



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:

ISCR Case No. 07-08882

Applicant for Security Clearance

**Appearances**

For Government: Candace Le'i, Esquire, Department Counsel

For Applicant: Andrew M. Belt, Esquire

October 14, 2008

**Decision**

RIVERA, Juan J., Administrative Judge:

Applicant failed to mitigate the criminal conduct and personal conduct security concerns raised by his misconduct. Furthermore, he falsified his security clearance application. Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) or Questionnaire for National Security Positions (SF 86 Format) on February 3, 2007. On April 8, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the Government's security concerns under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct).<sup>1</sup>

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<sup>1</sup> The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR on April 26, 2008, and requested a hearing before an Administrative Judge. The case was assigned to me on June 9, 2008. The first Notice of Hearing was issued on June 17, 2008, convening a hearing on July 7, 2008. Applicant's attorney entered his appearance on July 1, 2008, and requested a continuance. The final Notice of Hearing was issued on July 7, 2008, convening a hearing on August 11, 2008. At the hearing, the Government presented six exhibits, marked GE 1-6, which were admitted without objection (Tr. 15). Applicant testified on his own behalf, and presented five exhibits, marked Applicant Exhibit (AE) 1-5, which were admitted without objection. DOHA received the transcript (Tr.) on August 19, 2008.

### **Findings of Fact**

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a, 1.b, 2.a, 2.b, and 2.c, with explanations. He admitted he was charged with theft and driving while impaired (DWI). He denied he was ever arrested in relation to those offenses. He denied SOR ¶¶ 2.d and 2.e. His admissions are incorporated herein as findings of fact. After a thorough review of all evidence of record, including his demeanor, I make the following additional findings of fact.

Applicant is a 24-year-old software engineer working for a government contractor. He has never been married and has no children. He completed high school in 2002 with a 3.9 grade point average (GPA) (Tr. 17). Following high school, Applicant was admitted into the U.S. Naval Academy (Academy). He attended the Academy for about one academic year, achieved a 3.3 average. He participated in boxing and wrestling, and was considered by Cadre and fellow midshipmen to be among the top one-third midshipmen of his class. He distinguished himself by making the Dean's List and the Superintendent's List (Tr. 18, GE 4).

In May 2004, Applicant visited a retail store and stole a fishing vest and other fishing supplies (Tr. 21-23). He was with three other midshipmen. Applicant and his friends were violating several midshipmen regulations by taking advantage of privileges they were not authorized. He claimed he did not take the merchandise off the shelf. He averred one of his friends took the merchandise off the shelf, they passed it along themselves in the store, and ultimately he walked out of the store without paying for the items. He claimed they were joking around and, at the time, he believed it would make a funny prank to steal the merchandise. He acknowledge that what he did was wrong and attributed his behavior to being young and stupid (Tr. 22-23).

He was detained by the store's loss prevention officers and held for the arrival of police officers (Tr. 24). Applicant had in his possession a false military identification card he manufactured. Applicant also had manufactured at least two other false identification cards for fellow midshipmen. After the police officers took his personal information, he was allowed to leave the store on his own. He was not handcuffed, photographed, fingerprinted, or placed under arrest. At a later date, he was served with the theft (under \$500) charge/summons at his home.

In December 2004, Applicant was found guilty of the theft charge and placed on unsupervised probation before judgment. He completed his term of probation without incidents (Tr. 26). At the Academy, Applicant underwent a Commandant's Hearing under the Academy's Administrative Conduct System. Some of the administrative charges he faced were based on punitive articles under the Uniform Code of Military Justice (UCMJ), i.e., conspiracy (Article 81), false official statements (Article 107), larceny (Article 121), and conduct unbecoming a midshipman (Article 133).

Applicant was disenrolled from the Academy as a result of his theft, manufacturing false military identification cards for himself and other midshipmen, and for his violation of other midshipmen regulations. After his disenrollment from the Academy, Applicant continued his education at a university. He completed the requirements of his Bachelor of Science (computers) degree and graduated in August 2008 (Tr. 20).

In November 2007, Applicant went out partying with some friends and drove his car after consuming alcoholic beverages (Tr. 36-38). Applicant was forced to make an emergency stop after one of his car tires blew up, exposing the rim and throwing sparks all over. A police officer saw the incident and stopped to render assistance. He noticed Applicant smelled of alcohol and administered a field sobriety test which Applicant failed. He was charged with driving while impaired by drugs and/or alcohol; driving while impaired by controlled dangerous substance, and driving damage causing vehicle on highway. He immediately took the initiate to attend rehabilitation/alcohol counseling. In July 2008, Applicant was convicted of driving under the influence of alcohol (DUI). The other charges were dismissed. He was placed on probation before judgment for a period of 12 months. As part of his probation, he is required to visit his probation office once a month and to pay a fee.

In his response to question 23.e of his February 2007 security clearance application, Applicant answered "No" to the question of whether in the last seven years he had been subject to court-martial or other disciplinary proceeding under the UCMJ. The Government alleged that Applicant's Commandant's Hearing conducted pursuant to the Academy's Administrative Conduct System was a proceeding under the UCMJ, and that Applicant falsified his SF 86 when he failed to disclose it. Applicant testified he did not falsify his SF 86, because he believed the Commandant's Hearing was not a proceeding under the UCMJ (Tr. 30).

I find that a Commandant's Hearing is an Academy administrative proceeding and not a proceeding under the UCMJ. The phrase a "proceeding under the UCMJ" refers to those actions specifically authorized by the UCMJ such as non-judicial punishment pursuant to Article 15 of UCMJ, or one of the three different levels of courts-martial - Summary, Special or General Courts-martial, provided under Article 16 of the UCMJ. Thus, Applicant was not required to disclose he underwent a Commandant's Hearing at the Academy in his answer to question 23.e.

Question 23.f asked whether in the last seven years Applicant had been arrested for, charged with, or convicted of any offenses not listed in response to other questions. Applicant answered “No” and failed to disclose he was charged with theft in May 2004. He did not believe he was ever arrested because he was not placed in handcuffs, detained, or in custody by the police. He was allowed to go free after his interview. Considering the record evidence, I find Applicant was not arrested.

Applicant explained he failed to disclose his theft charge because he lacked understanding of the legal semantics (Tr. 12). Applicant claimed he had the honest belief that his conviction was set aside and removed from his records when he completed his probation. His belief was based on his then attorney’s advice (the attorney that represented him for the theft charge) that if he successfully completed his probation, under the state’s “probation before judgment” rules, his conviction would be set aside and removed from his record.

In mitigation, Applicant asserted that although he mistakenly failed to disclose his theft charge, he corrected his mistake by being candid and forthcoming with a Government investigator during an interview conducted after he submitted his February 2007 SF 86. Applicant was called for a follow-up interview with a Government investigator in May 2007. Applicant did not request the interview. During the interview, the investigator asked Applicant whether there was anything else he wanted to disclose. He disclosed the circumstances related to his 2004 theft charge and the subsequent probation before judgment.

Applicant has been working for his current employer, a defense contractor, since May 2006. While at the Academy he was granted access to classified information at the secret level. Apparently, his secret clearance was not withdrawn when he was disenrolled from the Academy. His access was continued after he was hired by his current employer to the day to the hearing. He needs his security clearance to work in Government contracts and to access his customer’s facilities (Tr. 45). While working for his employer, Applicant has been placed in positions of responsibility such as supervising two other employees, and handling sensitive matters. He has consistently performed well and has received no complaints from his supervisors or customers. There is not evidence he has ever compromised or caused others to compromise classified information.

Applicant has not disclosed to his employer the circumstances related to both the theft and DUI charges and the resulting probationary periods. He was concerned about the possible adverse impact it may have on his ability to retain his job if his employer found out about these incidents (Tr. 71). His employer knows about Applicant’s disenrollment of the Academy, but he does not know the details.

Applicant expressed remorse for his questionable behavior in 2004 and 2007. He averred he has matured and now understands the serious consequences of his actions.

## Policies

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information.<sup>2</sup>

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). The adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be considered in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's controlling adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security."<sup>3</sup> In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally

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<sup>2</sup> See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

<sup>3</sup> *Egan*, *supra*, at 528, 531.

permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline J, Criminal Conduct**

Under Guideline J, the security concern is that criminal activity “creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.” AG ¶ 30.

Applicant was 20 years old and had completed one year at the Academy when he stole merchandise from a retailer in 2004. He also created false identification cards for himself and others, and violated several of the Academy's midshipmen rules. He was 23 years old when he drove his car under the influence of alcohol in 2007. He was given probation before judgment as a result of his July 2008 DUI conviction, and was placed on one-year supervised probation. Applicant will be on probation until July 2009. Furthermore, Applicant falsified his security clearance application when he failed to disclose he was charged with theft. His falsification of the security clearance application is material and a violation of 18 U.S.C. § 1001, a felony.<sup>4</sup>

Applicant's overall behavior raises security concerns under Criminal Conduct disqualifying conditions AG ¶ 31(a) “a single serious crime or multiple lesser offenses,” AG ¶ 31(c) “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted,” and AG ¶ 31(d) “individual is currently on probation or parole or probation.” Applicant's recent falsification brings to the forefront the criminal conduct concerns raised by his past behavior. The Government did not allege the falsification under Guideline J. Thus, the falsification of the security clearance cannot be used as grounds to deny Applicant's application under Guideline J. However, I am required to consider Applicant's overall questionable behavior when evaluating the seriousness of the conduct alleged in the SOR to determine factors such as the extent to which his behavior is recent; the

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<sup>4</sup> 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. Security clearances are within the jurisdiction of the executive branch of the Government of the United States. See *Egan*, 484 U.S. at 527 (discussing 18 U.S.C. § 1001). The SOR does not allege a violation of 18 U.S.C. § 1001 as criminal conduct, and I have not based my determination on the applicability of 18 U.S.C. § 1001.

likelihood of recurrence; Applicant's explanations concerning the circumstances of the incidents alleged; and his rehabilitation.<sup>5</sup>

AG ¶ 32 lists four conditions that could mitigate the criminal conduct security concerns raised under AG ¶ 31. After considering all the mitigating conditions, I find that none apply. Applicant's theft happened four years ago, and except for the falsification of the security clearance application, it could be considered temporally remote. However, his recent falsification of the security clearance application brings to the forefront the criminal conduct concerns. Considering the evidence as a whole, the theft, the DUI, and the falsification are recent. Applicant receives some credit in mitigation because he expressed remorse for his past behavior, he attended rehabilitation/alcohol counseling, and he has a good employment record working for a defense contractor.

Notwithstanding, because of the nature and seriousness of the offenses (particularly the falsification); because of his age, education, and occupation at the time of the offenses; and the fact that he is still on probation for his DUI; the passage of time, his counseling, ongoing rehabilitation, expressed remorse, and good job performance are insufficient to mitigate his criminal behavior.

Moreover, having observed Applicant's demeanor, and considering his testimony in light of the record evidence, I find Applicant's testimony was not fully candid and forthright, and that he tried to minimize aspects of his questionable behavior, i.e., his participation in the theft, the circumstances surrounding his DUI, and the falsification of the SF 86. Applicant's overall behavior cast serious doubts about his judgment, reliability, and willingness to comply with laws, rules and regulations.

## **Personal Conduct**

Under Guideline E (Personal Conduct), conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. AG ¶ 15.

Applicant admitted, and the government's evidence established, he failed to disclose relevant information in his answer to questions 23.f of his security clearance application. Considering the record as a whole, I am convinced Applicant deliberately failed to disclose the information. Numerous factors weighed in my analysis to reach that conclusion, including: Applicant's age, his level of education, his employment and education history, and his demeanor and testimony. He knew the importance of accurate completion of his security clearance application, and nevertheless failed to provide information that was material to making an informed security decision. Applicant also has not disclosed to his employer the circumstances surrounding the theft, his

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<sup>5</sup> ISCR Case No. 04-09959 at 3 (App. Bd. May 19, 2006).

disenrollment from the Academy, and his DUI. Disqualifying conditions AG ¶ 16(a): “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire,” and AG ¶ 16(e): “personal conduct or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress,” apply.

I considered all Guideline E mitigating conditions and conclude that none apply. Applicant’s falsification is recent, and his favorable information is not sufficient to apply any of the mitigating conditions. I specifically considered AG ¶ 17.a: “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts,” and find it does not apply. A Government investigator arranged for the interview and asked an open ended question - whether Applicant had anything else to disclose, then Applicant disclosed his theft charge. Applicant’s evidence failed to establish he disclosed his theft charge and conviction before confrontation. Applicant’s omission was not caused by improper advice of legal counsel advising him concerning the security clearance process, thus, AG ¶ 17.b, does not apply. I do not consider Applicant’s falsification a minor offense, and it is temporally recent, AG ¶ 17.c, does not apply. Applicant also has failed to reduce his vulnerability to exploitation because of failure to fully disclose to his employer the theft, his disenrollment from the Academy, and his DUI. AG ¶ 17.e, does not apply. Additionally, for the same reasons outlined under the discussion of Guidelines J, incorporated herein, I conclude Applicant’s behavior shows questionable judgment, lack of reliability, and untrustworthiness.

### **Whole Person Concept**

Under the whole person concept, the Administrative Judge must evaluate an Applicant’s eligibility for a security clearance by considering the totality of the Applicant’s conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(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 extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

I have carefully weighed all evidence, and I applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guidelines in light of all



the facts and circumstances surrounding this case. I considered Applicant's age, education, maturity level, both at the time of each incident of misconduct and at the time of his hearing. I considered his four years of good performance for a defense contractor. While employed, he had access to classified information without causing security concerns or problems. I considered that he is doing well on his probation, and in his rehabilitation efforts. On balance, the record evidence does not convince me of Applicant's eligibility and suitability for a security clearance. Applicant has failed to mitigate the security concerns arising from his criminal conduct and personal conduct concerns.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraphs 1.a - 1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a – 2.c, and 2.e:	Against Applicant
Subparagraph 2.d:	For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to continue Applicant's security clearance. Eligibility for access to classified information is denied.

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JUAN J. RIVERA  
Administrative Judge