

DATE: November 27, 2007

In re:)
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 -----) ISCR Case No. 06-19084
 SSN: -----)
)
 Applicant for Security Clearance)
)
)

**DECISION OF ADMINISTRATIVE JUDGE
NOREEN A. LYNCH**

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 51-year-old employee of a defense contractor who has a history of alcohol-related driving incidents and other offenses. He failed to mitigate the security concerns raised under personal conduct guidelines. He also intentionally falsified his security clearance application. Applicant's eligibility for a security clearance is denied.

STATEMENT OF THE CASE

On September 27, 2006, Applicant applied for a security clearance and submitted a Security Clearance Application (SF 86). On July 12, 2007, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) stating that it was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance.¹ The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline E (Personal Conduct) of the revised Adjudicative Guidelines (AG) issued on December 29, 2005, and implemented by the Department of Defense effective September 1, 2006. The revised guidelines were provided to Applicant when the SOR was issued.

On August 27, 2007, Applicant submitted a notarized response to the SOR, and elected to have a hearing before an administrative judge. The case was assigned to me on October 2, 2007. A notice of hearing, dated October 5, 2007, scheduled the case.² I scheduled the hearing for October 26, 2007.

The hearing was convened as scheduled on October 26, 2007, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Government Exhibits (GE 1-10) were admitted without objection. Applicant did not provide any exhibits for the record. Applicant testified in his own behalf. The hearing transcript was received on November 5, 2007.

FINDINGS OF FACT

Applicant admitted to all allegations in the SOR³ under Guideline E with the exception of 1.e and 1.o.⁴ The admissions are incorporated as findings of fact. After a complete review of the evidence in the record and upon due consideration, I make the following additional findings of fact:

Applicant is a 51-year-old employee of a defense contractor.⁵ After receiving his GED in 1973, he worked as an electrician. He has worked for his current employer since 1974. Applicant is twice divorced with one grown daughter.⁶ He has had a security clearance for 20 years.⁷

¹This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

²A Notice of Hearing dated October 5, 2007 was mailed to Applicant. He waived the 15-day period for notice.

³Department Counsel noted at the hearing that allegation 1.a had an error in the date of the application. The correct date is September 27, 2004. In addition, allegation 1.o should read January 1991 not 1990. The allegations were amended at the hearing with no objection from the Applicant.

⁴Applicant's Answer to SOR, dated August 27, 2007.

⁵GE 1 (Application for Security Clearance (SF 86), dated September 27, 2004).

⁶*Id.*

⁷Tr. 31.

Applicant completed his first security application in 1991. On that application, he listed a Chapter 13 bankruptcy discharged in 1985. He also responded “yes” to Question 18 concerning arrests for May 1981, February 1989, and January 1991. These three incidents were DUI’s.⁸

In a sworn statement on March 31, 1992, Applicant explained in great detail that a writ of garnishment was filed against him for a debt of \$236 which he paid. He also explained in detail the alcohol driving incidents of 1981, 1989, and 1991.⁹

Applicant was again arrested on December 15, 1995 for public drunkenness, resisting arrest trespassing, and simple assault. He was convicted of public drunkenness and resisting arrest, and fined \$295. In 1996, Applicant was arrested for public drunkenness and assault again. The court found him guilty on the public drunkenness charge. He was fined \$100.¹⁰

Applicant married his second wife in 1998. This marriage proved very difficult for him. His wife drank heavily and there were incidents of domestic violence. They also had financial difficulties. In fact, Applicant filed for Chapter 7 Bankruptcy in March 1998 which was discharged in June 1998.¹¹

On June 19, 1999, Applicant was arrested for Assault/Domestic Violence. He pled guilty and was sentenced to one year in jail, all but five days suspended and two years probation.

In 2001, Applicant had several arrests and more financial difficulties. On July 15, 2001, Applicant was arrested for driving under the influence, and possession of a controlled substance cocaine which is a felony.¹²The police confiscated cocaine found in his vehicle. He pled guilty to the possession of cocaine. The case was transferred to a drug court diversion program. Applicant completed a Drug Court Diversion and Treatment Program on or about July 11, 2003.¹³

When Applicant explained the 2001 incident at the hearing, he asserted that he did not know anything about drugs in his vehicle. He does not use drugs. However, he was embarrassed because the drugs in the car were his daughter’s. He was charged with the possession of the drugs in his car. This was an automatic felony. The charge for DUI was nolle prossed.¹⁴

⁸GE 1 (National Agency Questionnaire, dated November 22, 1991).

⁹GE 3 (Statement of Subject, dated March 31, 1992).

¹⁰GE 6 (Criminal Investigation Report, dated November 9, 2004).

¹¹GE 7 (Credit Bureau Report, dated April 20, 2006).

¹²GE 10 (Arrest Report, dated July 15, 2001).

¹³GE 8 (Order of Case Dismissal, dated July 11, 2003).

¹⁴GE 5 (FBI Investigative Report, dated February 2, 2003).

As for the financial problem in 2001, Applicant had a vehicle repossessed. He admitted that in his answer to allegation 1.c and 1.d, and at the hearing stated he falsified that answer because he was embarrassed. He said that he honestly did not know why he made the false statements.¹⁵

When Applicant completed a security clearance application in September 2004, he answered “no” to Questions 24 (Police Record - Alcohol/Drug Offenses); 26 (Your Police Record-Other Offenses); 33 (Financial Records/Bankruptcy); 35 (Financial Record-Repossessions); and 36 (Your Financial Record-Tax Lien). Applicant acknowledged falsification of the answers to Questions 24, 26, 33 and 35. He did not falsify an answer to Question 36.

Applicant was adamant that he did not falsify his response to Question 36 concerning a tax lien. He was quite clear at the hearing that the property in question was turned over to his first wife after the divorce through the court agreement. The property was sold. He had no interest in the property and answered the question based on that belief.¹⁶

On May 11, 2006, a Special Agent interviewed Applicant. When questioned about the July 15, 2001 charge for drug possession, Applicant told the Agent that the substance was given to him by a friend. Later in an answer to an interrogatory, he noted that the substance belonged to his daughter. He admitted that he was inconsistent with his statement. He did not want to involve his daughter in any way.

Applicant enjoys his current position. He has never had any problem during his 34 years with his employer while he held his security clearance. He admits his mistakes. He does not use drugs. He answered his 1991 security clearance application and disclosed his alcohol-related incidents and his financial problems. The incidents from 1989 until 1991 were disclosed on his first application. Also, Applicant is divorced from his second wife. It was during that marriage that most of his domestic violence incidents and alcohol-related incidents had occurred.

POLICIES

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.”¹⁷ In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information and determining trustworthiness within the executive branch.

To be eligible for a security clearance or access to sensitive information, an applicant must meet the security guidelines contained in the Directive. The revised Adjudicative Guidelines (AG) set forth potentially disqualifying conditions (DC) and mitigating conditions (MC) under each

¹⁵Tr. 41.

¹⁶Tr. 37.

¹⁷ *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

guideline. Additionally, each security decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the adjudicative process factors listed in ¶ 6.3 of the Directive, and AG ¶ 2(a).

“The adjudicative process is an examination of a sufficient period of a person’s life to make an affirmative determination that the person is eligible for a security clearance.”¹⁸ An administrative judge must apply the “whole person concept,” and consider and carefully weigh the available, reliable information about the person.¹⁹ An administrative judge should consider the following factors: (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 voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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.²⁰

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information.²¹ Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts.²² An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.”²³ Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security.²⁴

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a *prima facie* case for disqualification under Guideline E of the revised Adjudicative Guidelines (AG) most pertinent to the evaluation of the facts in this case.

Guideline E (Personal Conduct) The Concern: *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.*

¹⁸ Directive, ¶ E2.2.1.

¹⁹ Directive, Revised Adjudicative Guidelines (AG) ¶ 2(a)(1)-(9).

²⁰ *Id.*

²¹ Directive, ¶ E3.1.14.

²² Directive, ¶ E3.1.15.

²³ ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 2002).

²⁴ Directive, ¶ E2.2.2.

On September 27, 2004, Applicant, in response, to Question 24: Your Police Record - Alcohol/Drug Offenses did not disclose his charge of July 15, 2001 of DUI and Possession of a Controlled Substance. Despite the fact that the guilty plea was set aside after his successful completion of a Drug Court Diversion program on July 11, 2003, this charge was intentionally omitted from Applicant's answer.

On the same application, Applicant failed to disclose a June 19, 1999 arrest and charge for Assault and Domestic Violence in response to Question 26: Your Police Record-Other Offenses. He pled guilty to the charges and received a suspended sentence and two years probation. He admitted intentionally omitting this information.

At the hearing, Applicant specifically admitted to intentionally falsifying Questions 33 and 35 concerning his financial record (again on the September 2004 application). He had no reasonable explanation other than he was embarrassed about the situations. When questioned, he stated he honestly had no other reason for not providing the correct information.

Under Disqualifying Condition (DC) Personal Conduct (DC PC)¶ 16(a), the government established that Applicant omitted a material fact from his answers to Questions 24, 26, 33 and 35. Applicant's admissions that he deliberately falsified his answers to these questions raise DC PC ¶ 16(a) (*deliberate omission, concealment, or falsification of relevant and material facts from an personnel security questionnaire*). I find that this was a deliberate falsification for the reasons discussed above. For these reasons, allegations 1.a through 1.d are found against Applicant.

Applicant presented credible evidence at the hearing that he did not intentionally falsify his answer to Question 36 concerning a tax lien against his property. When a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an Applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record as a whole to determine whether there is direct or circumstantial evidence regarding an Applicant's intent or state of mind at the time the omission occurred. I find that Applicant's answer to Question 36 was not a concealment or deliberate falsification. Thus, allegation 1.e is found in favor of Applicant.

Applicant's inconsistent statements to the Special Agent in 2006 considering his answers to the interrogatory concerning the July 15, 2001 drug charge raises DC PC ¶ 16(b) (*deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative*). Thus, allegation 1.f is found against Applicant.

Applicant admitted to the allegations relating to domestic violence or assault and public drunkenness (allegations 1.h through 1.m). These incidents are from 1995 through 1998. However, these allegations are not properly under PC DC¶ 16(c) and (d) as suggested by Department Counsel. They are covered under other guidelines which are not alleged in this case. Under other guidelines they may have been mitigated due to time and rehabilitation. Moreover, they have been included as the basis for the falsifications alleged under 1.a, and 1.b.

Allegations 1.n through 1.q were listed on Applicant’s 1991 security clearance application. They are from 1989 through 1992. Thus, they are not found against Applicant in this case under personal conduct for falsification. Moreover, the conduct alleged in these SOR paragraphs would be mitigated under PC MC ¶ 17(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 case doubt on the individual’s reliability, trustworthiness, or good judgment.*

Whole Person

In all adjudications, the protection of our national security is the paramount concern. The objective of the trustworthy determination process is the fair-minded, commonsense assessment of a person’s life to make an affirmative determination that the person is eligible for assignment to sensitive duties. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the “whole person” concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

Applicant was sincere in his demeanor and testimony at the hearing. He acknowledges that he made mistakes and has corrected them. He is divorced from his second wife and is no longer involved in domestic violence issues. His last alcohol-related incident was in 1999. He has worked steadily for his employer for 34 years without any incidents. He has had a security clearance for 20 years. However, Applicant has not carried his burden in this case. Even Applicants with a good work record may be denied a security clearance because his work performance is not the only issue in a security clearance case. His off-duty conduct is the critical component in this case, and his multiple arrests and convictions show a lack of reliability and trustworthiness.

I have considered all the evidence and the “whole person” in evaluating Applicant’s security clearance determination. I have considered his embarrassment over the 2001 incident and his desire to conceal that information given his successful drug diversion program in 2003. However, over a 12-year period, Applicant has committed a variety of offenses. He has no arrests since 2001, but the 2004 intentional falsification is not mitigated. His failure to be candid with the investigator in 2006 is recent, serious and not mitigated. It is not clearly consistent with the interests of national security to grant a security clearance for Applicant. Clearance is denied.

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 E:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant

Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	For Applicant
Subparagraph 1.i:	For Applicant
Subparagraph 1.j:	For Applicant
Subparagraph 1.k:	For Applicant
Subparagraph 1.l:	For Applicant
Subparagraph 1.m:	For Applicant
Subparagraph 1.n:	For Applicant
Subparagraph 1.o:	For Applicant
Subparagraph 1.p:	For Applicant
Subparagraph 1.q:	For Applicant

DECISION

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

Noreen A. Lynch
Administrative Judge