

DATE: March 20, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-08509

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

This 42-year-old technologist for a defense contractor completed an electronic personnel security questionnaire (SF 86) influenced by the faulty advice of the company's security officer. He then signed a final version of the SF 86 in which the security officer had entered erroneous information. Applicant did not have the opportunity to detect and correct any errors because the security officer instructed him to sign the SF 86 without reading it. No deliberate falsifications were established. Consequently, no criminal conduct based on the alleged but unproven falsifications has been established. Clearance is granted.

STATEMENT OF THE CASE

On May 28, 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, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons

why DOHA could not make the preliminary affirmative finding required under the Directive that it

is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and

determine whether a clearance should be granted, denied or revoked.

On June 17, 2002, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made after a hearing before a DOHA Administrative Judge. The matter was assigned to me for resolution on October 15, 2002. A Notice of Hearing was issued on November 6, 2002, setting the matter for November 20, 2002. At the hearing, Applicant testified on his own behalf, called two other witnesses, and introduced one exhibit (Applicant's Exhibit (AX) A). The Government called one witness, and offered 12 exhibits, which were marked as Government Exhibits (GX) 1 - 12. Without objection from either party, all exhibits were admitted as marked.

FINDINGS OF FACT

Applicant is a 42-year-old "Junior Technologist" (GX 1). The SOR contains three allegations under Guideline E, of falsification on his security clearance application of October 10, 2000 (first SF 86) (GX 1), containing a total of 12 separate suballegations. The SOR also contains one allegation under Guideline J of criminal conduct relating to the alleged falsifications cited under SOR 1, above. In his response to the SOR, Applicant denied all allegations in the SOR, with explanations.

After considering the totality of the evidence derived from Applicant's response to the SOR, the testimony of Applicant and all other witnesses at the hearing, and all exhibits, I make the following FINDINGS OF FACT as to each SOR allegation:

Guideline E (Personal Conduct)

SOR 1.a. - Applicant *did not deliberately falsify material facts* on the Questionnaire for National Security Positions (second SF 86) (dated October 10, 2000), when he answered "Yes" to both parts of Question **19 YOUR MEDICAL RECORD** but failed to mention three periods of treatment/counseling for alcohol-related mental health problems:

- (1) 1996, as a result of his being convicted of Driving Under the Influence of Intoxicants (DUI) on May 7, 1996;
- (2) January 5, 1998 to May 27, 1998, for a condition diagnosed as Alcohol Dependence, Continuous and Polysubstance Dependence; and
- (3) December 1999 to June 2000 for a condition diagnosed, in part, as major Depressive Disorder, Recurrent, Anxiety Disorder, and History of Alcohol Abuse.

The government called Agent Z, who works for the Defense Security Service (DSS). Agent Z "ran part of [Applicant's] background investigation and interviewed Applicant twice" (Tr at 36, 37). Agent Z showed the Applicant the SF 86 (second SF 86) (GX 1) on which the SOR allegations are based and asked about the "No" answer to Question 30. Applicant responded that "he wasn't sure why it had not been answered yes and indicated that when he had submitted the information, it had been answered correctly" (Tr at 39, 40). He had in fact answered "Yes" to the equivalent question, 23.d., on the first SF 86 he had prepared (AX A), and which cited his 1996 DUI conviction.

SOR 1.b. - Applicant *did not deliberately falsify material facts* on the Questionnaire for National Security Positions (first SF 86) (dated October 10, 2000), when he answered "No" to Question **24 YOUR POLICE RECORD - ALCOHOL/DRUG OFFENSES**, but cited an April 1996 DUI arrest, while omitting any mention of seven other alcohol-related arrests that occurred between 1985 and 1991, SOR 1.b.(1) to 1.b.(8).

In his September 26, 2001 sworn statement to DSS, Applicant discussed his alcohol-related arrests and convictions, including the one in 1991 and the ones before that (GX 2). However, none of the pre-1996 arrests and convictions are cited in either the first SF 86 (Question 23.d.) or the second SF 86 (Question 24). In talking about his alcohol-related arrests to Agent Z, Applicant told him that "he thought the response was supposed to go back a matter of ten years," based on what he had been told by Ms. X (Tr at 41). Agent Z testified that "in the scope of an investigation like this," some items are seven years, some are ten years, and some are phrased specifically "have you ever" (Tr at 41). However, the questions as stated on the SF 86s (AX A and GX 2) specify either "7 years" or "have you ever" as to all medical, arrest, and alcohol-related questions.

Considering the totality of the record evidence, I find that Applicant should have complied with the "have you ever" language of Question 23.d. on the first SF 86 and Question 24 on the second SF 86, but that he answered as he did because of the incorrect advice and guidance he received from Ms. X, and his inability to examine the second SF 86 before signing it and having it submitted. On this basis, I find that Applicant did not act deliberately and with intent to deceive. Consequently, I find that the allegation in SOR 1.b. is not supported by the overall record evidence.

SOR 1.c. - Applicant *did not deliberately falsify material facts* on his Questionnaire for National Security Positions

(second SF 86) (dated October 10, 2000), when he answered "No" to Question **33. YOUR FINANCIAL RECORD - BANKRUPTCY** [within the seven years prior to the filing for bankruptcy]. A "Yes" answer was not required and the bankruptcy cited in SOR 1.c. did not have to be reported since the bankruptcy filing occurred on July 16, 1993. This was three months prior to the October 10, 1993 date that marked the beginning of the seven-year period covered by the question. The allegation in SOR 1.c. does not correctly state the standard by which the obligation to report bankruptcies is determined. Consequently, the record evidence does not establish a violation of the reporting requirements as stated in either SF 86.

The owner of Applicant company (Mr. Y) has held a Top Secret security clearance for 30 years and understands and supports the rationale behind the security clearance program. He has known Applicant for three years, believes Applicant to be trustworthy and a valued employee, and rates him in the top 25% of all employees (Tr at 28, 29, 33, 34).

POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing 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 (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Because each security case presents its own facts and circumstances, it should not be assumed that the factors cited above exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable financial judgment and conduct.

Considering the evidence as a whole, I find the following specific adjudicative guidelines to be most pertinent to this case:

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 might not properly safeguard classified information.

Conditions that could raise a security concern and maybe disqualifying include:

None that are established by the totality of the record evidence, since no deliberate falsification of material facts has been proven.

GUIDELINE J (Criminal Conduct)

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. [\(1\)](#)

Conditions that could raise a security concern and maybe disqualifying include:

None that are established by the totality of the record evidence, since the underlying allegations in paragraph 1 have not been proven.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of

whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination based on the "whole person" concept required by the Directive, the Administrative Judge is not permitted to speculate, but can only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make

critical judgments as to the credibility of witnesses.

An applicant's admission of the information in specific allegations relieves the Government

of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either

by the Applicant's admissions or by other evidence) and establishes conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the Applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence

of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the Applicant.

A person seeking access to classified information enters into a fiduciary relationship with the

Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended,

at E2.2.2., "any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

CONCLUSIONS

The SOR states concerns under Guidelines E (Personal Conduct - falsifications) and J (Criminal Conduct - related to the falsifications). The alcohol-related arrests are not separately alleged under Guideline J, but only as the basis for the falsification allegations under Guideline E.

Applicant has established that specific parts of the SOR are incorrect as alleged. Clearly, he is ultimately responsible for the contents of the security clearance application, on which his request for a security clearance is based. However, this is one of those rare cases where the alleged falsifications are substantially the result of poor advice, errors, and confusion, on the part of a person in a position of authority, his company security officer (Ms. X). She admits her mistakes, for which she apologizes (Tr at 56, and 62 at lines 11, 12). It is also significant that Applicant did not have an opportunity to review the second and final version of his SF 86 (GX 1), and was asked to "just sign it instead of reading it" (Tr at 57 at lines 13 - 20). The security officer's overall testimony establishes the confusing and unhelpful circumstances under which Applicant was trying to complete his SF 86 (Tr at 55 - 70).

As to SOR 1.a., I find that Applicant's security officer, Ms. X, made a series of errors in working with Applicant in completing the first SF 86 (AX A) and in her transferring and translating that information from the first SF 86 (AX A) into its final version (GX 1). One significant error was that Ms. X did not accurately transfer Applicant's citing of his consulting with a mental health professional (Question 21 on the May 2, 2000 SF 86 (AX A) onto the final version (GX

1), on which the SOR is based. Because of this error by Ms. X, which Applicant credibly contends he was not aware of, there is no basis for concluding that Applicant deliberately omitted mention of the treatment periods in 1996 (SOR 1.a.(1)), 1998 (SOR 1.a.(2)), or 1999/2000 (SOR 1.a.(3)) in his response to Question 30 in the October 10, 2002 SF 86 (GX 1).

In the first SF 86 (AX A), Applicant did not specifically mention the 1996 treatment, but he did cite the 1996 conviction that resulted in treatment being ordered. However, he specifically cited the 1998 treatment/counseling in his answer to Question **25 YOUR USE OF ALCOHOL**; and he cited the 2000 treatment in his response to Question **21 YOUR MEDICAL RECORD**. Although he should have been more careful as to where and how he should have reported these treatment periods, the record does not suggest any intentional omission or attempt at deception.

As to SOR 1.b., Applicant admits the arrests cited in SOR 1.b.(1) - 1.b.(8) (Tr at 79 - 84). He denies that he intentionally omitted mention of the eight arrests/convictions before 1996. Although he admits some "oversight" (Tr at 75), he relied, to a considerable degree, on the confusing advice of Ms. X as to required reporting periods (Tr at 57). Ms. X testified at the request of Applicant and recalled the instruction she gave him: "You read the front of the form and most of it's like seven years and some of them are ten years. The program we had to use is - even though the form would say seven years, the EPSQ program wouldn't accept less than 10 years on some things. I guess it was a glitch in the program. The newer one isn't like that" (Tr at 57).

While it is clear that she did not tell Applicant that all questions were limited to the previous seven years, even if that period was not the one specified in the question, and to follow the instructions for each question, it is also clear that what she was saying was confusing to Applicant.

As to 1.c., the first SF 86, at Question 27.a., asks if Applicant had filed a bankruptcy petition within the previous seven years. The second SF 86, at Question 33, asked precisely the same question. The Chapter 13 filing occurred on July 16, 1993, and the bankruptcy was discharged on June 18, 1998. The filing date is prior to the required reporting period. The discharge date is within that period. These dates suggest that the SOR allegation was improperly based on the discharge date, rather than the filing date stated in the question as the standard. Whether or not Applicant noticed and understood the difference is not clear, but his failure to report the bankruptcy filing does not violate the requirements of the question.

As to all allegations, and based on the totality of the evidence, I conclude the advice Applicant received from Ms. X, her failure to spot and discuss possible problem issues, and her errors in transferring information prevented Applicant from making informed and correct decisions, which in turn led to the present adjudication. She compounded the problem by not giving him an opportunity to review the second SF 86 before signing it and submitting it on his behalf. On this basis, I conclude that Applicant's description of the circumstances under which he was operating is credible and does not suggest deception (Tr at 104 - 106).

Applicant has established that the allegations in the SOR are not supported by the record evidence and, specifically, that none of the Disqualifying Conditions stated under Guidelines E or J have been established.

FORMAL FINDINGS

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

Guideline E (Personal Conduct) For the Applicant

Subparagraph 1.a.(1) For the Applicant

Subparagraph 1.a.(2) For the Applicant

Subparagraph 1.a.(3) For the Applicant

Subparagraph 1.b.(1) For the Applicant

Subparagraph 1.b.(2) For the Applicant

Subparagraph 1.b.(3) For the Applicant

Subparagraph 1.b.(4) For the Applicant

Subparagraph 1.b.(5) For the Applicant

Subparagraph 1.b.(6). For the Applicant

Subparagraph 1.b.(7) For the Applicant

Subparagraph 1.b.(8). For the Applicant

Subparagraph 1.c.(1) For the Applicant

Guideline J (Criminal Conduct) For the Applicant

Subparagraph 2.a. For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

BARRY M. SAX

ADMINISTRATIVE JUDGE

1. The SOR, in paragraph 2, cites the Guideline J concerns as relating to the "information set forth in paragraph 1, above, which constitute a violation of Title 18, U.S.C. Section 1001," i.e. false statements to the Government. The language of Paragraph 2 does not cite the Applicant's arrests and/or convictions from 1985 to 1996, which do not qualify as false statements. Since all falsification allegations have been resolved in Applicant's favor, there is thus no basis for a finding against Applicant as to SOR allegation 2.a.