



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



In the matter of: )  
 )  
----- ) ISCR Case No. 08-09892  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Alison O’Connell, Esq., Department Counsel

For Applicant: *Pro Se*

November 20, 2009

**Decision**

LEONARD, Michael H., Administrative Judge:

This is a security clearance case in which Applicant contests the Defense Department’s intent to deny his eligibility for a security clearance to work in the defense industry. The record shows Applicant engaged in a pattern of multiple lesser offenses during 2003–2004, when he was a soldier in the U.S. Army. The command imposed nonjudicial punishment on him on four occasions, and then administratively separated him from the service due to a pattern of misconduct. Applicant failed to disclose his record of nonjudicial punishment in his May 2008 security-clearance application; he also failed to disclose past treatment or counseling for his use of alcohol. The facts and circumstances surrounding Applicant’s conduct create doubts about his judgment, reliability, and trustworthiness. The record contains insufficient evidence to explain, extenuate, or mitigate the security concerns. Accordingly, as explained below, this case is decided against Applicant.

## Statement of the Case

Acting under the relevant Executive Order and DoD Directive,<sup>1</sup> the Defense Office of Hearings and Appeals (the Agency) issued a statement of reasons (SOR) to Applicant on July 27, 2009. The SOR is equivalent to a complaint and it details the factual basis for the action. The SOR alleged security concerns under Guideline J for criminal conduct and Guideline E for personal conduct. Also, the SOR recommended submitting the case to an administrative judge for a determination to deny or revoke Applicant's security clearance.

Applicant answered the SOR on or about August 6, 2009, when his handwritten response to the SOR was received by the Agency. He requested a decision without a hearing. Accordingly, the case will be decided on the written record.<sup>2</sup>

On August 25, 2009, the government submitted its written case consisting of all relevant and material information that could be adduced at a hearing.<sup>3</sup> This so-called file of relevant material (FORM) was mailed to Applicant and received by him on September 1, 2009. He then had 30 days to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation. He did not respond within the 30-day period. The case was assigned to me November 9, 2009.

## Findings of Fact

Applicant is a 26-year-old employee of a federal contractor. He married in 2004, and he divorced in 2007. He is now raising a four-year-old son. It appears this is the first time he has applied for an industrial security clearance, completing an application in May 2008.

Applicant completed high school in 2001. He then worked as a clerk for a food business and a fast-food restaurant until he joined the U.S. Army in 2002. He was trained as an automated logistical specialist to work in the field of logistics. He was then assigned to a forward support battalion where he engaged in a pattern of misconduct that resulted in his early discharge from the Army in 2004.

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<sup>1</sup> This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended, and DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, because the SOR was issued after September 1, 2006, the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines) approved by the President on December 29, 2005, then made effective within the Defense Department on September 1, 2006, apply to this case. They supersede or replace the guidelines published in Enclosure 2 to the Directive.

<sup>2</sup> Directive, Enclosure 3, Paragraph E3.1.7.

<sup>3</sup> The file of relevant material consists of Department Counsel's written brief and supporting evidence, which will be identified as exhibits in this decision.

The SOR alleges that Applicant received nonjudicial punishment on six occasions while in the Army. But the record establishes four occasions. Nonjudicial punishment (called Article 15 in the Army and Air Force, captain's mast in the Navy and Coast Guard, and office hours in the Marine Corps) is a procedure under military law in which the commanding officer imposes punishment against a servicemember for a minor offense under the Uniform Code of Military Justice (UCMJ). Nonjudicial punishment is not a court-martial, and it does not constitute a conviction.<sup>4</sup>

What follows below is a description of Applicant's record of nonjudicial punishment based on four records of proceedings under Article 15, UCMJ:

- April 2003—for violation of a lawful general regulation (underage drinking).<sup>5</sup> It stemmed from a drinking-and-driving incident in March 2003, when Applicant was involved in an on-post traffic accident by driving into a light pole. He also received written counseling for driving while impaired and making false statements stemming from the March 2003 incident.
- January 2004—for disrespectful language toward a noncommissioned officer.<sup>6</sup> This Article 15 was imposed using summarized proceedings, which limits the amount of punishment.
- June 2004—for failure to go to appointed place of duty and two instances of disobeying a lawful order of a noncommissioned officer.<sup>7</sup> This Article 15 was imposed while Applicant was deployed in Afghanistan.
- July 2004—for disobeying a lawful general order (wrongfully have sexual intercourse with a female soldier) and disobeying a lawful order of the battalion commander by being present in one of the battalion's female tents.<sup>8</sup> This Article 15 was imposed while Applicant was deployed in Afghanistan.

The July 2004 Article 15 proceeding resulted in Applicant's reduction from private first class (E3) to private (E1) and 45 days of extra duty.

Several days after the last Article 15 was imposed, the Army initiated action to administratively separate Applicant before the end of his term of service due to a pattern

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<sup>4</sup> For a detailed discussion of nonjudicial punishment, see David A. Schlueter's *Military Criminal Justice Practice and Procedure* (4<sup>th</sup> ed. 1996), Chapter 3, and Army Regulation 27-10, Legal Services—Military Justice, Chapter 3.

<sup>5</sup> Exhibit 7, page 7 of 47.

<sup>6</sup> Exhibit 7, page 24 of 47.

<sup>7</sup> Exhibit 7, pages 22–23 of 47.

<sup>8</sup> Exhibit 7, pages 20–21 of 47.

of misconduct.<sup>9</sup> The task force commander approved the separation action on July 24, 2004.<sup>10</sup> In doing so, the commander directed that Applicant be discharged and furnished a general discharge certificate and not be transferred to the Army's Individual Ready Reserve. Applicant was then returned to his battalion's rear detachment for separation processing, and he was discharged as ordered on September 29, 2004.<sup>11</sup> The certificate of release or discharge from active duty (commonly known as DD Form 214) shows, among other things, the following: (1) type of separation–discharge; (2) reason for separation–pattern of misconduct; and (3) character of service–under honorable conditions (general).<sup>12</sup> He was separated from the Army at the lowest enlisted grade of private (E1).

Before his discharge, the command security manager forwarded a copy of the administrative separation action to the Army's security-clearance facility with the commander's recommendation that Applicant's security clearance be revoked.<sup>13</sup> Applicant's access to classified information had already been suspended, as the Army had previously granted Applicant a secret-level security clearance. The Army's security-clearance facility intended to use the information to review Applicant's eligibility, but his affiliation with the Army ended before a final resolution due to his discharge in September 2004.<sup>14</sup>

After his discharge, he worked a series of three jobs as a logistics or property clerk from October 2004 to September 2007. He then worked as a warehouse supervisor from September 2007 to May 2008. His past employment included working in Iraq during 2005–2008.

He has worked in his current position as an asset manager since May 2008. For that employment, Applicant completed a security-clearance application in May 2008.<sup>15</sup> In doing so, he was required to provide full, frank, and truthful answers in response to questions about his background. Applicant answered the following questions in the negative without explanation:

- Question 19 about Applicant's military record: Have you ever received other than an honorable discharge from the military?

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<sup>9</sup> Exhibit 7, pages 13, 14, and 15 of 47.

<sup>10</sup> Exhibit 7, page 10 of 47.

<sup>11</sup> Exhibit 6, page 8 of 8.

<sup>12</sup> Exhibit 6, page 8 of 8.

<sup>13</sup> Exhibit 7, page 9 of 47.

<sup>14</sup> Exhibit 7, page 8 of 47.

<sup>15</sup> Exhibit 5.

- Question 23d about Applicant's police record: Have you ever been charged with or convicted of any alcohol- or drug-related offenses?
- Question 23e about Applicant's police record: In the last seven years, have you been subject to court-martial or other disciplinary proceedings under the UCMJ?
- Question 25 about Applicant's use of alcohol: In the last seven years, has your use of alcohol resulted in any alcohol-related treatment or counseling?

The Agency issued written interrogatories to Applicant, to which he responded in January 2009.<sup>16</sup> Concerning why he did not list his alcohol-related arrest and his discharge due to misconduct on his security-clearance application, Applicant explained that he did not pay attention to the questions.<sup>17</sup> Asked about his use of alcohol and any alcohol-related treatment or counseling, Applicant reported that he was no longer drinking alcohol and that he received treatment or counseling at a military facility.<sup>18</sup>

Applicant admitted the SOR allegations when he answered the SOR, to include the falsification allegations, without explanation.

### **Policies**

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. To start, the only purpose of a clearance decision is to decide if an applicant is suitable for access to classified information.

It is well-established law that no one has a right to a security clearance.<sup>19</sup> As noted by the Supreme Court in the case of *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>20</sup> 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.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.<sup>21</sup> An

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<sup>16</sup> Exhibit 6.

<sup>17</sup> Exhibit 6, page 3 of 8.

<sup>18</sup> Exhibit 6, pages 4 and 5 of 8.

<sup>19</sup> *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 (10<sup>th</sup> Cir. 2002) (no right to a security clearance).

<sup>20</sup> 484 U.S. at 531.

<sup>21</sup> Directive, ¶ 3.2.

unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.<sup>22</sup>

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>23</sup> The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>24</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>25</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>26</sup> In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.<sup>27</sup> The agency appellate authority has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.<sup>28</sup>

The Revised Guidelines set 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 commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.

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.<sup>29</sup> Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

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<sup>22</sup> Directive, ¶ 3.2.

<sup>23</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>24</sup> Directive, Enclosure 3, ¶ E3.1.14.

<sup>25</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>26</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>27</sup> *Egan*, 484 U.S. at 531.

<sup>28</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

<sup>29</sup> Executive Order 10865, § 7.

## Analysis

Starting with the falsification allegations, personal conduct under Guideline E<sup>30</sup> includes issues of false statements and credible adverse information that may not be enough to support action under any other guideline. The overall concern is:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations [that may] 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.<sup>31</sup>

A statement is false when it is made deliberately (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 issues here are the truthfulness of Applicant's answers to four questions on his May 2008 security-clearance application. As discussed below, two are resolved in Applicant's favor and two are resolved against him.

The falsification allegation in SOR ¶ 2.a concerns Question 19. It alleges Applicant deliberately failed to list that he had been discharged from the military under other than honorable conditions because he failed to disclose his general discharge. This allegation is unproven, because the record contains no evidence to establish Applicant was discharged "under other than honorable conditions." The record, Applicant's DD Form 214 in particular, shows he was discharged under honorable conditions, typically called a general discharge, as directed by the commander. Accordingly, this allegation is decided for Applicant.

The falsification allegation in SOR ¶ 2.b concerns Question 23d. It alleges Applicant deliberately failed to disclose an alcohol-related charge or conviction based on the March 2003 drinking-and-driving incident, which was the basis for the April 2003 Article 15. This allegation is unproven, because the record contains no evidence showing that Applicant was charged with or convicted of an alcohol-related offense. At best, the record shows Applicant was involved in the March 2003 drinking-and-driving incident, was probably cited or arrested or both by the military police for driving while impaired, and received nonjudicial punishment for violation of a regulation for underage drinking. Applicant was not charged with or convicted of an alcohol-related offense because, by definition and design, an Article 15 proceeding is not a judicial process and

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<sup>30</sup> Revised Guidelines, ¶¶ 15, 16, and 17 (setting forth the security concerns and the disqualifying and mitigating conditions).

<sup>31</sup> Revised Guidelines, ¶ 15.

does not constitute a charge or conviction under military law. Accordingly, this allegation is decided for Applicant.

The falsification allegation in SOR ¶ 2.c concerns Question 23e. It alleges Applicant deliberately failed to disclose his record of nonjudicial punishment. Because this case is decided on the written record, I am unable to assess Applicant's credibility and determine if he omitted his record of four Article 15 proceedings because he genuinely forgot about it, inadvertently overlooked it, misunderstood the question, genuinely thought the information did not need to be reported, or, as he contends, did not pay attention to the questions. As a former soldier and clearance holder, Applicant had to know that his record of nonjudicial punishment and discharge for misconduct might prevent him from obtaining a clearance. Given these circumstances, the record supports this falsification allegation.

The falsification allegation in SOR ¶ 2.d concerns Question 25. It alleges Applicant deliberately failed to disclose his alcohol-related treatment. The allegation appears to be based upon Applicant's disclosure of his alcohol-related treatment or counseling when he responded to the Agency's interrogatories. As a former soldier and clearance holder, Applicant had to know that this type of negative information might prevent him from obtaining a clearance. Given these circumstances, coupled with his omission of his record of nonjudicial punishment, the record supports this falsification allegation.

Taken together, the two established falsifications support application of the relevant disqualifying condition that addresses the deliberate omission, concealment, or falsification of relevant facts from a security questionnaire.<sup>32</sup> I reviewed all the potential mitigating conditions under the guideline and conclude none apply. Making false or misleading statements to the federal government during the security-clearance process is serious misconduct. It is not easily explained away, excused, or mitigated. Accordingly, Guideline E is decided against Applicant.

Under Guideline J for criminal conduct,<sup>33</sup> an applicant's record of criminal conduct raises obvious security concerns. The overall concern is:

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.<sup>34</sup>

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<sup>32</sup> Revised Guidelines, ¶ 16(a).

<sup>33</sup> Revised Guidelines, ¶¶ 30, 31, and 32 (setting forth the security concerns and the disqualifying and mitigating conditions).

<sup>34</sup> Revised Guidelines, ¶ 30.



Applicant received nonjudicial punishment for multiple offenses on four occasions—twice while deployed to a combat zone—which by itself is sufficient to raise security concerns. Added to that, however, is Applicant’s falsification of his security-clearance application, which was also alleged under Guideline J in SOR ¶ 1.h as a violation of federal law (18 U.S.C. § 1001) for making a false statement within the jurisdiction of a federal agency; this is a felony offense. His record of nonjudicial punishment for UCMJ violations, combined with a more recent violation of federal law by falsifying his security-clearance application, justify application of two disqualifying conditions<sup>35</sup> under Guideline J.

I reviewed all the potential mitigating conditions under the guideline and conclude none apply. Although the nonjudicial punishment took place during 2003–2004, which ended about five years ago, it is too soon to tell if Applicant has reformed his ways. This conclusion is justified based on his recent criminal conduct by deliberately failing to disclose relevant facts about his background when he completed the May 2008 security-clearance application. This is both recent and serious criminal conduct. Accordingly, Guideline J is decided against Applicant.

To conclude, the facts and circumstances surrounding Applicant’s conduct create doubts about his judgment, reliability, and trustworthiness. He did not present sufficient evidence to explain, extenuate, or mitigate the security concerns. In reaching this conclusion, I considered the nine-factor whole-person concept<sup>36</sup> and Applicant’s favorable evidence. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. This case is decided against Applicant.

### Formal Findings

The formal findings on the SOR allegations, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	Against Applicant
Subparagraph 1.a:	For Applicant <sup>37</sup>
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant <sup>38</sup>
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant

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<sup>35</sup> Revised Guidelines, ¶¶ 31(a) and 31(c).

<sup>36</sup> Revised Guidelines, ¶ 2(a)(1) – (9).

<sup>37</sup> Decided for Applicant because it alleges he was counseled for receiving a traffic ticket, and the record does not prove that the traffic offense was criminal conduct. For example, the SOR did not allege, and the record did not establish, that Applicant’s traffic offense was a violation of a punitive regulation issued by the Army.

<sup>38</sup> Decided for Applicant because he did not receive nonjudicial punishment as alleged.

Subparagraph 1.f:	For Applicant <sup>39</sup>
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	Against Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraphs 2.a and 2.b:	For Applicant
Subparagraphs 2.c and 2.d:	Against Applicant

### **Conclusion**

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Michael H. Leonard  
Administrative Judge

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<sup>39</sup> Decided for Applicant because he received nonjudicial punishment once in June 2004, not twice as alleged.