

DATE: April 25, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-10168

DECISION OF ADMINISTRATIVE JUDGE

BURT SMITH

APPEARANCES

FOR GOVERNMENT

Jonathan A. Beyer, Esq., Department Counsel

FOR APPLICANT

Timothy W. Barbrow, Esq.

SYNOPSIS

Applicant has a history of criminal conduct which he falsely denied or minimized on his security questionnaire, and he also falsified information pertaining to unpaid debts and a former job termination. Applicant's evidence in rebuttal is not persuasive. Clearance is denied.

STATEMENT OF THE CASE

On July 30, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to Applicant. The SOR details 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. It recommended referral to an Administrative Judge to determine whether a clearance should be granted or denied.

The Applicant responded to the SOR in a written answer dated August 24, 2002, in which he requested a hearing. The case was assigned to me on October 25, 2002. On November 15, 2002, a Notice of Hearing was issued scheduling the hearing on December 13, 2002. At the hearing the Government submitted eight documentary exhibits. Applicant testified, and he submitted five documentary exhibits. The transcript was received by DOHA on December 23, 2002.

FINDINGS OF FACT

Paragraph 1 (Guideline F - Criminal conduct.). The Applicant is thirty-four years old and unmarried, and he holds a bachelor's degree in economics. He is employed by a defense contractor as an information technology specialist.

In his written responses to the SOR, Applicant generally admits to the factual allegations. With respect to allegations 1.a. through 1.c. Applicant admits he was arrested and convicted for possession of cocaine in 1994, and he was

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sentenced to 100 hours of community service. In 1997, Applicant was arrested and charged with misdemeanor assault upon his girlfriend. The victim failed to appear and testify at trial, and the charge was dismissed.

In 1998, Applicant was arrested and charged with three felony counts of kidnaping, robbery and assault upon the same girlfriend. The female victim reported Applicant struck her violently in the head, causing blurred vision and a temporary loss of hearing. Applicant was convicted of Assault in the 2nd degree, and he was sentenced to three years probation, payment of a \$1,700 fine⁽²⁾, and court-ordered attendance at an anger management program.

Applicant claims his arrest for possession of cocaine in his vehicle was erroneous because the cocaine belonged to a passenger. As to his arrests for assault, Applicant claims his girlfriend was jealous and she often made false reports that Applicant assaulted her.

Applicant's version of events regarding his arrests and convictions has been considered. Applicant was also afforded an opportunity to present his exculpatory evidence to a court. However, Applicant was convicted of drug possession and 2nd degree assault, resulting in sentences of community service, a large fine, three years' probation, and anger management therapy. At the time of these offenses, Applicant was a mature adult in his mid-twenties. Since 1998, Applicant has not been arrested or charged with any other criminal conduct.

The SOR alleges in subpara. 1.d. Applicant engaged in felony misconduct under 18 USC 1001 when he willfully provided false material information to the Government, as described in paragraph 2, below. Factual findings entered under paragraph 2 are incorporated by reference under subparagraph 1.d.

Paragraph 2 (Guideline E - Personal Conduct). On July 24, 2001, Applicant completed a Security Clearance Application (SF-86) containing requests for specific information about Applicant's personal background. (Gov. Ex. 1.) After answering the questions on the SF-86, Applicant signed the form under a certification of truth which informed him willful false statements may be punishable under federal law.

Question 20 of the SF-86 asked Applicant whether he was fired from a job within the last ten years. Applicant answered "No," although he was fired by a former employer in January 2001 because on his employment application he claimed a bachelor's degree he did not have. At the hearing, Applicant explained he claimed the degree because he had completed all required hours. He was not awarded his BS in Economics until May 11, 2002, because he owed debts to the university. (App. Ex. E.) On the SF-86, he answered "No" because he interpreted the question to ask if he were ever fired for unsatisfactory performance on the job. A reasonable reading of the question does not support Applicant's interpretation.

Other parts of the SF-86 asked Applicant about his prior arrests, charges, or convictions. Question 21 asked whether Applicant has "ever been charged with" any felony offense, and question 24 asked if he has "ever been charged with or convicted" of any offense related to alcohol or drugs. Applicant answered "No" to each question. Applicant failed to disclose his 1994 arrest for possession of cocaine and a 1986 arrest for possession of marijuana. He also failed to disclose his 1998 arrest on three felony counts, discussed above. Applicant explained in his testimony he listed only his 1998 conviction for 2nd degree assault, a misdemeanor, because he believed questions 21 and 24 applied only to arrests or charges leading to a conviction. (Tr. 11-17; 21.) Applicant's explanation is not founded upon a reasonable, commonsense interpretation of the questions.

Question 38 asked Applicant to identify any debts delinquent over 180 days in the last seven years, and question 39 asked Applicant to identify any current debts delinquent over 90 days. Applicant answered "Yes" to each question, and he identified two overdue debts. However, at the time Applicant answered the questions he was over 180 days delinquent on at least four more debts ranging from \$207 to \$3,600. On direct examination Applicant was asked why he did not identify the four over due debts, and he answered "I was paying the accounts off and on, even though they [were] 180 days delinquent." (Tr. 24.) Applicant's explanation does not satisfactorily explain his failure to identify the debts.

Taking all the evidence into account, it is found that Applicant knowingly and willfully entered false material information on the SF-86, as alleged under subparagraph 1.d. of the SOR. Applicant's explanations for his false answers

are not credible.

Paragraph 3 (Guideline F - Financial Considerations). In his written and testimonial responses to the SOR, Applicant conceded all of the debts identified under paragraphs 2 and 3 were at one time owing and overdue, except for the debt at subparagraph 2.d.(2), which Applicant does not recognize. The current status of these debts, as evidenced in Applicant's credit report⁽³⁾, is set forth below, in numbers corresponding to the SOR subparagraphs:

2.d.(1). Bank debt, \$1,038. Overdue, but two other bank debts paid. (Tr. 26-28; 76.)

2.d.(2). Federal Govt, \$392. Overdue. Not recognized by Applicant. (Tr. 79-80; 97.)

2.d.(3). Department store, \$588. Paid. (App. Ex. D; Tr. 80-81.)

2.d.(4). Furniture store, \$207. Overdue. (Tr. 84.)

3.a. Bank, \$1,354. Paid. (App. Ex. C.)

3.b. Telephone, \$984. Overdue. (Tr. 96-97.)

In subparagraph 3.d. of the SOR, the Government alleges Applicant has made only a minimum effort to resolve his indebtedness despite being financially able to do so, as evidenced by Applicant's financial statement showing a monthly net remainder of \$951 after expenses. (Gov. Ex. 2, p.5). Applicant claims a portion of his net remainder is used to provide financial assistance to family members. (Answer to SOR, p.4; Tr. 85-89.)

Applicant has not sought financial counseling to establish payment plans. Applicant has used his net remainder income to pay a \$1,700 court fine, he has purchased a car, and he is presently trying to buy a house. (Tr. 83.) Applicant has worked full-time without significant unemployment for at least five years. (Gov. Ex. 1, block 6.) Applicant has the ability to pay his overdue debts, but he gives them a low priority relative to other expenditures he chooses to pay.

POLICIES

Enclosure 2 of the Directive, as amended by DepSecDef Memorandum dated June 7, 2001, sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. The guidelines are divided into those that may be considered in deciding whether to deny or revoke a security clearance (Disqualifying Conditions, hereafter DC) and those that may be considered in deciding whether to grant or continue a clearance (Mitigating Conditions, hereafter MC).

Based upon a consideration of the entire record, I find the following adjudicative guidelines have application in this case:

Guideline J - Criminal Conduct. *The concern*. A history of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Disqualifying Conditions applicable:

1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
2. A single serious crime or multiple lesser offenses.

Mitigating Conditions applicable:

(None have application.)

Guideline E - Personal Conduct. *The concern*. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Disqualifying Conditions applicable:

2. The deliberate omission, concealment, or falsification of relevant and material 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;
4. Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail;
5. A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency.

Mitigating Conditions applicable:

(None have application.)

Guideline F - Financial Considerations. *The concern.* An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Disqualifying Conditions applicable:

1. A history of not meeting financial obligations;
3. Inability or unwillingness to satisfy debts.

Mitigating Conditions applicable:

6. The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

The whole person concept. In addition to the above guidelines, the Directive provides in Para. E.2.2.1. that under the "whole person concept" the Administrative Judge shall also consider (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.

CONCLUSIONS

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted upon to safeguard it 24 hours a day. The Government is therefore appropriately concerned where reliable information indicates an Applicant for clearance may be involved in criminal activities or other misconduct demonstrating financial irresponsibility or a lack of trustworthiness. On a commonsense basis, these unfavorable personal characteristics might easily lead to a disregard of rules and procedures designed to protect classified defense secrets.

With regard to burden of proof in DOHA cases, the Government must prove all controverted facts that tend to demonstrate Applicant is ineligible for clearance. Once this burden is met, the Applicant must overcome the Government's case, if he or she is to prevail, by persuasive evidence in refutation, mitigation, or changed circumstances. However, the Applicant always bears the ultimate and overall burden of proving it is clearly consistent with the national interest to grant him or her a security clearance. Furthermore, the Directive provides "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, Para. E2.2.2.) Thus, the Applicant's burden is a heavy one.

Paragraph 1 (Guideline J - Criminal Conduct). In 1994, Applicant was convicted for possession of cocaine, and he was sentenced to community service (conviction later expunged). In 1997, Applicant was arrested for assault, but charges were dismissed due to the victim's failure to testify. In 1998, Applicant was arrested and convicted for assaulting the same female victim in a violent manner, causing physical injury. In the 1994 and 1998 incidents, Applicant was afforded an opportunity to bring his defenses before a court, but he was convicted. His explanations in this forum are no more persuasive.

DC 1 and DC 2 have application because Applicant's multiple arrests involving drug possession and at least one violent assault are evidence of unacceptable criminal conduct. SOR allegations 1.a.-1.c. are concluded against Applicant.

In answering official questions about his personal background, Applicant willfully provided false material information to the Government and then signed the questionnaire under a certification of truth, thereby engaging in felony criminal conduct under 18 U.S.C 1001. DC 2 has application, and allegation 1.d. of the SOR is concluded against Applicant.

Paragraph 2 (Guideline E- Personal Conduct). As discussed above, Applicant willfully furnished false or incomplete answers when he completed the SF-86 application for a security clearance. In responding to six questions, Applicant wrongly denied being fired; he failed to admit prior arrests; and he embellished his financial record by omitting delinquent debts. Applicant's various explanations have been considered (*e.g.*, misinterpretation, incomplete memory, bad advice), but these explanations are not credible and do not mitigate Applicant's failure to be honest with the Government.

Applicant's deliberate omission of unfavorable information on the questionnaire constitutes a pattern of dishonesty, and supports application of DC 3 and DC 5. Furthermore, wrongful conduct of this nature, if known, might draw the attention of unfriendly foreign agents seeking opportunities to blackmail clearance holders in the US security program. For this reason, MC 4 also applies. Allegations 2.a.-2.d. are concluded against Applicant.

Paragraph 3 (Guideline F - Financial Considerations). A review of Applicant's debts reveals he has a history of allowing financial obligations to go unpaid until they are delinquent. In many instances Applicant takes lightly his promise to pay creditors as agreed. To be sure, Applicant paid some of his creditors in anticipation of the hearing, but he continues to have overdue debts that he fails to honor. Applicant does not present convincing evidence to explain or justify his delinquent financial obligations.

Considering Applicant's poor payment history and his unwillingness to satisfy debts, DC 1 and DC 3 must be applied. In recognition of Applicant's belated and partial effort to pay some of his debts before the hearing, MC 6 is applied. However, this effort does not offset or outweigh Applicant's general disinterest in meeting his debts. Applicant's financial statement indicates an ability to pay his creditors, but he uses his net remainder for other purposes. Subparagraphs 3.a.-3.d. are concluded against the Applicant.

In reaching the above conclusions, the "whole person concept" has been carefully considered. While Applicant shows some promise of behavioral change in the future (whole person concept, element 6) it is clear Applicant has not yet developed sufficient insight into his poor judgment and misconduct.

On balance, it is concluded the Government has met its burden of proof under each paragraph of the SOR. For his part, the Applicant has failed to introduce persuasive evidence in refutation, mitigation, or changed circumstances.

FORMAL FINDINGS

Formal findings For or Against the 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. Criminal Conduct: Against the Applicant.

Subparas. 1.a.-1.d.: Against the Applicant.

Paragraph 2. Personal Conduct: Against the Applicant.

Subparas. 2.a.-2.d.: Against the Applicant.

Paragraph 3. Financial Considerations: Against the Applicant.

Subparas. 3a.-3.d.: Against the Applicant.

DECISION

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

Burt Smith

Administrative Judge

1. Upon completion of the sentence, Applicant's conviction was expunged.
2. Tr. 66-67.
3. Gov. Ex. 7.