

DATE: October 15, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-27698

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

This 42-year-old technician showed poor judgment in 2000 when he allowed an unlicensed teenage girl to drive his car. He was arrested and convicted of the charges and ordered not to have anything more to do with the teenager while he was on probation. He ignored the order on several occasions. In addition, he allowed the teenager to drive his vehicle again, in an adjoining state, with him in it, and to give a false name to the police when she was stopped for speeding. When questioned by a Government agent two years later, he intentionally gave an incorrect and false version of what had happened, minimizing his own culpability. No mitigation has been shown. Clearance is denied.

HISTORY OF THE CASE

On March 3, 2004, 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 March 25, 2004, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made by a DOHA Administrative Judge on the written record, i.e., without a hearing. Department Counsel issued a File of Relevant Material (FORM) on June 22, 2004. The FORM instructed Applicant that any response to the FORM had to be submitted within 30 days of its receipt by Applicant. Applicant received the FORM on July 2, 2004, so any response was due by August 2, 3004, but no response was received by DOHA. The matter was assigned to me for resolution on August 10, 2004.

FINDINGS OF FACT

Applicant is a 42-year-old technician employed by a defense contractor.

In his response to the SOR, Applicant admits all five allegations under the single Guideline E (Personal Conduct). He did not admit or deny the single allegation under Guideline J (Criminal Conduct), which I deem equivalent to a denial. Applicant's admissions are incorporated by reference and adopted as Findings of Fact.

After considering the totality of the evidence, I make the following additional FINDINGS OF FACT as to each SOR allegation:

Guideline E (Personal Conduct)

1.a. - Applicant (then about 37) was convicted and sentenced in March 2000 in State A for allowing an unlicensed driver to operate his motor vehicle. The driver was his female babysitter, who was about 16 or 17 years old. The court found Applicant guilty, sentenced him to 30 days in jail, suspended on the condition he have no contact with the female juvenile during the six months of probation imposed, and to pay a fine and costs of \$50 (Items 6, 7, and 8).

1.b. - Applicant allowed the young female to drive his motor vehicle again, on April 4, 2000 in adjoining State B, while he was a passenger. The vehicle was stopped for speeding. The female juvenile gave a false name and received a citation under the false name. Applicant paid the fine.

1.c. - Applicant picked up the female juvenile in the alley behind her home to take her to school. He also picked her up and/or had dinner with her at a restaurant on other occasions during his period probation, despite the court order against such contact.

1.d. - A Petition for Revocation of his probation was filed on April 26, 2000 in State B on the basis of the information cited in 1.c., above, and a bench warrant was issued for his arrest. He was sentenced to 30 days in jail, with credit for seven days served, and he was again ordered to have no contact with the female juvenile.

1.e. - In a sworn statement dated March 12, 2002, and given to a Contract Investigator for the Defense Security Service (DSS), Applicant deliberately falsified material facts about his relationship and dealings with the juvenile female cited in 1.a. - 1.d., above.

Guideline J (Criminal Conduct)

2.a. - His failure to tell the truth to DSS, as cited in 1.e., above, constitutes a violation of 10 U.S.C. 1001, a felony.

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.

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.

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted on to safeguard classified information and material twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an applicant for a security clearance, in his or her private life or connected to work, may be involved in conduct that demonstrates poor judgment, untrustworthiness, or unreliability. These concerns include consideration of the potential, as well as the actual, risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

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 proves 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

Guideline E (Personal Conduct) - The concerns expressed in the Directive's guidelines for personal conduct are essentially that personal misconduct may raise questions about whether a person has the judgment, reliability, and trustworthiness of anyone seeking access to the nation's secrets.

SOR 1.a. - 1.e. - In his April 14, 2004 response to the SOR (Item 3), Applicant admitted all of the above allegations. However, in a signed sworn statement given by Applicant to a Contract Investigator for the Defense Security Service (DSS) on March 12, 2002 (Item 5), Applicant falsified material facts about the incidents. He claimed that the female juvenile, whom he had hired as a babysitter, had used his car without his knowledge, while he was at work. He claimed that she must have taken the keys out of his house without his knowledge or permission. He also stated that during his period of probation, when he was ordered to have no contact with the female juvenile, he "would inadvertently come into contact with her in public places."

Applicant also stated the was found in violation of his probation because of these "unplanned contacts," thereby failing to mention his allowing the juvenile female to drive his car while he was a passenger, as cited in 1.b., above, after he had been ordered by the court to stay away from her. He also failed to mention his planned meetings with the female during the probationary period.

The evidence of record, including but not limited to Applicant's admissions in his response to the SOR as to all Guideline E allegations, clearly supports the validity of all SOR allegations under both Guidelines E and J. That same evidence of questionable judgment, improper personal conduct, and criminal conduct establishes a legal connection or nexus with Applicant's eligibility to have access to the nation's secrets. The sole remaining question is whether Applicant has demonstrated substantial evidence of mitigation and or extenuation.

Applicant did not respond to the FORM, wherein Department Counsel stated her concerns and her evaluation of the record evidence. That means the most recent evidence is found in Applicant's April 19, 2004 response to the SOR. That evidence consists of his admissions of SOR 1.a, 1.b., 1.c., and 1.d., and his following statement:

I admitted to committing those acts and served my 21 days in jail for the probation violation. Since my incarceration I have not had any contact with that person and have turned my life around. I remarried on 5 May 2001 and have a wonderful and loving family. I have also been working for [Company A at an Air Force Base] since 15 February 2001. Prior to that I served 20 years in the US Air Force and was honorably discharged on July 1, 2000. My life was in turmoil when those incidents occurred, my first wife had left me and my two teenage daughters were getting out of control. I know there is no excuse for what I did. I do feel that I am a trustworthy person and I have changed my life around totally. Your cooperation in the matter of my keeping my clearance would be greatly appreciated.

Applicant is now 42. The criminal matters occurred in 2000 and the falsifications in 2002. Applicant's relationship with the teenage girl in 2000 has not been shown (or treated by the court) to have gone beyond a close friendship, but the court was clearly concerned enough about the female juvenile's best interests to order Applicant to avoid contact with her. He did not do so and his excuses and explanations are not persuasive. The court obviously felt that way too, since Applicant was found to have violated the terms of his probation and he served some time in jail. Whatever else all this means, it certainly shows incredibly poor judgement in his part in 2000.

I have considered all of the evidence of record, including Applicant's various explanations for his conduct and the problems leading to his employment difficulties. The following Disqualifying Conditions (DC) are applicable: DC 2 - the deliberate omission, concealment, or falsification of relevant and material information from any . . . personal history statement . . . ; and DC 5 - a pattern of dishonesty or rule violations. The record does not establish any of the parallel Mitigating Conditions (MC) as applicable, particularly since the falsifications are still "recent" (MC 2), and the correct information was provided only after being confronted by the DSS agent (MC 3).

Guideline J (Criminal Conduct)

2.a - Applicant's position is weakened by his seeking to deceive the Government contract investigator two years later, in March 2002. His comments about the facts and circumstances of his relationship with the teenage female run contrary to the bulk of the record evidence, including his other statements and writings. Applicant's false statements in his sworn statement as to material facts, as cited in 1.e., above, constitute a violation of 18 U.S.C. 1001, a felony.

Disqualifying Conditions (DC) 1 - any criminal conduct, regardless of whether the person was formally charged, and 2 - a single serious crime or multiple lesser offenses are clearly applicable. Under Mitigating Conditions (MC), I have considered all possible mitigating conditions (MC) and find that none of them are applicable. MC 1 (in context, the criminal behavior in 2000 and 2002 remains recent); MC 2 (Applicant's criminal conduct is not an isolated incident); and C 6 (there is no clear indication of rehabilitation).

Summary - I have carefully considered Applicant's explanations of what was happening in his life during the period from 2000 to 2002. I cannot speculate as to any underlying rationale for Applicant's conduct with the babysitter. What I am required to do is make reasonable deductions from the evidence we have before us. I conclude that Applicant did allow the unlicensed teenager to operate his vehicle with and without him present, and to make false statements as to her identity when she was stopped for speeding. It is even more troubling that he did not learn from his arrest and conviction but went on to intentionally violate his probation and be required to serve time in jail. He does not seem to have learned from even that ordeal, since two years later, he was still in a state of denial about the nature of his involvement.

Applicant is clearly an intelligent person, but he has caused his own problems. The evidence suggests a state of denial. In the absence of any subsequent evidence of mitigation, extenuation, or rehabilitation, there is no basis to go beyond the evidence showing that his conduct has made him ineligible and that nothing he has done or said changes that conclusion. Viewing the totality of the evidence, I cannot conclude Applicant has demonstrated the integrity, good judgment, reliability, and trustworthiness required of someone seeking access to the nation's secrets.

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) Against the Applicant

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. Against the Applicant

Guideline J (Criminal Conduct) Against the Applicant

Subparagraph 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 national interest to grant or continue a security clearance for Applicant.

BARRY M. SAX

Administrative Judge