

DATE: October 26, 2007

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| In Re:) | |
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| -----) | ISCR Case No. 04-12870 |
| SSN: -----) | |
|) | |
| Applicant for Security Clearance) | |
| _____) | |

**DECISION OF ADMINISTRATIVE JUDGE
CHARLES D. ABLARD**

APPEARANCES

FOR GOVERNMENT

Nichole Noel, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

_____ Applicant failed to mitigate personal conduct security concerns arising from deliberate failure to list on his 2003 SF 86 at Question 26 three criminal charges occurring between 2000 and 2002. He also failed to report at Question 40 his application for a restraining order filed by him against his wife in 2003. He attributed the omissions to advice given to him by his corporate security staff to omit the information, but to report it to an investigator when he was interviewed. However, when he was interviewed by two investigators, he reported the information to the first but only after being asked about it, and told the second one that he had reported the information on his SF 86. He mitigated criminal conduct security concerns arising from the same incidents he failed to reveal because of the passage of time and no further incidents since 2002. Clearance is denied.

STATEMENT OF CASE

_____ On March 14, 2007, the Defense Office of Hearings and Appeals (DOHA), pursuant to

Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant which 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. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On April 14, 2007, Applicant responded to the SOR allegations, and requested a hearing. The matter was assigned to me on July 12, 2007. A notice of hearing was issued on July 19, 2007, for a hearing on August 7, 2007, and held that day. The government offered five exhibits and Applicant offered ten at the hearing. All were admitted into evidence. One witness and Applicant testified for Applicant. The transcript was received on August 20, 2007.

FINDINGS OF FACT

_____Applicant admitted one allegation (SOR ¶ 1.a.1.) under Guideline E relating to failure to disclose three arrests on his Application for Security Clearance (SF 86) dated August 23, 2003. He denied all other allegations under Guidelines E and J with explanatory information. After a complete review of the record, I make the following findings of fact:

Applicant is a 33-year-old employee of a major defense contractor. He works as a computer systems administrator. He served on active duty with the Air Force for nine years and has worked for his present employer in two different positions since April 2001. He is highly regarded for his work performance in statements and evaluations (Exhs. B, C, and E-J).

During a 22-month period between May 2000 and March 2002, Applicant had the three instances of criminal behavior to which he admitted as follows:

1. Arrested in May 2000 and charged with Harassment-Strike, Shove, Kick relating to a dispute with his then girlfriend, to whom he is now married. He removed her from the home he was then occupying with his former wife. He plead guilty to the charge and received a deferred sentence of 24 months probation with fines and costs. He was ordered to complete 36 weeks of a domestic violence course. In 2001 a warrant for arrest was issued for failure to comply; he was arrested and completed the terms of the sentence in May 2002 (Exh. 4). He was represented by counsel who advised that the failure to comply issue would be taken care of but it was not (Exh. H).

2. During the time he was on probation for the above charge, he was arrested for Prostitution (Solicitation) arising from a discussion with an undercover female police officer who approached his vehicle and mentioned having sex with him. He called her a "bitch" and drove off. A mile or so away he was stopped by another police officer who confronted him about the matter including the language used, and gave him a ticket. On the advice of counsel, he plead guilty and received a fine although he continues to deny the charge and believes the real reason he was ticketed was because of the language he directed to the undercover officer.

3. The third criminal charge was for Fighting on March 31, 2002 and concerned a dispute with a woman friend of his wife's who confronted him about his retrieval of a coat belonging to Applicant from the friend's husband. He received a ticket and the charge was dismissed.

When Applicant submitted his SF 86 he failed to list any of the above in response to Question 26: Your Police Record-Other Offenses. The only criminal conduct to which he admitted was at Question 25 relating to Military Courts on the SF 86. This was a 2000 Article 15 punishment of a reduction in rank for failure to attend a meeting when he was leaving the Air Force. He attributed the Article 15 to an overly aggressive supervisor.

Applicant also failed to report in response to Question 40: Public Record Civil Court Actions a complaint he filed for a temporary restraining order against his present wife on August 1, 2003. The court found sufficient cause existed for issuance of the order but he asked that it not be enforced against her and it was not (Exh. 5).

Applicant contended that he failed to list the required information on his SF 86 because he was under time pressure to complete the application as he was transferring to a new job and his security clearance (Top Secret) had expired. However, the evidence produced at the hearing indicated that he had been in the new job for six months before the SF 86 was completed. Despite the supposed time pressure, he gave quite detailed answers to other questions, including information relating to his formal education. He stated that the corporate security staff was aware of his lack of detailed information about the criminal charges and told him to wait for the interview to divulge it. He was supported in this belief by a statement from one member of the security staff who verified Applicant's statement but through hearsay from another officer who was no longer employed (Exh. K). The government objected to the admission of the statement as hearsay. I admit it for whatever probative value it may have. While not totally reliable, it does offer some support to his statement of justification for omitting the information from his SF 86. He testified that he saw an investigator within a few days of filing his SF 86 and revealed all to him, but no evidence was offered to support his contention.

Two statements from Applicant based on investigative interviews were introduced in the record. The first was given on January 26, 2004, six months after the SF 86 was filed. The second was on August 23, 2005, two years later. In the first interview, he discussed the first two criminal allegations but not the third one. He denied being guilty of the first two and stated erroneously that the prostitution charge was dismissed whereas, in fact, he plead guilty and was fined (Exh. 2). In his second interview he inexplicably stated to the investigator that he had given information about the criminal charges on his SF 86 (Exh. 3).

Even if I were to fully accept Applicant's account of the discussions with his security staff, the information revealed in the first interview was only given after the investigator asked if there were omissions in the SF 86. This does not comply with the Guideline E mitigating condition requirement that the information must be submitted on the initiative of the applicant and not after being questioned about it. Also, his actions do not comply with the instructions he says he received from his security staff. Instead, the interview reports indicate a number of partial and half-truths made to the investigators. Thus, rather than mitigating the problems created by the omissions on his SF 86, he compounded them by his subsequent failure to come forth immediately and volunteer complete information to an investigator.

Applicant holds two associate degrees, a bachelor's degree, and two master's degrees in his field. He has held security clearances for 13 years based on two clearances while in the Air Force. The SF 86 in question here was the third he had filed in his career. He is well regarded for his work. However, his lack of full and complete responses to both the requirements of the clearance application and his responsibility to respond accurately in his interviews indicates a casualness with his obligation to tell the truth and give full and candid answers. He tends to minimize his own conduct and blame others for the issues presented in this matter.

Applicant is married to his second wife. He has two children, ages 15 and 16. The older child is from his first marriage, and he shares custody. The second is his step child living at home. His wife is employed in the medical field and they have a joint income of \$125,000 per annum.

POLICIES

“[N]o 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 occupy a position that will give that person access to such information.” *Id.* at 527.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other 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. Directive, ¶ E2.2.1. Security clearances are granted only when “it is clearly consistent with the national interest to do so.” Executive Order No. 10865 § 2. *See* Executive Order No. 12968 § 3.1(b).

_____ Initially, the government must establish, by something less than a preponderance of the evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The applicant then bears the burden of demonstrating that it is clearly consistent with the national interest to grant or continue a security clearance. “Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security.” Directive, ¶ E2.2.2. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531. *See* Executive Order No. 12968 § 3.1(b).

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate adjudicative factors, I conclude the following with respect to all allegations set forth in the SOR:

Applicant's failure to report three arrests and charges at Question 26 of his SF 86, and the

application for a restraining order at Question 40, as well as failure to fully inform investigators of accurate details of the issues, prompted security concerns under Guideline E (Personal Conduct) of the revised adjudicative guidelines (AG) effective September 1, 2006. Such conduct might indicate questionable judgment, unreliability, and unwillingness to comply with rules and regulations and could indicate that the person may not properly safeguard classified information (AG 15). Specifically, conditions that could raise a security concern and be disqualifying include the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire (AG 16 a). The deliberate omission, concealment, or falsification of relevant and material facts in a personnel security interview could raise a security concern and be disqualifying (AG 16 b).

There are several mitigating conditions in Guideline E, but none are applicable. In view of the detail of other answers he gave on the SF 86 to other questions such as his education, is difficult to explain. Thus, I conclude against Applicant as to the three specific allegations under SOR ¶ 1.a. As to the allegation in SOR ¶ 1.b. relating to the failure to report the restraining order at Question 40 concerning Public Record Civil Court Actions I find his reason for not reporting it to be not credible since he was the initiator of the action. I rule against him. As to the misstatements in the reports of the two investigators in 2004 and 2005, the differences in the detail given to the two investigators as stated in their reports shows a lack of attention to detail to the point of justifying a finding that it was deliberate. I find against him as to that allegation.

I conclude in favor of Applicant as to the omission of the Fighting charge in 2002 since it was dismissed and Applicant reasonably believed that it did not need to be reported since he was only ticketed and not formally arrested. As to the allegation in SOR ¶ 1.d. I conclude against Applicant as to the statement that the Prostitution (Solicitation) charge was dismissed since he clearly knew that he had a plead guilty to the charge. As to SOR ¶ 1.e., I conclude against Applicant regarding the statement to the second investigator that he had included the three criminal charges on his SF 86 since he has consistently admitted that he omitted them but for reasons attributable to his corporate security staff.

Also alleged is security concern under Guideline J (Criminal Conduct) relating to the three civilian criminal arrests in 2000, 2001, and 2002 as well as the Article 15 in 2000 since criminal activity creates doubt about 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. Also alleged is a criminal violation of 18 U.S.C. § 1001 regarding the allegations in SOR ¶ 1 relating to the omission of the three criminal charges and inconsistency in information provided to the two investigators. Such conduct might create doubts about a person's judgment, reliability, and trustworthiness. It calls into question a person's ability or willingness to comply with laws, rules and regulations (AG 30). Conditions that could raise a security concern and may be disqualifying include an allegation or admission of criminal conduct (AG 31 c).

Mitigating conditions (MC) might apply if 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 judgement (AG 32 a). Another MC provides mitigation if there is evidence of successful rehabilitation without recurrence of criminal activity, remorse, and a good employment record.

Since the specific criminal conduct alleged in SOR ¶ 1. occurred five to seven years ago under circumstances unlikely to recur I conclude that both mitigating conditions are applicable. As to the allegation in SOR ¶ 2.c. relating to 18 U.S.C. 1001, I conclude that the evidence produced regarding SOR ¶ 1 rises to level required for establishing criminal conduct since the omissions were deliberate and were not mitigated by subsequent conduct with the investigators.

In all adjudications the protection of our national security is of paramount concern. Persons who have access to classified information have an overriding responsibility for the security concerns of the nation. The objective of the security clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. The "whole person" concept recognizes we should view a person by the totality of his acts and omissions. Each case must be judged on its own merits taking into consideration all relevant circumstances, applying sound judgment, mature thinking, and careful analysis. Applicant is a young man who, at age 33, has been employed in a stable and productive position for six years. The three acts of criminal behavior appear to be isolated events, each caused by different factors, and not a pattern of criminal conduct. However, the failure to report them on his SF 86 for reasons not fully established and the failure to tell straightforward stories to two official investigators precludes favorable application of the whole person test.

After considering all the evidence in its totality, including the whole person of Applicant, I conclude that a security clearance should not be granted.

FORMAL FINDINGS

Formal findings as required by the Directive (Par. E3.1.25) are as follows:

_____ Paragraph 1. Guideline E: AGAINST APPLICANT

- Subparagraph 1.a.: Against Applicant
- Subparagraph 1.b.: Against Applicant
- Subparagraph 1.c.: For Applicant
- Subparagraph 1.d.: Against Applicant
- Subparagraph 1.e.: Against Applicant

_____ Paragraph 2. Guideline J: AGAINST APPLICANT

- Subparagraph 2.a.: For Applicant
- Subparagraph 2.b.: For Applicant
- _____ Subparagraph 2.c.: Against Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or renew a security clearance for Applicant. Clearance is denied.

Charles D. Ablard
Administrative Judge
