

DATE: November 13, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-16939

DECISION OF ADMINISTRATIVE JUDGE

MARTIN H. MOGUL

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was convicted by special court martial of being absent without leave, forgery, obtaining services under false pretenses, and attempting to obtain services. As a result of this conduct, he received a sentence of reduction to Airman Basic, forfeited \$1,500.00, was sentenced to three months confinement, and ultimately received a General Discharge (Under Honorable Conditions). He was reprimanded for Violation of Article 134 of the Uniform Code of Military Justice (UCMJ), because he wrote checks with Insufficient Funds on three separate occasions. Finally, on a 1999 Security Clearance Application (SCA) Applicant failed to disclose that he served in the United States Air Force and that he received a General Discharge (Under Honorable Conditions). Mitigation has not been shown. Clearance is denied.

STATEMENT OF THE CASE

On June 3, 2002, 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 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 and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

In two signed and sworn statements, dated August 26, 2002, and October 15, 2002, Applicant responded to the SOR allegations. He requested that his case be decided on the written record in lieu of a hearing. On June 10, 2003, Department Counsel submitted the Department's written case, which was prepared on April 7, 2003. A complete copy of the file of relevant material (FORM) was provided to the Applicant, and he was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant had until June 1, 2003, to file a response to the FORM, but no response was received. The case was assigned to this Administrative Judge on June 10, 2003.

In the FORM, Department Counsel offered 18 documentary exhibits. (Exhibits 1 - 18). Additionally, in the FORM, Department Counsel requested that allegation 1.a. of the SOR be amended to comport with the evidence submitted in

the FORM.. Specifically, the request is that 1.a. be changed from its current language to read: "On or about September 27, 1985, you were convicted by special court martial of being absent without leave, forgery, obtaining services under false pretenses, and attempting to obtain services. You were sentenced to reduction in rate, forfeiture of \$1,5000.00 in pay and 3 month confinement. You were subsequently separated under the provision of AFR 39-10, receiving a General Discharge."

The wording in the last two sentences of this requested amended SOR allegation has not been changed. The only change requested is the date of the court martial and the specific allegations for which the court martial was issued. Applicant had notice of this proposed amendment and did not object. Paragraph 1.a. of the SOR is amended to reflect the wording stated above.

FINDINGS OF FACT

In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of the Directive. The SOR contains four allegations; two allegations, 1.a. and 1.b., under Guideline J and two allegations, 2.a. and 2.b., under Guideline E. In his response to the SOR, Applicant admits all four allegations. Since Applicant has not responded to the amended 1.a., I will not consider 1.a. to be admitted. Allegations 1.b., 2.a., and 2.b. are incorporated as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, and the documents, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is a 54 year old employee of a defense contractor. He is married and has no children. He attended college, but received no degree.

Guideline J (Criminal Conduct)

On or about June 1985, Applicant altered an Air Force form with the intent to defraud. He falsely pretended to possess official separation orders to obtain shipment of unaccompanied baggage at government expense. For a period of four days in July 1985, Applicant was absent without leave from his unit.

On or about September 27, 1985, Applicant was convicted by special court martial of being absent without leave, forgery, obtaining services under false pretenses, and attempting to obtain services. (Exhibit 18). As a result of this conduct, Applicant received a sentence of reduction to Airman Basic, he forfeited \$1,500.00, and he was sentenced to three months confinement. Ultimately, he received a General Discharge (Under Honorable Conditions) (Exhibit 11, Exhibit 18).

Applicant was reprimanded on October 5, 1981, for Violation of Article 134 of the UCMJ, because he wrote checks with Insufficient Funds on three separate occasions in 1981 (Exhibit 9).

Guideline E (Personal Conduct)

On the SCA, completed and signed by Applicant on August 16, 1999, **Question 11** asks, "Have you ever served in the military? Applicant answered "Yes"and he listed his service in the army from 1973 to 1977. However, Applicant failed to disclose that he also served in the United States Air Force from 1978 through December 1985 (Exhibits 6, 10-18).

Question 17 of Applicant's August 16, 1999 SCA, asks, "Have you ever received other than an honorable discharge from the military?" Applicant answered "No." Applicant failed to disclose that he received a General Discharge (Under Honorable Conditions) (Exhibits 6,18).

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines that must be carefully considered in evaluating an individual's security eligibility and making the overall common sense determination required. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and

circumstances presented. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk.

Each adjudicative decision must also include an assessment of: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (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 (*See Directive, Section E2.2.1. of Enclosure 2*).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

CRIMINAL CONDUCT (GUIDELINE J)

E2.A10.1.1. The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

E2.A10.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;

E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

E2.A10.1.3. Conditions that could mitigate security concerns include:

None.

PERSONAL CONDUCT (GUIDELINE E)

E2A5.1.1. 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. . .

E2. A5.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A5.1.2.2. 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, . . . [or] determine security clearance eligibility or trustworthiness. . . ;

E2.A5.1.2.5 A pattern of dishonesty or rules violations of any written or recorded agreement made between the individual and the agency;

E2.A5.1.3. Conditions that could mitigate security concerns include:

None.

BURDEN OF PROOF

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is

nevertheless clearly consistent with the national interest to grant or continue the security clearance. Assessment of an applicant's fitness for access to classified information requires evaluation of the whole person, and consideration of such factors as the recency and frequency of the disqualifying conduct, the likelihood of recurrence, and evidence of rehabilitation.

A person who seeks access to classified information enters into a fiduciary relationship with

the U.S. Government that is predicated upon trust and confidence. Where facts proven by the Government raise doubts about an applicant's judgment, reliability, or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, I conclude the following with respect to guidelines J and E:

The Government has established its case under Guideline J. Applicant's conduct that is the basis for allegation of 1.a. of the SOR is criminal and did result in his court martial and general discharge from the Air Force. Additionally, while it was not alleged in the SOR, Applicant's false statements on the SCA are a violation of section 1001 of Title 18 of the United States Code. I resolve Guideline J against the Applicant.

Under Guideline J, I conclude that Disqualifying Condition (DC) E2.A10.1.2.1. and DC E2.A10.1.2.2 apply because Applicant's conduct did involve a number of criminal offense. No Mitigating Conditions (MC)s apply.

With respect to Guideline E, the evidence establishes that Applicant intentionally provided false material information to the Government in response to two questions on the SCA that he executed in August 1999. Applicant certainly knew that he had served in the United States Air Force from 1978 through December 1985. There can be no reasonable explanation for Applicant failing to include this information on his SCA. Applicant also knew that he did not receive an Honorable

Discharge, but rather a General Discharge (Under Honorable Conditions). In this case, Applicant's falsifications of his SCA were knowingly and willingly committed.

The Government relies heavily on the honesty and integrity of individuals seeking access to our nation's secrets. When such an individual intentionally falsifies material facts on a security clearance application, it is extremely difficult to conclude that he nevertheless possesses the judgment, and honesty necessary for an individual given a clearance . I resolve Guideline E against Applicant.

In reviewing the DCs under Guideline E, I conclude that DC E2.A5.1.2.2. applies because of the false information that Applicant provided in his SCA. DC E2.A5.1.2.5 also applies because Applicant's conduct, which resulted in his court martial, shows a pattern of dishonesty. No MCs apply.

FORMAL FINDINGS

Formal Findings, as required by Section 3. Paragraph 7 of Enclosure 1 to the Directive, are hereby rendered as follows:

Paragraph 1. Guideline J: AGAINST THE APPLICANT

Subparagraph 1. a.: Against the Applicant

Subparagraph 1. b.: Against the Applicant

Paragraph 2. Guideline E: AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

Subparagraph 2.b.: 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 Applicant.

Martin H. Mogul

Administrative Judge