

DATE: December 15, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-10639

DECISION OF ADMINISTRATIVE JUDGE

DARLENE LOKEY ANDERSON

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's history of criminal conduct, alcohol abuse and poor personal conduct has not been mitigated by evidence of reform and rehabilitation. Clearance is denied.

STATEMENT OF THE CASE

On June 20, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the 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 the Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

The Applicant responded to the SOR in writing on July 11, 2003, in which he elected to have the case determined on a written record in lieu of a hearing. Department Counsel submitted the Government's File of Relevant Material (FORM) to the Applicant on September 18, 2003, consisting of twenty-two documents. The Applicant was instructed to submit information in rebuttal, extenuation or mitigation within 30 days of receipt. Applicant received the FORM on October 7, 2003, and he submitted a reply dated October 13, 2003.

The case was assigned to the undersigned for resolution on December 3, 2003.

FINDINGS OF FACT

The Applicant is 40 years old, and has a Bachelor's Degree in Computer Science. He is employed by a defense contractor as a Database Developer, and is seeking to obtain a security clearance in connection with his employment.

The Government opposes the Applicant's request for a security clearance, on the basis of allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR:

Paragraph 1 (Guideline J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he engaged in criminal conduct.

The Applicant has admitted each of the allegations set forth in the SOR under this guideline. From 1986 through 1997, the Applicant served in the United States Air Force. During his eleven year military career, he was investigated, arrested and charged with the various criminal offenses and violations of military regulations set forth below:

In 1991, he was charged with Driving Under the Influence of Alcohol. He was fined for the offense. (*See*, Government Exhibit 3).

In April 1994, the Applicant was investigated for Child Abuse, (assault consummated by battery on a person under the age of sixteen years), Article 128, Uniform Code of Military Justice (UCMJ). In his answer to the SOR, the Applicant explained that this was an isolated incident in which he spanked his daughter for playing in chemicals. No action was taken. (*See*, Government Exhibits 3 and 4).

In April 1995, the Applicant was charged by civilian authorities with 1) Dog fighting, and 2) Child Abuse, both felony offenses. He pled guilty to Attending a Dogfight, a misdemeanor, as recommended by his first sergeant and his attorney. He was sentenced to three years unsupervised probation, on condition that he spend three days in jail, pay a fine of \$100.00 and perform 240 hours of community service. Charge 2 was dropped. On February 1997, the Applicant completed the terms of his probation, and the proceeding was terminated. He received a letter of reprimand from his commanding officer for the incident. (*See*, Government Exhibits 3, 5 12, 20 and 21).

In January 1996, the Applicant was investigated for Failure To Obey An Order Or Regulation, and charged with misusing his Government credit card, Article 92, UCMJ. The Applicant explained that he mistakenly used his government American Express credit card several times for five or six months to purchase personal items. He believes that the incident that alerted his squadron commander to pursue an investigation is when his spouse purchased some personal items at Disneyland. He states that he immediately paid the bill upon its receipt. The Applicant received Non-Judicial punishment and was reduced to E-4, which was suspended until January 1997. He also forfeited \$310.80 in pay, and was restricted to the base for fourteen days. (*See*, Government Exhibits 7, 8 and 11).

The Applicant was arrested in December 1997, and was charged with Assault and Battery on his spouse, Article 128, UCMJ. The Applicant explained that prior to the altercation, he had consumed one beer, but he was not intoxicated at the time of the incident. The police report indicates that the Applicant was very upset and had accused his wife of sleeping with a neighbor. He threw her against the wall, slapped her numerous times and tried to choke her. Cuts and bruises were reported on and around her face and eyes. The Commander offered him the option of receiving a discharge in lieu of a court-martial. As a result, the Applicant was discharged in March 1998, with a General Discharge "Under Other than Honorable Conditions". (*See*, Government Exhibits 14, 15, 16 and 20).

In July 1999, the Applicant was arrested and charged with 1) Driving Under the Influence of Alcohol, and 2) Refusal Of Chemical Test. He was sentenced to three years probation, one year supervised, two years unsupervised, on condition that he participate in an alcohol program and fined \$500,000. Count 2 was dismissed in the interest of justice. His driving privileges were suspended for one year. The Applicant explained that he was breaking up with his wife and was going through a rough period. (*See*, Government Exhibits 18, 19, 20 and 21).

The Applicant blames his criminal conduct on a tumultuous marriage. He claims that his life is now a lot better than it was prior to 1999. He is now divorced from his second wife. He has obtained his Bachelor's Degree in Computer Science, and is working towards his Masters Degree. His son from his first marriage is living with him. He states that he is attentive to his two children and that he has put his past behind him.

Paragraph 2 (Guideline G - Alcohol Consumption). The Government alleges that the Applicant is ineligible for clearance because he abuses intoxicants.

The Applicant admitted each of the allegations set forth under this guideline. He consumed alcohol, at times to excess, from approximately 1996 until at least January 1999. His usual pattern was to consume four or five beers in the evening

after work. Since his last arrest for Driving Under the Influence of Alcohol in 1999, he states that he now only consumes two glasses of wine or less at a party, if there is a designated driver to take him home. The Applicant states that he no longer consumes alcohol to the point of intoxication or excess, although there is no court order requiring that he abstain. (See, Government Exhibits 3 and 20). In his reply to the FORM, he indicates that he has lost his appeal for alcohol and no longer drinks.

The Applicant's two arrests for Driving Under the Influence of Alcohol, in 1991 and 1999, and his arrest for Assault and Battery On His Spouse in 1997, were discussed above. (See, Government Exhibit 3).

Paragraph 3 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because he has been involved in questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations.

The Applicant admitted allegations 3.a., and 3.c., under this guideline. He denies allegations 3.b., 3.d., and 3.e. The Applicant has a history of questionable judgment and unreliability. In April 1995, he was issued a letter of reprimand by his first Sergeant, for Failure to Attend a Required Program. In April 1996, he was fined for Failure to Follow Air Force Regulations for the Prevention of Cruelty to Animals. In August 1996, he was issued a letter of reprimand by his Group Commander for failure to pay his debts. (See, Government Exhibits 6, 10, 12 and 13).

The Applicant completed a Security Clearance Application (Standard Form 86) dated September 13, 1999. Question 25 of the application asked the Applicant if in the last seven years the Applicant had been subject to court martial or to disciplinary proceedings under the Uniform Code of Military Justice. The Applicant responded "NO". (See, Government Exhibit 17). This was an intentional false answer. The Applicant failed to reveal that he received non-judicial punishment in January 1997, resulting in his discharge from the military under Other Than Honorable Conditions. (See, Government Exhibit 11).

The same questionnaire, at Question 24, asked the Applicant if he had ever been charged with or convicted of any offense related to alcohol or drugs. The Applicant listed his arrest for Driving Under the Influence of Alcohol in 1999. (See, Government Exhibit 17). The Applicant failed to list his first arrest for Driving Under the Influence of Alcohol in 1991. (See, Government Exhibit 3). This was an intentional omission.

POLICIES

Enclosure 2 and Section E.2.2. of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

Guideline J (Criminal Conduct)

Conditions that could raise a security concern:

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

Conditions that could mitigate security concerns:

None.

Guideline G (Alcohol Consumption)

Conditions that could raise a security concern:

1. alcohol-related incidents away from work, such as driving under the influence . . . ;
4. habitual or binge consumption of alcohol to the point of impaired judgement.

Conditions that could mitigate security concerns:

None.

Guideline E (Personal Conduct)

Condition that could raise a security concern:

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.

Conditions that could mitigate security concerns:

None.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature and seriousness of the conduct and surrounding circumstances
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned."

CONCLUSIONS

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for clearance may be involved in criminal conduct, alcohol abuse and dishonesty that demonstrates poor judgment or unreliability.

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation, which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance.

In this case the Government has met its initial burden of proving that the Applicant has engaged in criminal conduct (Guideline J); alcohol abuse (Guideline G); and dishonesty (Guideline E). This evidence indicates a history of poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with his security clearance eligibility.

Considering all of the evidence, the Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case under any of the Guidelines alleged in the SOR.

The Applicant's extensive criminal history, alcohol abuse and personal conduct occurred between 1991 and 1999. During this period, he was arrested twice for Driving Under the Influence of Alcohol, once for Spousal Abuse, and once for Dog Fighting. He was investigated for Child Abuse. He also received letters of reprimand for violating military regulations on a number of different occasions. Furthermore, he was discharged from the military under Other Than Honorable Conditions. Although, there is no evidence in the record that the Applicant has engaged in any criminal conduct or alcohol abuse since 1999, a period of four years, I am not convinced that the Applicant understands the seriousness of his past conduct or that he is sufficiently rehabilitated. Given the extent and seriousness of his criminal conduct and his history of alcohol abuse, coupled with his numerous violations of military regulations, that resulted in his military discharge under Other Than Honorable Conditions, sufficient rehabilitation and mitigation has not been shown. None of the mitigating factors under Guidelines J and G apply. Accordingly Guidelines J (Criminal Conduct) and G (Alcohol Consumption) are found against the Applicant.

Likewise, the Applicant did not reveal his complete criminal history in response to questions 25 and 24 on his security clearance application. His excuse is that he misinterpreted the questions on the form, and did not read the questions well enough to answer the questions correctly and went too fast. I do not find his explanation credible. The Applicant knew or should have known the importance of the application and should have taken the time to answer the questions correctly. If he did not take the time to answer the questions correctly, he has only himself to blame. Consequently, the evidence shows that the Applicant has not been completely honest with the Government regarding his criminal history and in fact sought to conceal the truth. None of the mitigating factors set forth in the Directive under Guideline E apply. I find that the Applicant deliberately failed to reveal this information to the Government.

The Government relies heavily upon the integrity and honesty of clearance holders. It is a negative factor for security clearance purposes when an Applicant has deliberately provided false information about material aspects of his personal background. The Applicant has not provided this Administrative Judge with sufficient evidence in mitigation that would negate the negative impact his falsifications have on his security worthiness. Furthermore, the Applicant has not demonstrated that he is trustworthy, and does not meet the eligibility requirements for access to classified information. Accordingly, I find against the Applicant under Guideline E (Personal Conduct).

On balance, it is concluded that the Applicant has failed to overcome the Government's case opposing his request for a security clearance. At this time, I cannot find that it is clearly consistent with the national interests to grant the Applicant a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1, 2 and 3 of the SOR.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3

of the Directive are:

Paragraph 1: Against the Applicant.

Subpara. 1.a.: Against the Applicant.

Subpara. 1.b.: Against the Applicant.

Subpara. 1.c.: Against the Applicant.

Subpara 1.d.: Against the Applicant.

Subpara 1.e.: Against the Applicant.

Subpara 1.f.: Against the Applicant.

Paragraph 2: Against the Applicant.

Subpara. 2.a.: Against the Applicant.

Subpara. 2.b.: Against the Applicant.

Paragraph 3: Against the Applicant.

Subpara. 3.a.: Against the Applicant.

Subpara. 3.b.: Against the Applicant.

Subpara 3.c.: Against the Applicant.

Subpara 3.d.: Against the Applicant.

Subpara 3.e.: 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 or continue a security clearance for the Applicant.

Darlene Lokey Anderson

Administrative Judge