

DATE: January 7, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-01296

DECISION OF ADMINISTRATIVE JUDGE

DARLENE LOKEY ANDERSON

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Department Counsel

FOR APPLICANT

Alan V. Edmunds, Attorney At Law

STATEMENT OF THE CASE

On June 6, 2001, 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 the attached 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, 2001, and requested a hearing before a DOHA Administrative Judge. This case was transferred to the undersigned on August 21, 2001. A notice of hearing was originally issued on August 29, 2001, scheduling the hearing for September 18, 2001. Applicant's counsel submitted a written request to continue the hearing because his client was out of state on the proposed hearing date. For good cause shown, the matter was rescheduled on September 10, 2001, and the hearing was held on October 10, 2001. At the hearing, the Government presented three exhibits. The Applicant presented twelve exhibits and called three witnesses to testify. The Applicant also testified on his own behalf. The official transcript (Tr.) was received on October 18, 2001.

FINDINGS OF FACT

The Applicant is 38 years old, and is employed by a defense contractor as a Technical Engineering Administrator. He is applying for a Top Secret security clearance in connection with his employment.

The Government opposes the Applicant's request for a security clearance, based upon the 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 E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because his conduct involves questionable judgment, untrustworthiness and unreliability, or an unwillingness to comply with rules and regulations.

The Applicant was hired by his employer in 1985. When he initially applied for the job, he underwent a company physical medical examination, and on his medical form, along with his job application, he revealed that he was diabetic. (Tr. pp. 80-81). This information was kept private. From that point on, he was never questioned by the company concerning that fact. The Applicant's job responsibilities at that time did not require that he fly on a test aircraft.

In 1992-1993, the Applicant's job responsibilities changed, and required that he fly on a test aircraft. He was required to take and pass a physical medical examination, and obtain a Federal Aviation Administration certificate. The Applicant completed a Federal Aviation Administration Medical Certificate Application (FAA form 8500-8). On this form, in addition to other questions concerning his health, he was required to indicate whether he is diabetic. The Applicant failed to answer the question. (Apparently, there was nothing regarding his health that was picked up during his physical that jeopardized his flight clearance). As a result, the Applicant was subsequently granted a FAA Medical Certificate (FAA form 8500-9), indicating that he had successfully completed the examination. This medical certificate entitled him to perform his duties as a flight test engineer. This certificate was subsequently submitted to his employer and to the United States Air Force, and permitted the Applicant to fulfill his job duties and responsibilities for a two year period. (Government Exhibit 2).

In 1995, the Applicant was again required to complete a FAA Medical Certificate Application and undergo a medical examination. Again, the form required him to indicate whether he is diabetic. Again the Applicant failed to answer the question. The Applicant was subsequently granted an FAA Medical Certificate, that entitled him to continue doing his job as a flight test engineer for another two years.

Following his medical examination in 1995, the Applicant was notified by the FAA that they had cross referenced his records, and found out that he was diabetic. The FAA requested that he return by mail the certificate they had issued him. (The Applicant's 1995 medical certificate was essentially revoked because he is diabetic). The Applicant failed to notify his employer and the United States Air Force that his 1995 certificate was revoked, and he continued in his capacity as a flight test engineer until August 1998.

In 1997, the Applicant chose not to take the medical examination required to up date his certificate, and instead submitted a copy of his 1995 FAA Medical certificate application, which he had altered to read 1997, so that it appeared to be current.

In the spring of 1999, a disgruntled coworker reported to management that he had overheard the Applicant and another employee in conversations discussing their diabetes, and their concerns about their continuing eligibility to be on board test aircraft. He also reported that the Applicant had falsified his FAA Medical Certificate, after it had been revoked. The Applicant's employer investigated the allegations of these omissions on his medical certificate application and his altered FAA Medical Certificate. The Applicant admitted the misconduct and prepared a written statement acknowledging the infractions, which he submitted to the human resource department. The Applicant received a verbal admonishment and was counseled for his inappropriate behavior by his supervisors. He was also precluded from obtaining flying status with his company. (Government Exhibit 3). Apparently the same disgruntled coworker had initially reported this information to the company back in 1996, but no action was taken. (Tr. pp. 81-82 and 90). The Applicant also learned that the disgruntled coworker reported the matter to the United States Air Force Flight Safety Office for their investigation.

In the fall of 1999, the Applicant was promoted into his current managerial position that does not require that he fly on test aircraft. (Government Exhibit 2).

The FAA policies have since changed and diabetes is no longer a disqualifying condition for flight clearance. (Government Exhibit 3).

I find that the Applicant's failure to respond to the question concerning his diabetes on his FAA medical certificate application (FAA form 8500-8) in 1992-1993, and again in 1995 on his (FAA form 8500-9) were deliberate attempts to conceal material information from the Government. The Applicant knew at the time he completed the medical certificate applications that he was to be candid, honest and truthful in answering the questions. He also knew that if he revealed the fact that he was diabetic, he would not meet the FAA eligibility requirements.

Paragraph 2 (Guideline J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he knowingly and willfully violated the felony provisions of 18 USC 1001.

As discussed above, I further find that the Applicant deliberately falsified material information in a Government document when he altered his 1995 FAA medical certificate. By doing so, the Applicant violated Title 18, United States Code, Section 1001.

The record does not contain sufficient evidence in mitigation to overcome or outweigh the negative effects of the Applicant's false statements to the Government.

Mitigation.

A Senior Manager, who is also a past supervisor of the Applicant, testified that the Applicant is, of all the employees he has ever known, one of the most hard working, ethical and devoted. This is why he recommended the Applicant to be his replacement as the manager of the group he left. The Applicant is well respected on the job. (Tr. pp. 16-20, and Applicant's Exhibit A).

A witness who is the Applicant's coworker and subordinate, who has known the Applicant in the professional environment for thirteen years, and has seen him on a daily basis for the past two years, testified that he considers the Applicant to be an outstanding person, highly ethical, honest and trustworthy. (Tr. p. 31-34).

A psychologist who examined the Applicant for purposes of this hearing, testified that the Applicant does not meet any of the criteria for either a psychiatric disorder or a personality disorder. Psychological testing further indicated that the Applicant's personality falls within all of society's norms and his most significant values are the importance of responsibility, conscientiousness, hard work, and honesty. Based upon these findings, the psychologist does not believe that the Applicant will repeat his misconduct. (Applicant's Exhibit K).

Twelve letters of recommendation from professional colleagues and friends of the Applicant are highly laudatory. They collectively indicate that the Applicant is considered to be a strong leader, intelligent, responsible, honest and trustworthy. The high quality and integrity of his work has become the standard for other engineers to work toward. (Applicant's Exhibit A through J).

The Applicant admits that he was wrong to conceal the truth and falsify information by not revealing that he is diabetic. The Applicant expresses that he is remorseful for his dishonest and blatant misconduct. He is embarrassed by his conduct and believes that he has learned a hard lesson. He states that he has matured through the process.

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive sets forth policy factors and conditions that could raise or mitigate a security concern; which must be given binding consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the conditions are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on own common sense. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

Guideline E (Personal Conduct)

Conditions 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 statute, determine security clearance eligibility or trustworthiness, or award fiduciary

responsibilities;

(5) a pattern of dishonesty or rule violations;

Conditions that could mitigate security concerns:

None.

Guideline J (Criminal Conduct)

Conditions that could raise a security concern:

(1) any 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.

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.

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 a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in criminal conduct, alcohol abuse and personal conduct which demonstrates poor judgment, untrustworthiness or unreliability.

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 dishonest and criminal conduct, which 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 or her a security clearance.

In this case the Government has met its initial burden of proving by evidence that the Applicant has engaged in dishonest conduct (Guideline E), and in criminal conduct (Guideline J). This evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant.

Where an Applicant engages in criminal conduct, it can be presumed that he will not take a serious attitude toward the important matter of protecting classified information. Criminal conduct reflects questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information. The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations at all times and in all places. If an Applicant has demonstrated a lack of respect for the law in his private affairs, there exists the possibility that he or she may demonstrate the same attitude towards security rules and regulations.

I have considered all of the evidence in the record including the favorable evidence provided by the Applicant in mitigation: the numerous letters of recommendation, the highly favorable testimony by his psychologist and professional colleagues and friends, as well as the outstanding career the Applicant has had over the past fifteen years, and his most recent promotion to manager. The Applicant has also expressed embarrassment and remorse for the misconduct that appears genuine and believable.

Notwithstanding this, this Applicant has failed to introduce persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case against him.

On two separate occasions, the Applicant deliberately concealed information on his FAA Medical certification application by concealing the fact that he was a diabetic. Although he did not commit an affirmative act, by failing to answer the question, he concealed the information from the Government. The Applicant knew that being a diabetic was disqualifying, and he chose not to reveal the information to the Government.

In 1995, when the FAA learned that he was diabetic and his certificate was revoked, he failed to inform his employer or the United States Air Force of the fact. In addition, he altered his old certificate and presented it as valid and current. This is fraud. 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 falsified information about material aspects of his personal background on a Government document. Given the seriousness and recency of this misconduct, the Applicant cannot be considered trustworthy, and does not meet the eligibility requirements for access to classified information at this time. Accordingly, I find against the Applicant under Guideline E, (Personal Conduct).

Furthermore, by deliberately falsifying a Government document the Applicant violated the provisions of Title 18 United States Code, Section 1001, a felony. The conduct is criminal, serious, recent, and shows immaturity and extreme poor judgment. Accordingly, Guideline J, (Criminal Conduct), is found against the Applicant.

On balance, it is concluded that the Applicant has failed to overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the Government's Statement of Reasons.

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.

Paragraph 2: Against the Applicant.

Subpara. 2.a.: Against the Applicant.

DECISION

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

DARLENE LOKEY-ANDERSON

Administrative Judge