



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 09-07118

Appearances

For Government: Candace Garcia, Esq., Department Counsel

For Applicant: *Pro se*

02/29/2012

Decision

HEINY, Claude R., Administrative Judge:

In 2005, Applicant received a punitive letter of reprimand under non-judicial punishment while serving in the U.S. Navy. He tendered his resignation in lieu of administrative separation and received a general discharge under honorable conditions for "misconduct serious offense." On a 2006 declaration for federal employment and on a 2008 security clearance questionnaire, he failed to indicate he had left a job by mutual agreement because of specific problems, following misconduct or unsatisfactory performance, or that he had been the subject of disciplinary proceedings under the Uniform Code of Military Justice including non-judicial punishment. He failed to rebut or mitigate the personal conduct security concerns. He rebutted or mitigated the information technology and financial considerations security concerns. Clearance is denied.

History of the Case

Applicant contests the Department of Defense's (DoD) intent to deny or revoke his eligibility for an industrial 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) on March 24, 2011, detailing security concerns under Guideline E, personal conduct, Guideline M, information technology, and Guideline F, financial considerations.

On June 5, 2011, Applicant answered the SOR and requested a hearing. On August 3, 2011, I was assigned the case. On November 23, 2011, DOHA issued a Notice of Hearing for the hearing held on December 6, 2011. The Government offered exhibits (Ex.) 1 through 14, which were admitted into evidence without objection. Applicant testified and submitted Exhibits A through X, which were admitted into evidence without objection.

The record was held open to allow Applicant to submit additional information. On December 28, 2011, additional material, consisting of six documents, was submitted. Department Counsel had no objection to the material; it was admitted into the record as Ex. Y through Ex. DD. On December 28, 2011, DOHA received the hearing transcript (Tr.).

Findings of Fact

In Applicant's Answer to the SOR, he admitted all of the factual allegations in the SOR, with explanation. His admissions are incorporated herein. After a thorough review of the pleadings and exhibits, I make the following findings of fact.

Applicant is a 48-year-old engineer who has worked for a defense contractor since October 2008. (Tr. 131) He served 15 years and 6 months in the U.S. Navy. From April 1990 until October 1994, he was an enlisted member in the U.S. Navy, at which time he was commissioned in the U.S. Navy. (Ex. 1, 2) In February 2006, Applicant – then a lieutenant commander (O-4) – left the U.S. Navy with a general discharge under honorable conditions. (Ex. 13) While in the Navy, he was commanding officer of two ships, among other duties. (Tr. 116) After leaving the Navy and before his current employment, he was employed as a design engineer for the Department of the Army at an Army depot. (Ex. 4, Tr. 23)

Applicant's Fitness Report and Counseling Record, RCS BUPERS 1610-1, dated mid-November 2004, rated him as "Greatly Exceeds Standards" and his commander gave him his "strongest possible recommendation for early promotion and selection for" command. (Exs. 13, BB-1) All of the fitness reports submitted indicated he was outstanding. (Ex. DD) He submitted numerous letters for recognition of outstanding achievement for work while in the Navy and with his current employer. (Exs. B, I, J, 13)

¹ Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

Applicant's co-workers and supervisors state: Applicant is hard working, capable, dedicated, compassionate, honest, loyal, selfless, and trustworthy. (Ex, A, B, D, E, F, G, and BB-2) Applicant's job evaluations rate his job performance as "exceptional performance." (Exs. H, 13) Manager's comments indicated: Applicant has a positive, proactive attitude, is very punctual and organized, highly dependable, demonstrates excellent work habits, a can-do spirit, and has excellent rapport with customers. (Exs. H, 13)

Illegal Drug Use:

In September 1990, Applicant completed a Personnel Security Questionnaire, DD Form 398 (Ex. 1) in which he indicated he had never used marijuana or any narcotic, depressant, stimulant, or hallucinogen. However, from 1983 to April 1987, Applicant used marijuana and cocaine with varying frequencies. In February 1991, he made a signed, sworn statement stating he was at a fraternity party in 1983 where he asserted he tried, but failed, to inhale from a marijuana cigarette and tried to inhale cocaine off a mirror. (Ex. 7) He stated he had not been around illegal drugs since that party. He asserts his recruiter advised him not to mention his drug use when he joined the Navy. (Tr. 55)

In May 1991, he made a signed, sworn statement stating he had used marijuana once at the previously described fraternity party. (Ex. 9) He stated he had used cocaine at the party as previously described and last used cocaine at a party in the spring of 1987. He stated he had used cocaine once or twice a year when offered at parties. (Ex. 9) In 1988, he was denied employment with the FBI after admitting he had used marijuana and cocaine until 1987. Applicant stated in his May 1991 sworn statement:

I did not reflect this on my PSQ nor did I fully acknowledge it in his previous statement because I had originally put the matter behind me and was afraid of the consequences of my mistakes. When I made my statement, I was surprised and made my comments in a manner to attempt to protect myself. I was afraid of the consequences and realized I should have been truthful from the start. (Ex. 9)

On his April 1997 Questionnaire for National Security Positions, Standard Form (SF) 86, he indicated he had used cocaine six times and marijuana once between April 1983 and June 1987. (Ex. 2)

Financial:

Applicant stated that while a student from September 1984 to May 1988, he "ran up a lot of bills." (Ex. 8) He stated that even after graduation, he continued to live and spend beyond his means, acting in an immature and irresponsible manner. (Ex. 8, Tr. 46) In January 1990, he filed for Chapter 7 bankruptcy protection and approximately \$23,000 in debt was discharged in May 1990. (Exs. 5, 8) He had \$5,400 in assets and \$21,554 in debts.

Between 2003 and 2007, Applicant acquired five rental properties. (Tr. 101) He purchased the first in 2003. In 2005, he purchased two rental houses, one of which was to be rented to his sister-in-law. In 2006, he purchased another rental and in 2007, the final residence was purchased. All of the properties went to foreclosure. He asserts he has received IRS Form 1099-Cs on all the properties indicating the debts on those properties have been cancelled. (Tr. 102, 105) The forgiveness on some of the rental property he owned that went to foreclosure was taxable income that resulted in him owing additional taxes. (Tr. 107) Between August 2011 and December 2011, he made five payments to the IRS of \$910 each. (Exs. R, Z)

The lack of tenants, the decline in the real estate market, his financial irresponsibility, and his spouse's spending resulted in financial problems. Although his then wife was a licensed massage therapist, a licensed cosmetologist, and a licensed surgical technician, she was not working. (Tr. 127-128) In April 2011, they divorced. (Tr. 111) He was also involved in a multilevel sales plan that sold benefit packages. (Tr. 128) In the second year of his involvement with the plan, it added an additional ten percent to his income. (Tr. 128) He was unemployed from July 2008 through September 2008. (Ex. 4)

In September 2008, he complied with pre-bankruptcy consumer-credit counseling. (Exs. P, 12) In October 2008, he filed for Chapter 13, Wage Earners' Plan, bankruptcy protection listing assets of \$819,000 and liabilities of \$935,000. (Exs. 13, 14) The plan requires \$750 monthly payments and continues until 2013. (Exs. 13, 14, Tr. 109) In November 2009, he started making his required monthly payments to the plan. (Tr. 108) As of December 2, 2011, \$323 is being deducted every two weeks for "Tax-Garn." (Ex. Q) As of that time, the amount of year-to-date garnishment was \$7,753.92. Applicant asserts this is not a tax garnishment, but is the amount being paid to his Chapter 13 Wage Earner's Plan. (Tr. 35, 48)

Applicant's 2008 federal tax return shows his adjusted income as an approximately \$10,500 loss, which included an approximate \$18,000 business loss, approximately \$21,000 in loss on the sale of business property, and an approximate \$17,000 loss on rental income for two rental homes subtracted from his approximate \$47,000 salary. (Ex. AA-3) His 2009 federal tax return shows approximately \$69,000 in adjusted income, which included a \$1,000 business loss, approximately \$2,500 in loss on the sale of business property, and an approximate \$10,000 net operating loss. (Ex. AA-2) His 2010 federal tax return shows \$93,000 in adjusted income, which included approximately a \$4,000 loss on one rental property. (Ex. AA-1)

Applicant's child support obligation is and has always been current. (Tr. 49) He lives within his means, has no car loan or credit cards, and all of his accounts are in good standing. He has recently moved into a smaller, less expensive home. (Tr. 49) He has obtained a second part-time job working 15 hours weekly at a university, which generated \$8,000 each the semester. (Tr. 49, 130) His 2003 BMW is not currently

working due to transmission problems. (Tr. 111) He has two motorcycles. His current annual income is in the mid \$90,000's. (Tr. 129)

Misconduct:

In March 1992, Applicant was charged with "Annoying Phone Call Obscene Threat." (Ex. 11) He obtained a psychiatric evaluation by the U.S. Navy and asserts the evaluation found him fully fit for duty. (Ex. 2) The charges were dismissed after he complied with conditions for court diversion. In August 1992, he was arrested for Driving Under the Influence (DUI) of Alcohol and was found guilty of the lesser included charge of "Wet and Reckless." (Ex. 6) He paid a fine and his driver's license was suspended. Neither conduct has been repeated.

In August 2004, he was on an Air Mobility Command flight from Virginia to Italy, acting in his capacity as commanding officer during a crew swap deployment, when he was intoxicated and contributed to the intoxication of junior enlisted Sailors under his command as well as an under-age civilian by supplying alcohol to them. (Ex. 10) Approximately 90 members of his crew were on the aircraft along with other passengers. (Tr. 117) His crew had completed 32 weeks of training in 19 weeks when they were told they would not do the normal state-side deployment, but would be deployed to the Gulf for six months. (Tr. 54) They had six weeks notice to get ready and transfer to the new ship. (Tr. 114) Applicant was not allowed to attend command leadership school prior to taking command nor did his senior enlisted advisor receive training. (Ex. Y) On the flight overseas, he allowed the crew to "cut-loose a little bit." (Tr. 55) He asserts he did not purchase alcohol for them, but did encourage them to "cut-loose." (Tr. 81) He realizes he was in command and realizes his error. He asserts he did not know the civilian was under age. (Tr. 55)

Between August 2004 and February 2005, he placed nude photographs of himself on a government computer in violation of DoD Directive 500.7-R Section 2-301B. The conduct resulted in one specification of failure to obey lawful general order and dereliction of duty in violation of UCMJ Article 92. The photos were taken by him, on his camera, on board ship. Those pictures were transferred with his other photographs onto a government computer on board the ship. The photos were placed in a file with personal information, tax returns, commanding officer documents, and photographs. (Tr. 123) No personal computers are allowed on the ship. (Tr. 52) At that time, the Navy allowed portable media to be put on the ship's unclassified computer network. He was unable to view the files to be transferred before they were transferred from his camera to the computer. (Tr. 71) He also moved folders from a CD-ROM he had burned from his home computer onto the government computer. (Tr. 70) The photo were never distributed or sent to anyone. He was unaware of the nude photos being on the ships' computer until being referenced in the Article 15. (Tr. 73).

In February 2005, Applicant was relieved of his command. In April 2005, he received non-judicial punishment under Article 15, Uniformed Code of Military Justice (UCMJ) for: failure to obey a lawful general order and five specifications of dereliction of

duty (UCMJ Article 92); a false official statement that had occurred in February 2005 which involved falsely back-dating his signature and comments on a Command Climate Survey (UCMJ Article 107); and for conduct unbecoming an officer (UCMJ Article 133). As commanding officer of the ship's crew at a time the vessel was embarked, he was not entitled to demand trial by court-martial in lieu of non-judicial punishment. (Ex. 10, Tr. 78)

The specifications for the failure to obey lawful general orders and dereliction of duty were: 1. violation of a lawful general order by wrongfully placing nude photographs of himself on a government computer; 2. he was derelict in failing to follow proper procedure to ensure that his personnel were cleared through transit quarters before obtaining hotel reservations; 3. he was derelict in performance of his duties by extending the liberty/curfew hours of enlisted members without authority; 4. he failed to coordinate his hotel room reservations with the USO as required; and 5. as commanding officer, he failed to notify his commander that he intended to remain ashore overnight. (Ex. 10) He was found guilty of each charge and specification. (Ex. 10) In April 2005, he received a punitive letter of reprimand, was removed from any promotion list, and was removed from the Commander select list. (Ex. 10) He acknowledges that as commanding officer, he was ultimately responsible for all that happened. (Tr. 121-122)

It was determined there was sufficient evidence to require Applicant to show cause for retention in the Navy. (Ex. 13, Tr. 79) He was given the opportunity to tender a qualified resignation in lieu of administrative separation. (Tr. 80) In October 2005, he tendered a resignation. His military service ended in February 2006 after having served 15 years in the Navy. (Tr. 86) His DD Form 214, Certificate of Release or Discharge from Active Duty, lists the character of service as "General Under Honorable Conditions." (Ex. 13) The reason for separation lists "Misconduct Serious Offense."

Falsification:

In January 2006, Applicant completed a Declaration for Federal Employment, Optional Form 306. (Ex. 4) He knew he was resigning from the Navy due to the circumstances that formed the basis of the Article 15. (Tr. 88) In response to question 12, asking if he had been fired from a job, quit after being told he would be fired, left a job by mutual agreement because of specific problems, he responded "no." He asserts he was not technically "fired," but could have gone to a board of inquiry to refute or mitigate the non-judicial punishment. (Tr. 60) He acknowledges he should have answered "yes" to the question. (Tr. 89)

In October 2008, he completed an Electronic Questionnaire for Investigations Processing (e-QIP). He answered "no" to questions in section 22 of that form related to his employment record. The question asked if he had left a job by mutual agreement following allegations of misconduct, left a job by mutual agreement following allegations of unsatisfactory performance, or left a job under unfavorable circumstances. In section 23.e he answered "no" when asked if he had any disciplinary proceedings under the

UCMJ including non-judicial, Captain's Mast, etc. He answered "no" to the question in section 23.d, which asked if he had ever been charged with or convicted of any offense related to alcohol or drugs. He did not list his 1992 wet and reckless charge because he considered it a traffic violation and not an alcohol incident. (Tr. 92)

The SOR alleges under SOR 1.f.(1) that Applicant failed to list the action under Article 15, non-judicial punishment, in response to question 13.d in the e-QIP dated October 2008, which asked if he had ever been charged with or convicted of any alcohol-related offenses. He answered "no" to the question. According to Rules of Court Martial 306(c), offenses dealt with under non-judicial punishment are neither a charge nor a conviction. As such, his answer to that question was not a falsification.

He acknowledged that in reviewing the 2008 questionnaire, he made "some errors . . . in reporting information." (Tr. 59) He asserts his errors were without malice or forethought and that he was not trying to deceive. (Tr. 67)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must 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 overarching adjudicative goal is a fair, impartial, and commonsense 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 interests of 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." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

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 to obtain 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order (EO) 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

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

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.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

- (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation; and,
- (b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 provides four conditions that could raise a security concern and may be disqualifying in regard to falsification of Applicant’s security clearance application:

- (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.

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information:

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and,

(4) evidence of significant misuse of Government or other employer's time or resources.

In February 2005, Applicant was relieved of command and subsequently, in April 2005, received non-judicial punishment under Article 15 of the UCMJ. In October 2005, he tendered a resignation in lieu of administrative separation. In February 2006, he received a general discharge from the U.S. Navy for Misconduct Serious Offense. The misconduct was sufficiently serious that he separated from the Navy after 15 years 6 months. Being relieved of command for misconduct and being separated from the U.S. Navy for misconduct is not something an individual is likely to forget. With respect to the personal conduct concerns involving Applicant's misconduct while in the U.S. Navy, the pertinent disqualifying conditions is AG ¶ 16(d)(3), a pattern of rule violations. The

conduct giving rise to the non-judicial punishment occurred more than seven years ago. The mitigation in AG ¶ 17(c) applies in that so much time has passed 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. I find for him as to SOR 1.a., 1.b, 1.c, and 1.d.

However, two-and-a-half years later, when he completed an e-QIP, he failed to indicate he had left a job by mutual agreement following allegations of misconduct, following allegations of unsatisfactory performance, or left for other reasons under unfavorable circumstances.

On that same e-QIP, he failed to indicate he had ever been charged with or convicted of any alcohol-related offense. Even though the Article 15 listed the offense of being intoxicated, non-judicial punishment under Article 15 does not involve being "charged" and is not a "conviction." He was not required to list the Article 15 in response to this question related to alcohol-related offenses. I find for him on SOR 1.f (1). He should have listed the 1992 DUI charge that was amended to "Wet and Reckless." However, that offense occurred more than 16 years before he completed his e-QIP and he had listed it on previous security questionnaires. The conduct itself occurred almost 20 years ago and has not been repeated. I find for him on SOR 1.j. I find for him on SOR 1.f (2).

In 1992, almost 20 years ago, he was charged with two counts of making annoying phone calls. He was evaluated by the U.S. Navy and found fit for duty. The conduct has not been repeated and he listed it on security questionnaires. I find for him as to SOR 1.k.

His 2008 e-QIP also asked him if he had been subject to any disciplinary proceedings under the UCMJ to include non-judicial punishment. He provided a false answer when he answered "no" to that question. I find against him as to SOR 1.g.

In January 2008, he completed a FORM 306 on which he indicated he had served in the Navy since 1990 and his discharge was in progress, but he had not yet received his DD Form 214. He had tendered his resignation and later received a general discharge for Misconduct Serious Offense. When an individual submits a resignation in lieu of administrative separation they hope to receive an honorable discharge, but due to the nature of the procedure, realize a general discharge is possible. However, his answer to question 8 was correct and the question did not require him to provide information as to his resignation. I find for him as to SOR 1.h.

That same form asked if he had been fired from any job for any reason or if he left a job by mutual agreement because of a specific problem. He provided a false answer to that question. Submitting a resignation in lieu of administrative separation and being fired are not exactly the same, but sufficiently close for him to answer "yes" to the question. And he did leave because of a specific problem. SOR 1.i is resolved against Applicant.

In 1989, more than 22 years ago, he was investigated for taking his father's car without permission. I find for him on SOR 1.n due to the passage of time, his conduct has not recurred, and is not likely to ever recur.

From 1983 to April 1987, Applicant used marijuana and cocaine with varying frequencies. The use of neither drug was extensive. His cocaine use was once or twice a year at parties until the spring of 1987, when he was a junior in college. All use of illegal drugs ended in 1987. On his 1997 SF 86, he indicated he had used cocaine six times and marijuana once between April 1983 and June 1987. However, on a 1990 personnel security questionnaire, he indicated he had never used marijuana or any narcotic, depressant, stimulant, or hallucinogen. In February 1991, he made a signed, sworn statement that he had tried, but failed, to use marijuana and cocaine at a fraternity party in 1983. His U.S. Navy recruiter advised him not to mention his drug use when he joined the Navy.

His falsifications concerning his illegal drug use are more serious because he was aware of the government concern about illegal drug use. In 1988, he was denied employment with the FBI because of his marijuana and cocaine use. He did not acknowledge the full extent of his illegal drug usage on the 1990 form because he had "put the matter behind" him and was afraid of the consequences of his mistakes. During the 1991 interview, when he made the statement, he was surprised and made his comments in an attempt to protect himself.

The falsifications concerning his illegal drug use occurred on two forms more than 20 years ago. The matter is mitigated by the passage of time. AG ¶ 17(c) applies. I find for him as to SOR 1.l, 1.m, and 1.o.

All of the personal conduct security concerns have been mitigated with the exceptions on his falsification on his 2008 e-QIP (SOR 1.e and g) and on his declaration for federal employment form (SOR 1.h). Applicant's concealment of relevant and material information demonstrates a lack of candor required of cleared personnel. Applicants are expected to give full and frank answers during the clearance process. The Government has an interest in examining all relevant and material adverse information about an applicant before making a clearance decision. The Government relies on applicants to truthfully disclose that adverse information in a timely fashion, not when they perceive disclosure to be prudent or convenient. Further, an applicant's willingness to report adverse information about himself provides some indication of his willingness to report inadvertent security violations or other security concerns in the future, something the Government relies on to perform damage assessments and limit the compromise of classified information.

Applicant left the U.S. Navy after more than 15 years of service. He knew he had resigned in lieu of administrative separation and knew he had received a general discharge for misconduct of a serious nature. One cannot forget a resignation under such conditions or fail to remember receiving non-judicial punishment. He knew the true answers to the questions and answered them falsely. None of the mitigating conditions

apply to his answers on these two forms. The personal conduct concerns pertaining to Applicant's falsification of his 2006 declaration and 2008 e-QIP are not mitigated at this time.

Guideline M, Misuse of Information Technology Systems

AG ¶ 39 articulates the security concerns relating to misuse of information technology systems:

Noncompliance with rules, procedures, guidelines or regulations pertaining to information technology systems may raise security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks, and information. Information Technology Systems include all related computer hardware, software, firmware, and data used for the communication, transmission, processing, manipulation, storage, and protection of information.

Applicant violated DoD directives when he placed nude photographs of himself on a government computer. He acknowledged he moved files, photographs, and documents from a CD-ROM and from his camera onto the government computer. Disqualifying Conditions ¶ 40(e), "unauthorized use of a government or other information technology system," applies.

Three mitigating conditions under AG ¶ 41 are potentially applicable:

(a) so much time has elapsed since the 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 misuse was minor and done only in the interest of organizational efficiency and effectiveness, such as letting another person use one's password or computer when no other timely alternative was readily available;

(c) the conduct was unintentional or inadvertent and was followed by a prompt, good-faith effort to correct the situation and by notification of supervisor.

The photographs were placed on the computer more than six years ago and it is unlikely that such an event is likely to recur. AG ¶ 41 (a) applies. AG ¶ 41 (b) does not apply, because having nude photo on a government computer is not a minor misuse.

Applicant asserted he was unaware he was placing the photos on the government computer. His statements are relevant and material, but not conclusive.

Although there was no prompt, good-faith effort to correct the situation because he was unaware of their existence on the computer until so informed during the non-judicial punishment proceedings, I find his actions to be unintentional or inadvertent. As the ship's commanding officer, he was well aware that placing nude photographs of himself on a government computer would not be tolerated. It is unlikely he would have intentionally transferred such photographs from his camera to the computer. It is more likely he would have left the photos on his camera and the transfer was inadvertent and unintentional. I find for him regarding the misuse of information technology systems considerations security concerns, SOR 2.

Guideline F, Financial Considerations

AG ¶ 18 articulates the security concerns relating to financial problems:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Additionally, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

A person's relationship with his creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts as agreed. Absent substantial evidence of extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a position of risk that is inconsistent with holding a security clearance. An applicant is not required to be debt free, but is required to manage his finances to meet his financial obligations.

Applicant has a history of financial problems. He has had to resort to bankruptcy protection two times. In October 2008, he filed for Chapter 13, Wage Earners' Plan, bankruptcy protection listing assets of \$819,000 and liabilities of \$935,000. (Exs. 13, 14) Disqualifying Conditions AG ¶ 19(a), "inability or unwillingness to satisfy debts" and AG ¶ 19(c), "a history of not meeting financial obligations," apply.

Shortly before and after leaving the Navy in 2006, Applicant purchased six real estate properties that have now all gone to foreclosure. Additionally, the lack of tenants, the decline in the real estate market, and his and his wife's financial irresponsibility resulted in financial problems. In October 2008, he filed for Chapter 13 bankruptcy protection and started making his monthly payments to the plan in November 2009. The plan continues until October 2013. He is current on his payments and as of December

2011, had paid \$7,753.92 that year into the plan. Having made his monthly payments for two years, I am confident he will continue making the monthly payments for the next two years, until the plan is completed.

His current annual income is in the mid \$90,000's. He is not living beyond his means. He is current on his child support obligation, has no car loan or credit cards, and is in good standing on all of his accounts. He has recently moved into a smaller, less expensive home to save money and has obtained a second, part-time job, which generated \$8,000 last semester. Someone who seeks additional part-time employment to address his financial obligations shows an individual acting in a responsible manner.

Five Financial Considerations Mitigating Conditions under AG ¶ 20 are potentially applicable:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;
- (c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and
- (e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

The mitigating factors in AG ¶ 20(a) have limited applicability. The debts are recent and extensive; he had more than \$900,000 in liabilities. However, the six real estate properties are gone and the factors leading to those foreclosures are unlikely to repeat themselves. The debts are being addressed and his current financial status does not cast doubt on his current reliability, trustworthiness, or good judgment.

Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his control, I must still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. January 12, 2007)(citing ISCR Case No. 03-13096 at 4

(App. Bd. November 29, 2005); ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. December 1, 1999).

Under AG ¶ 20(b), Applicant experienced financial problems based in part on the economic factors of the recent housing market. He has recently been divorced along with the financial burden associated therewith. He had limited periods of unemployment. These are factors beyond his control and he is acting responsibly to have his delinquent accounts addressed. AG ¶ 20(b) applies.

Good-faith requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. Accordingly, an applicant must do more than merely show that he relied on a legally available option (such as bankruptcy) in order to claim the benefit of the good-faith mitigating condition. ISCR case No. 02-30304 at 3 (App. Bd. April 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

While bankruptcy is intended to provide a person with a fresh start financially, it does not immunize an applicant's history of financial problems from being considered for its security significance. See, e.g., DISCR Case No. 87-1800 (February 14, 1989) at p. 3 n.2. His act of filing for bankruptcy did not preclude consideration of his overall history of financial problems. His financial problems were caused in part by the real estate market and other factors beyond his control. He has acted reasonably in addressing his delinquent debt. A Chapter 13 may not qualify for a "good-faith effort to repay creditors," but it is a means to "otherwise resolve debts. Additionally, he has received consumer credit financial counseling. AG ¶ 20 (c) and ¶ 20 (d) apply. I find for him on the financial considerations security concerns, SOR 3.

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 relevant 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant served more than 15 years of service to the U.S. Navy. His duty performance during the majority of that time was nothing less than outstanding. However, his career ended with him being relieved of command, receiving non-judicial punishment, and tendering a resignation in lieu of administrative separation. The action of placing the photographs on the government computer was an unintentional, inadvertent act. He had to resort to bankruptcy protection twice, once in 1990 and again in 2008. He is currently half way through his wage earners plan, is current on his monthly payments, and the amount of payments he had made gives assurance that he will complete the plan. He has no credit card debt, no vehicle loans, and is living within his means.

The concern is that he gave false answers on a 2008 e-QIP and declaration for federal employment. The e-QIP specifically asked if he had been subject to disciplinary actions under the UCMJ specifically to include non-judicial punishment. His answer to the question was false. Additionally, each form asked if he had left a job by mutual agreement because of a specific problem. Having been relieved of command for misconduct, having received non-judicial punishment, and having had to leave the Navy after 15 years with a general discharge for misconduct serious offense are so serious one cannot have inadvertently overlooked them when completing the questions.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising from his falsifications. He mitigated the security concerns arising from information technology and his financial considerations.

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, Personal Conduct:	AGAINST APPLICANT
Subparagraphs 1.a – 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f (1) and (2):	For Applicant
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	For Applicant
Subparagraph 1i:	Against Applicant
Subparagraphs 1.j – 1.o:	For Applicant
Paragraph 2, Information Technology:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Paragraph 3, Financial Considerations: FOR APPLICANT

Subparagraphs 3.a and 3.b: For Applicant

Conclusion

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

CLAUDE R. HEINY II
Administrative Judge