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

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| In the matter of: | ) | |
| | ) | |
| ---------- | ) | ISCR Case No. 08-05896 |
| SSN: ---------- | ) | |
| | ) | |
| Applicant for Security Clearance | ) | |

## Appearances

For Government: Nichole L. Noel, Esquire, Department Counsel
For Applicant: Chester H. Morgan, II, Esquire

March 25, 2010

## Decision

HARVEY, Mark, Administrative Judge:

From about 1997 to about 1999, Applicant filed forged certifications to receive about $15,000 in reserve pay. In 2004, he received mental health treatment. In 2005, court-martial charges were preferred against him. In August 2006, he failed to disclose the court-martial charges and mental health treatment on his security clearance application. In October 2006, he disclosed the court-martial charges and mental health treatment to an Office of Personnel Management (OPM) investigator. However, he was not fully candid at his hearing and to the OPM investigator. He mitigated security concerns under Guideline E; however, he failed to mitigate concerns under Guideline J and the whole person concept. Access to classified information is denied.

## Statement of the Case

On August 25, 2006, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) or Security Clearance Application (SF 86) (Government Exhibit (GE) 1). On June 19, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry,* dated February 20, 1960, as amended and modified; DoD Directive 5220.6, *Defense Industrial*

*Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified; and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleges security concerns under Guidelines J (criminal conduct) and E (personal conduct) (Hearing Exhibit (HE) 3). 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, and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked.

On July 16, 2009, Applicant responded to the SOR allegations and requested a hearing before an administrative judge (HE 4). On January 12, 2010, Department Counsel was ready to proceed on Applicant's case. On January 22, 2010, DOHA assigned Applicant's case to me. On January 25, 2010, DOHA issued a hearing notice, setting the hearing for February 9, 2010 (HE 1). The hearing was delayed. On February 19, 2010, DOHA issued a hearing notice, setting the hearing for March 4, 2010 (HE 1). On March 4, 2010, Applicant's hearing was held. At the hearing, Department Counsel offered eight exhibits (GE 1-8) (Tr. 11), and Applicant offered four exhibits (Tr. 15-16; AE A-D). There were no objections, and I admitted GE 1-8 (Tr. 11), and AE A-D (Tr. 16). Additionally, I admitted the hearing notices, SOR, and response to the SOR (HE 1-4). On March 16, 2010, I received the transcript.

## Findings of Fact[1]

In Applicant's response to the SOR, he admitted the conduct alleged in SOR ¶¶ 1.a, 2.b, and 2.c (HE 4). He admitted that he was charged with offenses under the Uniform Code of Military Justice (UCMJ), which were referred to general courts-martial (HE 4). He also provided clarifications and explanations about the various SOR subparagraphs, and provided other mitigating information (HE 4). His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is a 57-year-old employee of a defense contractor (Tr. 17, 19).[2] He has been employed doing competitive analysis since August 2002 (Tr. 18). He has one son, who is in the Navy (Tr. 27). His son recently completed his second tour in Iraq (Tr. 27). His son is an E-6 (Tr. 28). In August 2000, he became divorced (Tr. 28; GE 2 at 4). He said he has two adult stepdaughters (Tr. 28).

Three months after graduating from high school, Applicant joined the Army (Tr. 19). He served in the Army for 42 months as a linguist (Tr. 19). After leaving the Army,

[1]Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

[2]Unless stated otherwise, the facts in this section are from Applicant's September 7, 2005, security clearance application (GE 1).

he attended college and joined the reserve officers training corps (Tr. 20). After graduation, he served in the Air Force until 1992, when he accepted a separation bonus and left active service (Tr. 21-23). He stayed in the Air Force reserves until 2005. In 1994, he became a defense contractor (Tr. 26).

**Driving under the influence of alcohol in 2007**

On July 21, 2007, Applicant was drinking beer and whiskey at home (Tr. 30, 66, 73-74). His former spouse invited him to come to her residence for a visit (Tr. 29, 67). He decided to drive to her residence, which was about 10 miles away (Tr. 29). He fell asleep or passed out while driving and went off the road (Tr. 30, 67, 71-72; GE 4). The police arrested Applicant for driving under the influence of alcohol (DUI) (Tr. 29). His breath-alcohol test was .174 (Tr. 114). On November 14, 2007, he pleaded guilty to driving while ability impaired, and the court sentenced him to $400 in fees and costs, 48 hours community service, 36 hours of substance abuse training, and 15 months of probation (Tr. 29-30; HE 3, 4). He does not drive after consuming alcohol (Tr. 31, 75). Four months ago, the breath-alcohol test device or ignition interlock device was removed from his truck (Tr. 32; GE 4 at 6). He went to Alcoholics Anonymous (AA) meetings for awhile; however, he has stopped his AA attendance (Tr. 75). He has not consumed alcohol for about three months (Tr. 75).

**False certifications of reserve duty, court-martial charges, excess pay, and retirement**

In the 1997 to 1999 timeframe, when Applicant completed reserve duty, he signed an Air Force Form (AFF) 40a (Tr. 32, 36). Then his supervisor, a Lieutenant Colonel was supposed to sign the AFF 40a, certifying that Applicant completed the reserve duty (Tr. 32, 34; GE 5). Then Applicant was supposed to take the certified AFF 40a to the administrative section for processing (Tr. 32).

From November 30, 2000 to April 30, 2002, the Air Force Office of Special Investigations (OSI) investigated Applicant for false official statements, forgery, and frauds against the United States, in violation of Articles 107, 123, and 132, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 923, and 932 (GE 5). The OSI report listed the loss to the government of $15,603 in pay for the dates in question (GE 5 at 3, 16). The Defense Finance and Accounting Office (DFAS) is not listed as an addressee to receive the OSI report of investigation (ROI) (GE 5 at 1).

For six months, Applicant worked as a contractor at a location about 1,000 miles from his residence in state M (Tr. 40-41). He also performed his weekend reserve duty in that same vicinity (Tr. 40-41). When the Air Force investigated Applicant for submitting fraudulent claims, they were unable to locate anyone who remembered Applicant performing duties at his reserve location during those six months (Tr. 41). Applicant said he only performed about three full days of duties in state M (Tr. 42).

Applicant was doing shift work and did not actually work with Lieutenant Colonel C (Tr. 33). Applicant left an AFF 40a for his supervisor to sign, and then later Applicant would pick it up and take the AFF 40a to the administrative section (Tr. 33).

Applicant claimed he had some pre-signed AFF 40a's (Tr. 34). He photocopied the forms (Tr. 76). He said he was authorized to fill them out and turn them in to the administrative section (Tr. 34). Applicant explained:

> [T]he procedures we were using, the procedure we agreed upon was a gentleman's agreement, but it's not strictly legal. Well, I shouldn't say "legal" but it was improper. And I — I absolutely did all the time I claimed, and it was — but that improper agreement was an agreement between active duty officers and myself.

Tr. 52. On October 27, 2006, Applicant told an OPM investigator under oath:

> On approximately six of those requests to be paid, [Applicant] forged the signature of the U.S. Army lieutenant colonel on the form.[3] [Applicant] advised he forged the signature of the lieutenant colonel because it was common practice to do this. [Applicant] had to do the work and it was difficult to find the lieutenant colonel to have the form signed so he forged the signature of the lieutenant colonel.

(Tr. 77-80; GE 2 at 1-2). He initialed each page of the statement, and made corrections on some pages of his statement (GE 2). At his hearing, however, Applicant denied that he told the OPM investigators that he forged the signatures on the AFF 40a and he denied that he made his supervisor's signatures on the AFF 40as (Tr. 80). He did not have an explanation for why he swore, initialed, and signed the OPM investigative statement (Tr. 81).

Applicant accused three active duty colonels or lieutenant colonels of allowing Applicant to use pre-signed AFF 40as to obtain credit for his reserve duty (Tr. 53, 76). Applicant emphasized the OSI never interviewed Lieutenant Colonel C (Tr. 108, 111-112). Applicant's lawyer never obtained a statement from Lieutenant Colonel C (Tr. 112). None of his supervisors signed statements admitting to authorizing Applicant to fill out and submit AFF 40as in this manner (Tr. 110). The OSI report of investigation indicates three of five potential victims of forgery were interviewed and they indicated they believed their signatures to be forged (Tr. 110; GE 5 at 3). Applicant never obtained witness statements showing he was present for duty when he claimed in state M (Tr. 112). Applicant denied that he fraudulently claimed hours for work he did not do (Tr. 35, 42, 99). Applicant also denied forging any signatures (Tr. 35, 98-99). He said

[3] Under military law, uttering a forged document can constitute forgery under Article 123, UCMJ. Applicant's lawyer has suggested that Applicant's forgery is actually by uttering an improperly completed AFF 40a, rather than by actually writing the certification officer's signature on the AFF 40A (Tr. 98-99).

there was either a copied signature or an original signature on a blank AFF 40a that he used to file for credit for reserve duty (Tr. 35).

In 2000, the allegations of making and submitting false claims surfaced (Tr. 52). The case was delayed, and Applicant's active duty orders ended (Tr. 55). In February 2005, Applicant was recalled to active duty for two months, and then he was released from active duty and permitted to go on excess leave (Tr. 55, 106). A September 12, 2006 letter from the Defense Finance and Accounting Service (DFAS) indicates that Applicant owes $9,976 for pay from May 4, 2004, to July 1, 2004, because he was in no-pay status (GE 7 at 1). Applicant said DFAS paid him from May 4, 2004, to July 1, 2004, erroneously (Tr. 106). A DFAS printout indicates the $9,976 debt

> is to recoup the period of 09/01/2005 to 09/30/2005 due to non-performance. A review of your master pay account shows that you were paid for these periods, and your unit later reported that this period was not performed. If you have official certification of performance of this period, forward it to this office for review. (GE 7).[4]

Applicant said he was on excess leave from September 1, 2005, to September 30, 2005 (Tr. 55-56,105). Applicant said he tried to stop the checks while he was on excess leave; however, they continued (Tr. 56). Applicant set the checks aside and did not cash them until it was time to pay the money back (Tr. 56, 84). Applicant did not have any documentation showing he attempted to stop the DFAS overpayments (Tr. 82). He does not have any documentation showing he tried to pay the money back (Tr. 83). Applicant did eventually pay the money back (Tr. 57).

Applicant said he was charged with submitting false AFF 40a's or claims, in violation of Article 132, UCMJ (Tr. 76, 107). On October 27, 2006, he told an OPM investigator he was charged with conduct unbecoming an officer, a violation of Article 133, UCMJ (GE 2). The AFF 40a's contained the names of two supervisors, Lieutenant Colonel L and Lieutenant Colonel D (HE 3, 4). Applicant said he did not remember the number of specifications, and he did not have a copy of the charge sheet (Tr. 107). He did not remember if he had an Article 32 investigation or waived it (Tr. 112-113). He said he threw all of the records away (Tr. 107). Applicant's lawyer made a motion to dismiss the charges based on lack of jurisdiction and the judge agreed (Tr. 53). Most likely, Applicant successfully argued that the government could not prove Applicant submitted the false claims while he was on active duty; however, the precise basis for the dismissal of the charges is unclear because the transcript from the trial is not part of the evidence and Applicant said he was unsure of the rationale for the lack of jurisdiction (Tr. 81-82).

[4]Despite the OSI report of investigation indicating Applicant submitted forged certifications on his AFF 40a's in the 1997 to 1999 time frame, Applicant said DFAS never sought repayment and there is no evidence that the Air Force recalculated his retirement benefit based on the findings of the OSI report of investigation (Tr. 105).

Applicant submitted a request to retire, and on September 12, 2005, his request to retire as a reserve officer was approved in the grade of lieutenant colonel (Tr. 54; HE 4). Applicant becomes eligible to receive retired pay at age 60; however, he has to pay back the severance pay he received in 1992 (Tr. 54).

**False information on security clearance application**

On August 25, 2006, Applicant completed his SF 86. Section 21 asks, Your Medical Record. In the last 7 years, have you consulted with a mental health professional (psychiatrist, psychologist, counselor, etc.) or have you consulted with another health care provider about a mental health related condition?" Applicant answered, "No" (GE 1). From February to March 2004, Applicant was treated at a mental health facility (SOR ¶ 2.a; GE 2 at 3; HE 3, 4).

Applicant said he did not disclose his mental health treatment because he did not believe his clearance would be approved (Tr. 59, 85). Applicant was committed to a mental treatment facility for 30 days (Tr. 60). Applicant disclosed the information to the OPM investigator, and he did not believe the OPM investigator was already aware of it (Tr. 60-61). As an inpatient, he received treatment and counseling as well as anti-depressant medication (Tr. 61). After he was released from the mental health institution, he was allowed to go on excess leave and return to his civilian employment (Tr. 61).

On Applicant's August 25, 2006 SF 86, Section 23 asks: "Your Police Record. a. Have you ever been charged with or convicted of any felony offense? (Include those under Uniform Code of Military Justice)" and "e. In the last 7 years, have you been subject to court martial or other disciplinary proceedings under the Uniform Code of Military Justice? (include non-judicial, Captain's mast, etc.)" (GE 1). Applicant answered, "No" (Tr. 90-91; GE 1; SOR ¶¶ 2.b, 2.c; HE 3, 4). He did not disclose his court-martial charges on his SF 86. At his hearing, he said he did not disclose the court-martial charges because they were dismissed (Tr. 92). Applicant explained:

> I had been charged. That was—that was, honestly, it was a misunderstanding on my part. Because the charges were dismissed I viewed it as not having been—been charged in the first place. You know, I mean, if somebody had ever explained that to me, that if you have to fill out an SF 86 again, yes, you have been charged, and fill out a yes. But I didn't realize that, so I—I said no.

(Tr. 57; HE 4). On October 27, 2006, Applicant told an OPM investigator under oath that he did not reveal the information about his court-martial charges because he did not want his employer's security officer to know about it (Tr. 92-93; GE 2 at 2). Applicant said that he disclosed the court-martial charges at the outset of his interview in 2007 (Tr. 58).[5] He said he made a mental list before the OPM interview of matters he wanted to disclose to the OPM investigator (Tr. 95-96). He did not think the OPM

[5]Actually, the court-martial charges are discussed in his OPM interview on October 27, 2006 (GE 2 at 1-2).

investigator was aware of the DUI, court-martial charges, or mental health treatment prior to his interview (Tr. 95). He disclosed his DUI, mental health treatment, and court-martial charges to the OPM investigator (Tr. 31). The investigator did not have the privacy waiver forms, which is an indication he did not already know about the allegations (Tr. 58-59). He said he never intended to deceive anyone and he did not defraud the government (Tr. 115).

When the investigation began concerning the submission of false claims, Applicant's clearance was revoked and it was never restored (Tr. 96). The government took his badges and denied him access to the building where he worked (Tr. 102). He was not allowed access to places where classified information was stored or used (Tr. 102-103). However, Applicant erroneously failed to indicate that his clearance was denied, suspended, or revoked in response to Section 26 (Tr. 96-97; GE 1). The SOR did not allege he failed to disclose on his SF 86 the denial, suspension, or revocation of his security clearance (HE 3).

Applicant has held a security clearance in the past beginning in the early 1970s (Tr. 84-85). He was very familiar with the security clearance process and completion of security clearance applications (Tr. 84-86). He was well aware of the purpose of completion of security clearance applications and nevertheless deliberately chose not to reveal relevant information on his SF 86 (Tr. 86-87). At the time he completed his SF 86, he was unsure whether he would be interviewed (Tr. 88, 89). The security office was aware of Applicant's mental health treatment (Tr. 89). On October 27, 2006, Applicant told an OPM investigator under oath that he did not reveal the information about his mental health treatment because he did not want the security officer at his employer to know about it due to embarrassment (Tr. 90; GE 2 at 3). However, he provided a statement from his supervisor indicating he knew about Applicant's court-martial charges and mental health treatment because Applicant kept him informed of his status (Tr. 90, 100-101; AE C). His supervisor informed the security office and personnel officer about Applicant's status and charges (AE C). He attributed the errors in his OPM statement to careless mistakes and asserted there was no intent to deceive (Tr. 90-94).

Applicant is not concerned about public disclosure of the information about his past (Tr. 64). He would not compromise classified information to avoid disclosure of his past conduct or psychiatric treatment (Tr. 64-65).

Applicant's officer evaluation or effectiveness reports document his contributions to the national defense over more than 20 years (AE D). They also show his law-abiding character and integrity (AE D).

## Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no 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 have access to such information." *Id*. at 527. The President has authorized the Secretary of Defense or his designee to grant applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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 permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. *See also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to applicant's allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein 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. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

## Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concerns are under Guidelines J (criminal conduct) and E (personal conduct).

### Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct, "Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations." AG ¶ 31 describes two conditions that could raise a security concern and may be disqualifying in this case:

> (a) a single serious crime or multiple lesser offenses; and
>
> (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

AGs ¶¶ 31(a) and 31(c) apply because from about 1997 to about 1999, Applicant submitted forged certifications and received about $15,000 from DFAS. There was sufficient evidence to cite him in an OSI report, prefer charges, and refer those charges to general court-martial. On July 21, 2007, Applicant drove while under the influence of alcohol (DUI). On October 27, 2006, Applicant signed a confession to forging his supervisor's signature on the certification document. He received mental health treatment in February to March 2004. When he completed his SF 86 on August 25, 2006, he falsely denied that he had had court-martial charges preferred against him and mental health treatment, in violation of 18 U.S.C. § 1001. He admitted he deliberately failed to disclose this information on his SF 86. Although Applicant was not convicted of any offenses except for DUI, there is substantial evidence he committed these three criminal offenses.

AG ¶ 32 provides four conditions that could potentially mitigate security concerns:

> (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
>
> (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
>
> (c) evidence that the person did not commit the offense; and
>
> (d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or

> restitution, job training or higher education, good employment record, or constructive community involvement.

None of the mitigating conditions fully apply to all of the offenses. AG ¶¶ 32(b) and 32(c) do not apply because Applicant admitted the offenses and no one pressured him into committing the offenses. AG ¶¶ 32(a) and 32(d) are similar and partially applicable. Applicant's earliest offenses, the 1997 to 1999 forgeries and presenting forged documents, occurred more than 10 years ago. This offense is mitigated by the passage of time (SOR ¶ 1.b).

Applicant's July 21, 2007, DUI is mitigated because of Applicant's extensive mitigating efforts. He paid his fine, served his community service, and completed his probation. He presented strong evidence of remorse, job training, and a good employment record. His demonstrated intent not to commit future crimes is encompassed in these two mitigating conditions. He has accepted responsibility and culpability for his DUI. I am convinced he will not commit any future DUIs (SOR ¶ 1.a).

SOR ¶ 1.c alleges Applicant wrongfully accepted payment of $10,557. This allegation is not substantiated, and is therefore mitigated under AG ¶ 32(c).

Applicant's deliberate falsification of his August 25, 2006 SF 86 is more problematic. He deliberately and intentionally falsified his SF 86 by not disclosing his mental health treatment and court-martial charges because he wanted to deceive the government into giving him a security clearance. He understood the importance of providing accurate information on his 2006 SF 86. He was not fully truthful at his hearing and when he made a statement to an OPM investigator on October 27, 2006.[6] He said that he did not disclose his court-martial charges because they were dismissed. I do not believe this was his true rationale for failing to disclose this derogatory information at the time he completed his SF 86. As a lieutenant colonel with charges referred to general court-martial, and clearly an experienced and intelligent person, he was aware of the difference between never being charged and being charged and then having those charges dismissed, especially without a determination of his culpability. He knew the referral of court-martial charges for fraudulent activity, less than two years before he completed his SF 86, was highly relevant information.

[6]The SOR did not allege that Applicant failed to disclose the suspension or revocation of his security clearance on his 2006 SF 86. The SOR did not allege that he provided false information to the OPM investigator about why he failed to disclose his court-martial charges on his SF 86. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

> (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

(citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). I have considered the non-SOR misconduct for the five above purposes.

More progress is necessary to assure Applicant has the reliability, trustworthiness, and good judgment necessary to safeguard classified information. His failure to be fully candid and forthright at his hearing about his frame of mind when he completed his SF 86, shows poor judgment and militates against approval of a security clearance. His minimization of his culpability when he forged the certifications, as opposed to his more credible admissions to an OPM investigator, also shows poor judgment. At his hearing, he accused several of his supervisors of lying to the OSI or failing to disclose that they gave him permission to submit certifications with their signatures on the documents without their review of the completed documents. I do not find his statements about having their permission to violate the certification rules to be credible. He did not want to accept full responsibility for his misconduct.

**Personal Conduct**

AG ¶ 15 expresses the security concern pertaining to 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 ¶ 16 describes two conditions that could raise a security concern and may be disqualifying with respect to the alleged falsifications of documents used to process the adjudication of Applicant's security clearance in this case:

> (a) deliberate omission, concealment, or falsification of relevant 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; and
>
> (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.[7]

[7]The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

> (a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

On August 25, 2006, Applicant signed his SF 86. He falsely denied that he did not receive mental health treatment, and he did not have any court-martial charges. Applicant knew he was an inpatient for mental health treatment for a month in February-March 2004. He knew he had been charged and his charges were referred to general court-martial. He had sufficient military experience, and knowledge of security clearance matters to realize the significance of providing accurate information on his SF 86. His statement that he did not know the court-martial charges were reportable on his security clearance application is not credible. AG ¶¶ 16(a) and 16(b) apply.

AG ¶ 17 provides seven conditions that could mitigate security concerns in this case:

> (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
>
> (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
>
> (c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
>
> (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;
>
> (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;
>
> (f) the information was unsubstantiated or from a source of questionable reliability; and
>
> (g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

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ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

AG ¶ 17(a) fully applies to the allegations in SOR ¶¶ 2.a to 2.c. On October 8, 2006, Applicant disclosed his mental health treatment and court-martial charges to an OPM investigator, which constituted a prompt, good-faith effort to correct the omission, concealment, or falsification before being confronted with the facts.

SOR ¶ 2.d alleges Applicant admitted to an OPM investigator that he deliberately lied when failed to disclose the court-martial charges and mental health treatment on his SF 86. SOR ¶ 2.d essentially alleges the mitigating conduct in AG ¶ 17(a), and as such is unsubstantiated as a disqualifying condition.

AG ¶ 17(e) applies. Applicant has disclosed his court-martial charges and his mental health treatment to his employer and security officials. He has eliminated the possibility that he will be exploited, or manipulated by disclosure to the public of this information.

**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 incorporated my comments under Guidelines J and E in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

There is some evidence supporting approval of Applicant's access to classified information. He has only committed two criminal offenses involving judicial action. He submitted forged certifications in about 1997 and about 1999 to received about $15,000 in reserve pay, and he committed a DUI on July 21, 2007. The first offense is not recent, and the second offense is mitigated through his rehabilitative efforts. He served on active and reserve duty for more than 20 years and received positive supporting endorsements from his rating chain. Applicant significantly contributed to the national defense. Reliable military personnel serving with him laud his duty performance and contributions to mission accomplishment. He has made contributions to national security. All these circumstances demonstrate that Applicant will recognize, resist, and

report any attempts by a foreign power, terrorist group, or insurgent group at coercion or exploitation. There is no evidence of disloyalty. There is no evidence that he would intentionally violate national security, or that he would deliberately fail to safeguard sensitive or classified information. His character and good work performance show substantial responsibility, rehabilitation, and mitigation.

The evidence against approval of Applicant's clearance is more substantial. The importance of providing accurate information on a security clearance application is manifest. It is even more important that an applicant provide accurate information at his or her security clearance hearing. Applicant received notice in the SOR that the Department of Defense might deny his clearance because in the past he was not truthful and candid when he denied or omitted potentially disqualifying information from his security clearance application. Nevertheless, he intentionally and falsely denied at his hearing that was aware he was required to report his court-martial charges, asserting he thought they were not reportable because they were dismissed. I also believe, contrary to his statement at his hearing, and consistent with his statement to the OPM investigator, that he forged the signatures of his supervisors on some of his certification statements. At his hearing, he had an opportunity to correct his previous false statement to the OPM investigator about his rationale for failing to disclose his court-martial charges, and to admit that he intentionally provided false information on his security clearance application about why he failed to disclose his court-martial charges. Instead, he continued his pattern of failing to take full responsibility for his conduct.

Applicant's false statement on his 2006 SF 86 that he was not charged with felony-level court-martial charges constituted a violation of 18 U.S.C. § 1001. Even if this felonious false statement was mitigated because of his disclosure of the court-martial charges to an OPM investigator on October 27, 2006, I would not mitigate his conduct under the whole person concept because of his failure to be completely candid at his hearing. Applicant failed to disclose on his August 25, 2006 SF 86 that his security clearance was suspended or revoked when he was investigated for filing false certifications of his reserve duty. He did not disclose the suspension of his security clearance to the OPM investigator on October 27, 2006. Applicant is 57 years old and sufficiently mature to be fully responsible for his conduct. His false statements show lack of judgment and a failure to abide by the law. Such conduct establishes a serious security concern, and access to classified information is not warranted at this time. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances in the context of the whole person, I conclude he has mitigated the security concerns pertaining to personal conduct for the reasons stated under that adjudicative guideline. However, he has not mitigated the security concerns relating to criminal conduct.

I take this position based on the law, as set forth in *Department of Navy v. Egan,* 484 U.S. 518 (1988), my "careful consideration of the whole person factors"[8] and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant

[8]*See* ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

has not mitigated or overcome the government's case. For the reasons stated, I conclude he is not currently eligible for access to classified information.

## 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 to 1.c: | For Applicant |
| Subparagraph 1.d: | Against Applicant |
| | |
| Paragraph 2, Guideline E: | FOR APPLICANT |
| Subparagraphs 2.a to 2.d: | For Applicant |

## Conclusion

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 Applicant's eligibility for a security clearance. Eligibility for a security clearance is denied.

_____
MARK HARVEY
Administrative Judge