibit I. Applicant having no objections, the motion was granted (R. 13-14). In addition, Applicant moved to amend his Answer to subparagraphs 1.g and 1.h from "I admit" to "I deny" (R. 199-201). The motion was granted.

FINDINGS OF FACT

Under Guideline E, the SOR alleges Applicant gave false answers to various questions on security-clearance applications in 1988, 1993, and 2005, made false statements during an interview in 2003, and engaged in other questionable personal conduct. He, in essence, denied the falsification allegations and explained that he did not deliberately seek to conceal information. He admitted the other personal conduct alleged in SOR subparagraphs 1.n-1.cc.

Under Guideline J, the SOR alleges Applicant engaged in criminal conduct by making the false statements alleged under Guideline E. Also, it alleges he engaged in illegal drug involvement many years ago, and it alleges that when he was on active duty in the Army he engaged in criminal conduct in violation of military law (the Uniform Code of Military Justice). His response to these allegations is mixed.

Under Guideline B, the SOR alleges Applicant has family ties to the country of Panama and that he owns a small parcel of land and a house in Panama. He admits the foreign influence allegations.

Applicant's admissions and explanations are incorporated herein. And I make the following findings of fact set forth in numbered paragraphs:

1. Applicant is a 50-year-old tactical mission planner for a federal contractor. He started working for this company in September 2003, when he retired from the Army. His educational background includes an associate's degree in applied science awarded in 2000. Applicant was recruited to join the Army Special Forces and entered active duty in 1976. While in the Army, he completed numerous military schools and training courses, and his performance of duty was topnotch (Exhibits G and L). The Army granted him a top-secret security clearance in 1994 (Exhibit A). Also, Applicant is fluent in the Spanish language.
2. He married a citizen of Panama in 1984. She is 40 years old, and she became a U.S. citizen in 1989. They had three children during their marriage, born in 1984, 1986, and 1988. His wife is employed as a certified nurse's assistant with a hospital in the U.S.
3. Applicant's job involves the U.S. Government's counternarcotics program in the country of Columbia. Within the U.S. State Department, this is known as the aerial eradication program (Exhibit I). He is the intelligence coordinator for a detachment, and he reports to a forward operation location manager. Working together, they plan missions to spray the coca crop in Columbia. Applicant's work is important to the mission, in that the information he provides minimizes threats from opposing forces. The aircraft routinely receive hostile fire, and measures are taken to minimize threats to aircraft and crew. According to his manager, Applicant's work has been invaluable in this regard.
4. In addition to the testimony of his manager, Applicant presented character statements from several people involved in the program (Exhibit K). They praise Applicant's knowledge, skill, and ability to perform his job. Also, they vouch for his trustworthiness, judgment, and honesty.
5. The genesis of this case was a job offer Applicant received in 1998. He was then a master sergeant (military pay grade E8) stationed in Panama, where he had served previous tours of duty. While assigned in Panama, Applicant received a job offer from the National Security Agency (NSA). As part of the hiring process, Applicant was required to take an NSA polygraph examination to obtain eligibility for access to sensitive compartmented information (SCI). The result of two days of interviews in April 1998 was that the NSA determined that Applicant did not meet the criteria for access to SCI. The details of interview are set forth with specificity in the NSA Clearance Decision Statement and are incorporated herein by reference (Exhibit 2).
6. During the NSA interview, Applicant disclosed his involvement with illegal drugs--before he joined the Army and while in the Army--from the 1970s until January 1984. His drug involvement consisted of illegal drug use, including marijuana, amphetamines, cocaine, hashish, LSD, mescaline, crystal methamphetamine, and PCP. Also, his illegal drug involvement consisted of the purchase of drugs. In 1975, at the age of about 19, he was involved in the sale of a controlled substance and was placed on probation for one year. His involvement was limited to mere delivery.
7. According to the NSA document, Applicant did not inform the Army of his involvement with illegal drugs before his enlistment (Exhibit 2 at 2). His use of illegal drugs while in the Army consisted mainly of using cocaine from 1981 to

January 1984, when he was stationed in Panama. In summary, the NSA concluded that Applicant had "demonstrated a history of involvement in criminal activity for the past 26 years through his hiring of prostitutes; use, purchase, and cultivation of illegal drugs; theft and misappropriation of U.S. Government property; and purchase and sale of illegal firearms" (Exhibit 2 at 3). The NSA issued its decision in June 1998. Applicant did not appeal the decision, and it became final in October 1998 (Exhibit 3).

8. Sometime thereafter, the Army became aware of his NSA interview. The Army Criminal Investigation Command (CID) conducted a criminal investigation of Applicant. The investigation took place in both Panama and the U.S., as he had been reassigned to a stateside Army post. The Army CID report of investigation was not made part of this record. After completion of the investigation, the Army took no adverse action against Applicant. Indeed, the Army took favorable action for Applicant after the investigation was completed.

9. In March 1999, the suspension of favorable personal actions against Applicant was removed (Exhibit B). He was allowed to withdraw his request for voluntary retirement, and he was eligible for promotion consideration (Exhibit C). In April 1999, he was determined to be fully qualified for reenlistment and he did so (Exhibit D). In June 1999, the Army promoted Applicant to sergeant major (military pay grade E9), effective in July 1999. Consistent with this action, Applicant attended the Army's Sergeants Major Academy from June 1999 to May 2000 (Exhibit L). He successfully completed this course, and he went on to serve as a Special Forces company sergeant major until his retirement on August 31, 2003. During this time, Applicant held a top-secret security clearance granted to him by the Army based on an investigation dated March 2002 (Exhibit F). His DD Form 214--the certificate of release or discharge from active duty--reflects 27 years of distinguished service as a Special Forces soldier (Exhibit G). Upon his retirement, the Army awarded Applicant the Legion of Merit for his exceptionally meritorious service from September 1993 to August 2003 (Exhibit J).

10. According to the SOR, in June 2003, while still on active duty in the Army, Applicant was interviewed by an authorized investigator for the Defense Department. The investigator was not called as a witness, and no documentary information concerning the interview was offered or admitted into the record. The only evidence about the interview was Applicant's recollection. He denies withholding or concealing any information during this interview.

11. After his retirement, Applicant started his current job. Given the nature of the work in Columbia, the vast majority of personnel and administrative matters are conducted at a company location in the U.S. Applicant recalls completing a security-clearance application when he first reported for work in September 2003. He also recalls completing additional applications because he was told by the company that his applications were lost, misplaced, or otherwise not available. As described by Applicant and his manager, the process of completing applications was rather chaotic. On at least once occasion, it involved the company sending documents to Applicant in Columbia, and requiring him to complete the documents in the field. On another occasion, administrative personnel from the company flew from the U.S. to Columbia. Applicant and other employees reviewed and signed completed applications sitting at picnic tables within a limited time frame, about an hour or so, so the plane could depart Columbia as quickly as possible.

12. Exhibit 1 is Applicant's security-clearance application, signed by him on January 10, 2005, about 16 months after he started working for the company. It contains some odd entries. For example, in response to Question 8 about a spouse, it indicates that Applicant's wife was born in the U.S., when she was born in Panama and became a U.S. citizen through the naturalization process, information he had previously disclosed. Likewise, in response to Question 9 about relatives, it lists his wife and parents, but not his three children. In response to Question 12 about foreign property, he did not list the land and house in Panama, information he had disclosed during the NSA interview in 1998. In response to Question 24 about ever being charged with or convicted of alcohol- or drug-related offenses, Applicant replied in the negative. He did not disclose the 1975 controlled substance offense. There is no record evidence that Applicant was interviewed by a Defense Department investigator about the 2005 security-clearance application and confronted about his answers to Questions 8, 9, 12, or 24. [\(2\)](#)

13. The 2005 application was not the only application Applicant completed. While in the Army, he completed at least two security-clearance applications (Exhibits 4 and 5). The first application was in February 1988, when he was a sergeant first class, a senior noncommissioned officer. Applicant did not reveal his history of illegal drug involvement (use and purchase) in response to two questions seeking that type of information. Likewise, he did not reveal the 1975

controlled substance offense resulting in probation in response to a question seeking that type of information. The second application was in March 1993, when he was a master sergeant. Like the 1988 application, Applicant did not reveal his history of illegal drug involvement or the 1975 controlled substance offense.

14. Concerning the land and house in Panama, Applicant explained that his wife is the legal owner of both under local law. The land cost about U.S. \$350, and about U.S. \$15,000 has been spent building the house. Both have contributed to the purchase of the land and construction of the house. A photograph of the house is in the record (Exhibit N). It does not appear to be a lavish or luxurious home. Applicant was last at the home about 16 months ago when he was taking a break from his duties in Columbia.

15. Applicant has foreign relatives due to his marriage. His mother-in-law and father-in-law are citizens of and residents in Panama. They are no longer married to each other, and Applicant has a distant relationship with each. Applicant's wife has about 23 siblings who are citizens of Panama; many of the siblings are half-brothers and half-sisters. There are four siblings in the U.S., and Applicant's wife has the most contact with these relatives. His foreign relatives include a brother-in-law who is a lieutenant with the Panamanian National Police. The brother-in-law was formerly a member of the Panamanian Defense Force. Applicant has little, if any, contact with his foreign relatives, and has not talked to any relatives in Panama for several years. The last time Applicant spoke with his brother-in-law was when he was promoted to police lieutenant (R. 164-166), which was sometime after Operation Just Cause in 1989.

16. Applicant's youngest daughter is attending high school in Panama. She lives with an aunt when attending school. His daughter is doing this because she prefers that school system to the public school system available to her in the U.S. She is scheduled to complete high school in December 2007. She will then return to the U.S. to attend college. His oldest son completed college in the U.S., and he is currently working as a mechanic at a shipyard. His middle daughter is a college student, and she lives with her mother in the family home in the U.S.

17. In addition to the land and house in Panama, Applicant and his wife own a home in the U.S. It has an estimated assessed tax value of about \$85,000. He also has certificates of deposit that have an estimated value of \$40,000 to \$50,000.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.⁽³⁾ 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 those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.⁽⁴⁾ Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽⁵⁾ There is no presumption in favor of granting or continuing access to classified information.⁽⁶⁾ The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.⁽⁷⁾ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.⁽⁸⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁹⁾

No one has a right to a security clearance.⁽¹⁰⁾ And as noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹¹⁾ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be

allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

1. *The Personal Conduct Security Concern*

Personal conduct under Guideline E addresses issues of questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. In this regard, the deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the government when applying for a security clearance or in other official matters is a security concern. It is deliberate if it is done knowingly and willfully. An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported.

The SOR sets forth 13 falsification allegations (SOR subparagraphs 1.a-1.m) and 16 incidents of questionable personal conduct (SOR subparagraphs 1.n-1.cc). For ease of understanding, the falsification allegations are grouped into four distinct times: (1) the 1988 security-clearance application; (2) the 1993 security-clearance application; (3) the June 2003 interview; and (4) the 2005 security-clearance application. The 16 incidents of questionable personal conduct are based on information from the NSA. ⁽¹²⁾ Those matters are addressed first.

The 16 incidents took place when Applicant was serving in the Army from 1976 to 2003. He admits the conduct, and he offered explanations for much of it during the hearing to provide some context. The allegations paint Applicant as a drug-using soldier who repeatedly acquired property under questionable circumstances. But that is not case. His last involvement with illegal drugs was more than 20 year ago. Moreover, the 16 incidents are based on information obtained from Applicant during the NSA interview. Those matters were presumably investigated and reviewed by the Army in 1998-1999. Given that the Army took no adverse action against him--coupled with his subsequent reenlistment and promotion to sergeant major in 1999--the security significance of these matters is *de minimis*. ⁽¹³⁾ Also, the security significance of these matters is further undermined and mitigated by staleness. Most of the 16 incidents took place in 1998 or earlier. For these reasons, SOR subparagraphs 1.n-1.cc are decided for Applicant.

Turning to the falsification allegations, the 1988 and 1993 security-clearance applications are addressed first. The SOR sets forth six falsification allegations, three per application, wherein Applicant did not reveal his history of illegal drug involvement (use and purchase) and his 1975 controlled substance offense resulting in probation. Applicant maintains that he did not deliberately seek to conceal this information. He explained in great detail during the hearing that he disclosed his pre-Army drug use when he enlisted, and he disclosed his history again when he arrived at his initial assignment and was placed into a certain program involving sensitive duties. Having done so, he believed he did not need to further disclose the information. As an operator in a Special Forces unit, he viewed the process as yet another routine requirement that he was required to update every five years or so (R. 210-212). If nothing happened, there was nothing to update.

In evaluating his credibility, I gave weight to his favorable character references. Also, I gave weight to his distinguished record of military service, which I hold in high regard. Still, I have doubts about his explanation and his veracity.

When he completed the 1988 security-clearance application, he was a sergeant first class with about 12 years of military service. When he signed off on his answers to the three questions at issue, he had to answer the questions in the negative. Had he answered truthfully, he would have not only disclosed his pre-Army drug involvement, he would have also disclosed his drug involvement while in the Army, to include cocaine use during the early 1980s. Even accepting his statement that he believed his pre-Army drug involvement was old business that need not be reported, ⁽¹⁴⁾ he was required to report his illegal drug involvement while in the Army. Of course, disclosure might have put his security clearance, his status as a Special Forces soldier, and his military career in jeopardy. And he had to be aware of the potential adverse consequences of disclosure.

When he completed the 1993 security-clearance application, his position was even more compromised. He was now a master sergeant with about 17 years of military service. When he signed off on his answers to the three questions at

issue, he had to answer the questions in the negative. He had no choice but to continue with his falsehood. Significantly, the 1993 application makes it clear that answers to the three questions at issue here are not limited to the last 5, 10, or 15 years, but cover a person's entire life (Exhibit 4 at 4). Given these circumstances, I conclude Applicant deliberately falsified material facts on his 1988 and 1993 security-clearance applications when he failed to disclose his history of drug involvement, to include the 1975 controlled substance offense. Accordingly, disqualifying condition 2-(15) applies against Applicant.

The June 2003 interview is addressed next. According to the SOR allegations, Applicant is accused of denying any involvement with illegal drugs or criminal activity within the last seven years during an interview with a Defense Department investigator. The allegedly withheld or concealed information is the information he had provided during the NSA interview in 1998. Applicant denies this allegation. The investigator did not testify, and no documentary information about the June 2003 interview was offered or admitted into the record. Accordingly, SOR subparagraphs 1.g and 1.h are decided for Applicant because the evidence is not sufficient to prove these allegations.

Applicant is also accused of lying on his 2005 security-clearance application. The SOR sets forth five falsification allegations. Some of the allegations are bizarre, accusing Applicant of deliberately concealing his wife's place-of-birth in Panama and deliberately concealing his three children. At bottom, the three falsification allegations concerning his spouse, relatives, and associates have no merit because the government has not established his deliberate intent to mislead or conceal.

The other two falsification allegations raise legitimate issues. He is accused of deliberately concealing his 1975 controlled substance offense in response to Question 24, which requires an applicant to report whether he had ever been charged with or convicted of an alcohol- or drug-related offense. Also, he is accused of deliberately concealing the land and house in Panama in response to Question 12 about foreign property. He should have answered both questions in the affirmative. But given the haphazard circumstances surrounding the completion of several security-clearance applications for his current employer, I am not persuaded by substantial evidence that Applicant had full knowledge of the information in his 2005 security-clearance application. Accordingly, SOR subparagraphs 1.i-1.m are decided for Applicant.

I reviewed the mitigating conditions under the guideline and conclude none apply. Making false statements to the federal government during the security-clearance process is serious misconduct, and it is not easily explained away, extenuated, or mitigated. It is not mitigated by passage of time because he perpetuated his falsehood by asserting a disingenuous explanation during the hearing in 2007. For these reasons, SOR subparagraphs 1.a-1.f are decided against Applicant. Accordingly, Guideline E is decided against Applicant.

2. The Criminal Conduct Security Concern

Under Guideline J, criminal conduct is a concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures for safeguarding and handling classified information.

Here, a criminal conduct concern is raised under Guideline J. (16) The criminal conduct at issue (making a false statement within the jurisdiction of a federal agency in violation of 18 U.S.C. § 1001) is based on the falsification allegations. Because I concluded that 6 of the 13 falsification allegations were substantiated, the criminal conduct concern under Guideline J is decided against Applicant as well. None of the mitigating conditions apply. It is not mitigated by passage of time because he perpetuated his falsehood by asserting a disingenuous explanation during the hearing in 2007. Accordingly, Guideline J is decided against Applicant.

3. The Foreign Influence Security Concern

SOR paragraph 3 alleges foreign influence under Guideline B. The allegation is based on Applicant's ties to Panama, which are based on foreign relatives and property. A security concern may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation, are not

citizens of the U.S. or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information.

Applicant's ties to Panama are longstanding (he married his wife in 1984) and no secret to the U.S. Government. Indeed, he served his country as a Special Forces soldier and held a top-secret security clearance while having these ties to Panama. Given these circumstances, his ties to Panama do not rise to the level of disqualification due to the potential for foreign influence. Stated differently, the totality of his ties to Panama and the surrounding circumstances (including the realistic potential for exploitation) justify a favorable conclusion. Accordingly, Guideline B is decided for Applicant.

4. Conclusion

To sum up, I have no doubts that Applicant was a superb Special Forces soldier. Likewise, I have no doubts that his current job performance is superb. But I am concerned about whether Applicant will voluntarily report information that is contrary to or inconsistent with his self-interest. This concern is the crux of this case.

After weighing the favorable and unfavorable information, I conclude that Applicant has failed to rebut, explain, extenuate, or mitigate the personal conduct and criminal conduct security concerns as discussed above. Likewise, he did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, I also considered Applicant's case under the whole-person concept, and my whole-person analysis does not support approval of a clearance for Applicant.

FORMAL FINDINGS

Here are my conclusions for each allegation in the SOR:

SOR ¶ 1-Guideline E: Against Applicant

Subparagraphs a-f: Against Applicant

Subparagraphs g-cc: For Applicant

SOR ¶ 2-Guideline J: Against Applicant

Subparagraph a: Against Applicant

Subparagraphs b-e: For Applicant

SOR ¶ 3-Guideline B: For Applicant

Subparagraphs a-e: For Applicant

DECISION

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

Michael H. Leonard

Administrative Judge

1. Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).
2. In addition to Questions 8, 9, 12, and 24, Applicant answered Question 32--to your knowledge have you ever had a clearance or access authorization denied, suspended, or revoked, or have you ever been debarred from government employment--in the negative. His answer was factually incorrect because the NSA denied him SCI access in 1998. This

was not alleged as a falsification in the SOR, and it was not developed during the hearing. Therefore, I express no opinion whether Applicant made a deliberately false answer in response to Question 32.

3. Directive, Enclosure 2, ¶ E2.2.1 (setting forth nine factors to consider under the whole-person concept).

4. Executive Order 10865, § 7.

5. ISCR Case No. 96-0277 (App. Bd. Jul. 11, 1997).

6. ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

7. Directive, Enclosure 3, ¶ E3.1.14.

8. Directive, Enclosure 3, ¶ E3.1.15.

9. Directive, Enclosure 3, ¶ E3.1.15.

10. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) ("It is likewise plain that there is no 'right' to a security clearance, so that full-scale due process standards do not apply to cases such as Duane's.").

11. *Egan*, 484 U.S. at 531.

12. Exhibit M is a helpful document. It cross-references the SOR allegations to the NSA Clearance Decision Statement.

13. "*De minimis* is a shortened form of the Latin maxim *de minimis non curat lex* (= the law does not concern itself with trifles)." *A Dictionary of Modern Legal Usage* 263 (Bryan A. Garner, 2nd ed., Oxford University Press 1995).

14. His claim that he reported his pre-Army illegal drug involvement when he enlisted is contradicted by the NSA document, which states he did not report that information (Exhibit 2 at 2).

15. Directive, Enclosure 2, Item 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.

16. The matters in SOR subparagraphs 2.b-2.e allege violations of military law. As the Army had an opportunity to take adverse action against Applicant after the NSA interview and did not, the security significance of these matters is *de minimis*. Also, the security significance of these matters is further undermined and mitigated by staleness. For these reasons, SOR subparagraphs 2.b-2.e are decided for Applicant.