

KEYWORD: Personal Conduct

DIGEST: Applicant was involved in a number of incidents as a police officer resulting in disciplinary action which included suspension without pay. Applicant demonstrated poor judgment, unreliability or unwillingness to comply with rules and regulations by these violations. Clearance is denied.

CASENO: 01-22926.h1

DATE: 09/25/2002

DATE: September 25, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-22926

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Department Counsel

FOR APPLICANT

SYNOPSIS

The Applicant was involved in a number of incidents as a police officer resulting in disciplinary action which included suspension without pay. The Applicant demonstrated poor judgment, unreliability or unwillingness to comply with rules and regulations by these violations. Clearance is denied.

STATEMENT OF THE CASE

On October 26, 2001, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding [\(1\)](#) it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On January 4, 2002, the Applicant answered the SOR and requested a hearing. The case was assigned to me on April 19, 2002. A Notice of Hearing was issued on April 24, 2002, scheduling the hearing, which was held on May 17, 2002.

The Government's case consisted of five exhibits (Gov Ex). The Applicant relied on his own testimony, the testimony of one other witness, and 21 exhibits (App Ex). The transcript (tr.) of the hearing was received on May 28, 2002.

PROCEDURAL

The Department Counsel moved to amend SOR subparagraph 1.b. by striking the words "June 1994" and substituting therefore the word "1992." (tr. 198) There being no objection, the motion was granted.

FINDINGS OF FACT

The SOR alleges disqualifying conditions under personal conduct (Guideline E). The Applicant denies the allegations in part and admits them in part. The Applicant is 44 years old, has worked for a defense contractor since July 1997, and is seeking a security clearance. As a police officer, the Applicant received numerous awards, letters of appreciation and had outstanding performance (App Ex's G, H, I, J, K, L, and N) to include being nominated for the Officer of the onth during 1997. (App Ex M) The Applicant retired from county government after twenty years of service (App Ex R). In his current job, the Applicant has received an achievement award (App Ex S, T) where his work, enthusiasm, and energy are greatly appreciated. (App Ex U)

In February 1993, the Applicant was found in violation of Operation of a Police vehicle following a motor vehicle accident. The Applicant was on duty with his supervisor when he attempted to cross the oncoming lanes of traffic. In doing so, his police car was struck by another vehicle, resulting in minimal damage. The Applicant received a written reprimand for failing to exercise careful observation of surrounding conditions before turning (App Ex E). Eligibility for promotion is not affected by written reprimands related to police vehicle accidents (App Ex D). His performance evaluation, for the time covering the accident, rated him as consistently far exceeding the agency's standards for all elements of the job (App Ex O).

In 1992, the Applicant violated regulations by having sex in his police cruiser during duty hours. He was suspended from duty without pay for 30 hours. (Gov Ex 3) The Applicant, during a period of separation from his wife, had dated a female employee of the police department and in April 1992, had a sexual liaison with the woman, while on duty and in a county police cruiser. In 1994, the woman admitted the relationship when she was applying for a new job. The Applicant has since reconciled with his wife and has had no further sexual contacts with the woman or anyone other than his wife.

In March 1995, the Applicant was investigated for violating overtime/secondary/ supplemental/ part time work rules. Police officers were restricted from working more than 120 hours during a two-week pay period (tr. 114), and restricted working more than 16 hours a day. The Applicant had signed up for secondary and supplemental work which involved overtime work as a guard in a shopping center, community policing requests, etc. After making the commitments to work the overtime, country police work would require him to work extra hours. By doing his police job and meeting his secondary and supplemental overtime commitments, he exceeded the maximum hours per pay period restriction. The Applicant was found to be in violation of laws and regulations concerning off duty employment, reports and bookings, insubordination, ⁽²⁾ double dipping part time hours, and using other names. (Gov Ex 3) After an Internal Affairs Division investigation, it was recommended the Applicant's employment be terminated. The Chief of Police sustained all the violations against the Applicant and imposed a demotion in rank to Police Officer 1, 160 hours of suspended from duty without pay, suspended his ability to work police related part-time assignments for one year, and transferred the Applicant to a new job and location.

The Applicant admits the insubordination for violating the policy and violation of the hours worked policy. The Applicant denies he intended to violate department policies. He signed up for off-duty work assignments and later discovered he was over the hour limit imposed by his Department. He worked the assignments because he had made a commitment to work them. In May 1995, he received a certificate of appreciation in recognition of his outstanding service to the police department. (App Ex K)

In March 1996, the Applicant sent a message to a subordinate through the on board Mobile Data Terminal (MDT) communications computer system. The message told the subordinate--a new recruit--in strong words to improve his performance and work attitude. The language used by the Applicant was unacceptable. The Applicant received an oral reprimand for his language and ordered to refrain from using profanity.

In May 1996, the Applicant was involved in a collision with another vehicle and held at fault for driver inattention. He was found to be in violation concerning the operation of a police vehicle, for which he received a written reprimand.

In October 1996, the Applicant was promoted to police officer first class. (App Ex L) In June 1997, the Applicant received a certificate of appreciation and was nominated for officer of the month. (App Ex M) In September 1998, the Applicant, having finished his master's degree, and nearing retirement from the police force, started looking for a full time job outside of the police department.

In 1998, the Applicant had decreased his amount of overtime, but was still working extra hours to fill critical staffing shortages. (tr. 120) Between July 1998 and August 1998, the Applicant was found to have had five violations concerning off duty employment. The Applicant claims he projected his part time work ahead as required and listed all the time he worked. The Applicant failed to record a total of 32 hours of employment during various pay periods. The Applicant claims he was confused as to the starting and ending dates of the pay periods in question and worked across pay periods resulting in an unintentional violation of the off duty staffing. In addition to violating the 120-hour restriction, on August 21, 1998, the Applicant worked 17 hours in violation of the 16-hour per day restriction. The Applicant's Captain found the Applicant's excuse plausible, but not mitigating and stated, "(Applicant's) intent to violate the rules may not be present, however, it is a clear violation of General Orders and both violations of the 120-hour rule will be sustained . . . The excuse of not giving the form significance or importance may be true, however, it is a clear example of your unwillingness to comply with the simple directions required to work secondary employment." (Gov Ex 3) In November 1998, the Applicant received a memorandum about the off duty employment violations in which his privilege to work secondary law enforcement was suspended for one year, and his privilege to work supplemental overtime at any other station was restricted for six months and he was suspended from duty without pay for 30 hours which was imposed in late January 1999. (Gov Ex 3)

The county had a requirement to put a certain number of officers on duty at a given time, which was called "critical staffing." When police districts had trouble meeting this requirement, the district would ask for officers to work to meet the requirement. Districts would first look to local officers to meet the need before looking county-wide. Sometimes a

fellow officer in the district needing staffing help would sign up to work the overtime, but the work was performed by the Applicant. In mid-January 1999⁽³⁾ and March 1999, the Applicant worked to supplement manpower at two other police stations which had critical staffing shortages. The Applicant thought the work was for critical staffing, and, as such, exempt from the November 1998 restriction concerning additional work. Even though the Applicant had volunteered for the overtime, he considered it a mandatory shift extension. The overtime restriction memorandum allowed the Applicant to work mandatory shift extensions. Before working the overtime, the Applicant asked a fellow officer to verify that the time to be worked was critical staffing so he could work it. However, the Applicant never checked with his supervisor to determine the classification of this overtime.

On July 7, 1999, the Applicant met with his station commander to explain the situation, asked for copies of message traffic related to staffing and overtime work, requested other documents, and asked that witnesses from each station be contacted. The next day, the Applicant went to a previously scheduled job interview. On July 13, 1999, he was offered (App Ex F) and he accepted full time employment⁽⁴⁾ as a software engineer. On July 23, 1999, the Applicant retired from the police department. On July 26, 1999, the police department held a second disciplinary hearing, which sustained the insubordination charges, off duty employment violations, and truthfulness charge, and recommended the Applicant's employment be terminated. (Answer to SOR) "The employee was not provided with the appropriate memorandum documenting the recommendation since (Applicant) elected to retire prior to this disciplinary action being imposed."⁽⁵⁾ (Gov Ex 3) The Report of Employee Involvement in Internal Cases, dated April 1, 2002, indicates:

Date concluded: 09/01/1999

Charge: Insubordination

Finding: Sustained-no Action

Action: RETIRED 07/23/99

Since retiring from the police force, the Applicant had heard nothing further related to this disciplinary action until he was so informed of the recommendation during a Defense Security Service (DSS) investigation.⁽⁶⁾ (tr. 138). At the time he retired from the police department, he had twenty years of service--as of July 2, 1999--and was the most senior officer assigned to the evening shift. The Applicant received a certificate of appreciation (App Ex R) in recognition of his 20 years of dedicated service. His retirement was independent of the disciplinary action. When he retired, the Applicant had not been told to retire or resign, had not been told he was being fired, nor was his leaving by mutual agreement following allegations of misconduct, or under unfavorable circumstances.

In August 1999--within a month of leaving the police force, the Applicant completed his Std. Form 86 (Gov Ex 1). The Applicant answered "no" to question 20 concerning his employment record which asked if he had, within the prior 10 year period, been fired from a job, quit a job after being told he would be fired, left a job by mutual agreement following allegations of misconduct or unsatisfactory performance, or had left a job for other reasons under unfavorable circumstances. The Applicant states he did not leave the police force due to duress, and, therefore, answered the question as he did.

While with the police department, the Applicant received numerous recognitions for outstanding duty performance. The Applicant's supervisor's overall assessment of the Applicant's performance for the period of June 1998 through June 1999 (App Ex Q), which was the Applicant's final evaluation, was, "Performance consistently exceeds agency minimum standards for all elements of the job and frequently far exceeds standards for many job elements, including all which are critical to the job." This assessment was the second highest overall assessment of the seven available assessments.

At his current job, the Applicant has been nominated for an individual achievement award due to the Applicant's total dedication, extensive knowledge, high professional manner, and tireless devotion. (App Ex S, T, U).

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive as well. In that vein, the government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate the facts proven have a nexus to an Applicant's lack of security worthiness.

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. 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.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

PERSONAL CONDUCT (Guideline E) 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.

Conditions that could raise a security concern and may be disqualifying also include:

1. Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances. (E2.A5.1.2.1.)

5. A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency. (E2.A5.1.2.5.)

Conditions that could mitigate security concerns include:

1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability. (E2.A5.1.3.1.)

BURDEN OF PROOF

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the Applicant who must remove that doubt and establish his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the 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 is nonetheless security worthy. As noted by the United States Supreme Court in *Department of 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." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against the applicant.

CONCLUSIONS

The Government has satisfied its initial burden of proof under guideline E, (Personal Conduct). Under Guideline E, the security eligibility of an applicant is placed into question when that applicant is shown to have been involved in personal conduct which creates doubt about the person's judgment, reliability, and trustworthiness.

The Applicant was a police officer for 20 years. During that time he was involved in two motor vehicle accidents--in 1993 and 1996-- while driving police vehicles. As a result of each accident he received a written reprimand. Motor vehicle accidents are not the type of questionable judgment, untrustworthiness, or unreliability, or unwillingness to comply with rules and regulations contemplated under Guideline E. Mitigating Condition (MC) 1-[\(7\)](#) applies. Motor vehicle accidents without extenuating conditions are merely that, accidents and are not pertinent to a determination of judgment, trustworthiness, or reliability. I find for the Applicant as to SOR subparagraphs 1.a. and 1. d.

In 1998, the Applicant used profanity in a police message for which he received an oral reprimand. This is the only incident of this type in the Applicant's record. Applying the "whole person" factors concerning the frequency and recency of the conduct, I find for the Applicant as to SOR subparagraph 1.e.

In April 1992-[\(8\)](#)--more than 10 years ago, the Applicant was involved in unbecoming and immoral conduct for having sexual relations in his police cruiser with a fellow employee of the police department. His conduct was wrong and clearly inappropriate, for which he was suspended from duty without pay for 30 hours. If this had been the only incident for which the Applicant was suspended without pay, then the "whole person" factors of the frequency and recency of the conduct would result in a finding for the Applicant as to this allegation. However, this is not the only incident resulting in suspension without pay and is the first in a pattern of misconduct going from April 1992 through March 1998. Although not recent, because it is one of a number of acts of misconduct, I find against the Applicant as to SOR subparagraph 1.b.

The Applicant was involved in three incidents related to overtime, off duty employment, insubordination, and rule violation. In 1995, the Applicant was found to have violated the rules concerning part time hours and for using other names. Following a review of the administrative investigation the Applicant was demoted in rank, suspended from duty for 160 hours, his ability to do part-time employment was suspended for one year, and he was transferred to a different police station. The punishment was harsh, imposed following an investigation, and imposed by someone who knew the facts, the regulations, knew the Applicant, and had considered the Applicant's explanation of the events.

Within three years, in July 1998 and August 1998, the Applicant again violated the off duty employment rules. The Applicant acknowledged the violations but stated the mistakes were unintentional and caused by inattention to details. In a November 1998 memorandum, the police commander found the Applicant's explanation plausible, but not mitigating. Additionally, his commander found, even if there was no intent to violate the rules, the Applicant was still in

clear violation of general orders. After considering the facts, circumstances, and the Applicant's explanation, the Applicant was suspended without pay for 30 hours, his privilege to work secondary law enforcement duties was suspended for one year, and for six months his privilege to work supplemental overtime at any other station was restricted.

Within two months of his commander's memorandum, in mid-January 1999, the Applicant again violated his commander's direct order and volunteered to work at another police station. This was after the memorandum, but prior to the Applicant's 30 hour suspension which occurred in late January 1999. In March 1999, following the 30-hour suspension, the Applicant again violated the restrictions imposed on him by working at another police station. Following an investigation, the Applicant's explanation that he thought the work was exempt from the restrictions because the work was filling critical manning requirements was not accepted and the violations were sustained. It was recommended the Applicant's employment be terminated because of these incidents, but this was not done since the Applicant had already retired.

Disqualifying Condition (DC) 5⁽⁹⁾

is applicable to the Applicant's rule violations concerning off duty employment/overtime/secondary law enforcement work which occurred in 1995, 1998, and 1999. These three separate incidents all involved rule violations, of which two resulted in suspension without pay. Additionally, two of the violations recommended the Applicant's employment be terminated. None of the MC apply to these violations. I find against the Applicant as to SOR subparagraphs 1.c., 1.f., and 1.g.

Because of the January 1999 and March 1999 rule violations, the police department contemplated taking disciplinary action against the Applicant. On July 7, 1999, the Applicant met with his station commander. The following day he went to a previously scheduled job interview. He was offered and accepted a job and on July 23, 1999, retired from the police force. After the Applicant had left the force, the police department held a disciplinary hearing, which sustained the charges against the Applicant and recommended his employment be terminated. However, the Applicant was never given this information. The police chief states (Gov Ex 3), "(t)he employee was not provided with the appropriate memorandum documenting the recommendation since (Applicant) elected to retire prior to this disciplinary action being imposed." The Applicant did not learn of the recommendation until a year later when asked about it during a DSS interview, a year after he completed his Std. Form 86.

The Applicant's retirement was independent of any pending disciplinary investigation. His final evaluation, for the period of June 1998 through June 1999 was very favorable. Additionally, the Applicant received a certificate of appreciation (App Ex R) in recognition of his 20 years of dedicated service, which was achieved on July 2, 1999.

In August 1999, when the Applicant completed his Std. Form 86 he answered "no" in response to question 20 concerning his employment record which asked if he had, within the prior 10 year period, been fired from a job, quit a job after being told he would be fired, left a job by mutual agreement following allegations of misconduct or unsatisfactory performance, or had left a job for other reasons under unfavorable circumstances. The Applicant knew

there were allegations of misconduct and knew a disciplinary hearing had been set for a date after he left the police force. However, mere knowledge of these facts fails to establish the Applicant left his job after being told he would be fired, had been told to retire or resign, left the job under unfavorable circumstances, or was fired from the job. It has not been established the Applicant left by mutual agreement following allegations of misconduct because the disciplinary hearing's findings were not made until some time after the Applicant had already left the police force. There was no "mutual agreement." I find for the Applicant as to SOR subparagraph 1.h.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

In fairness to the Applicant, this decision should not be construed as a determination that at some future date the Applicant cannot or will not attain the state of true reform and rehabilitation necessary to justify the award of a DoD security clearance. To the contrary, his mitigating evidence suggests potential for positive reform and outstanding accomplishments in the defense industry. The most recent of the misconduct forming the basis for the denial of clearance occurred in arch 1999. Should Applicant be afforded an opportunity to reapply for a security clearance in the future he may well demonstrate persuasive evidence of his security worthiness. However, at this time, the disqualifying conditions have not been mitigated.

FORMAL FINDINGS

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

Paragraph 1 Guideline E (Personal Conduct): AGAINST THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

Subparagraph 1.d.: For the Applicant

Subparagraph 1.e.: For the Applicant

Subparagraph 1.f.: Against the Applicant

Subparagraph 1.g.: Against the Applicant

Subparagraph 1.h.: For 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.

Claude R. Heiny

Administrative Judge

1. Required by Executive Order 10865, as amended and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 as amended.
2. The insubordination being failure to follow prescribed rules, regulations, or directives related to overtime/secondary/supplemental/part time work.
3. This work at a different police station occurred in mid-January 1999, after the November 1998 memorandum concerning the Applicant's July 1998 and August 1998 over time/off duty work/secondary employment violations, but before the 30 hour suspension was imposed in late January 1999.
4. During the prior nine months prior his retirement, the Applicant had been seeking a new career position.
5. The date of the police department's final action is uncertain. The report bears a date at the top of each page of May 14, 1999 (Gov Ex 3), however in the report it mentions a disciplinary hearing held on August 20, 1990 and does not contain a dated signature page to indicate when the report was completed. The Administrative Investigation Case Management Log states the completed case file was sent to Internal Affairs on October 23, 1999, but there is no indication when the final disposition was made.
6. The notification probably occurred during the same time period that the Applicant made his sworn statement (Gov Ex

2) which was August 2001.

7. MC 1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability. (E2.A5.1.3.1.)

8. Although the incident occurred in April 1992, it was discovered when the other employee made a job application in 1994.

9. DC 5. A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency. (E2.A5.1.2.5.)