

DATE: December 22, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-29259

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant served six months in prison for his involvement in a car theft in 1989 and less than a year for a drug offense in 1993-1994, and was arrested for battery in February 1996 and in October 1996 for a drug offense and a handgun offense, but he later became a highly respected employee of a defense contractor. He received a Chapter 7 bankruptcy discharge in September 2003, but he still owes a child support arrearage and delinquent state taxes, which he was paying by payroll deduction until he was terminated from his latest job for lack of a security clearance. He erroneously answered "no" to questions on his security clearance application about his criminal record. The allegations of falsifying his SF-86 are rebutted, and the security concerns based on criminal conduct and financial considerations are mitigated. Clearance is granted.

STATEMENT OF THE CASE

On September 21, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to deny Applicant a security clearance. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive). The SOR alleges security concerns under Guidelines J (Criminal Conduct), E (Personal Conduct), and F (Financial Considerations).

Applicant answered the SOR in writing on October 6, 2004, admitted the allegations in part and denied them in part, offered explanations, and requested a hearing. Because the SOR alleged the Smith Amendment, 10 U.S.C. § 986, was applicable to this case, scheduling of the hearing was delayed by the moratorium imposed on Smith Amendment cases while the Department of Defense determined whether new or additional implementing guidance should be published. (U) After the moratorium was lifted, the case was assigned to me on September 15, 2005, and heard on October 25, 2005. DOHA received the transcript on November 9, 2005.

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I also make the following findings:

Applicant is a 34-year-old telecommunications technician. He is married and has one child. He began working for his most recent employer in December 1999, and he received an interim clearance in February 2002.⁽²⁾ He was terminated in April 2005 because of his lack of a final clearance, but he is eligible for rehiring if he is granted a clearance.⁽³⁾

Applicant has a reputation for hard work, technical skill, diligence, reliability, and high integrity. One of his supervising network engineers called him "one of the core technicians in his group that is always called upon to complete high visibility projects," because he is extremely reliable and diligent.⁽⁴⁾ Another supervisor said he "demonstrates the highest levels of integrity and honesty" in his work. A colleague regarded him as a person of "impeccable character." His team leader commented on his "exemplary behavior," and his leadership and expertise.

In January 2002, Applicant submitted an SF-86.⁽⁵⁾ He answered "no" to questions 20 (arrest, charge, or conviction of any offense in last seven years), 21 (arrest or conviction of a felony), 22 (charge or conviction of firearms or explosives offenses), and 24 (charge or conviction of alcohol or drug offenses). He did not disclose his arrests and convictions.

Applicant was arrested in September 1989 for grand larceny, a felony, while he was riding in an automobile stolen by his friends.⁽⁶⁾ He was convicted of the lesser offense of unauthorized use of a motor vehicle and sentenced to 12 months in jail, with six months suspended, and he was placed on probation for one year.⁽⁷⁾

In October 1992, Applicant was charged with conspiracy to distribute cocaine. In April 1993, he was convicted and sentenced to confinement for 15 years, with 10 years suspended, and probation for 20 years with three years of probation supervised. He also was ordered to undergo drug counseling.⁽⁸⁾ He was paroled in February 1994.⁽⁹⁾ At the hearing, Applicant testified this incident occurred while he was with the same friends who had stolen the car in September 1989. Applicant knew his friends were cocaine dealers, and they were in a drug-dealing area when they all were arrested.⁽¹⁰⁾ Applicant testified he did not use or sell drugs, even though he associated with drug users and dealers. He admitted being identified in court as one of the dealers.⁽¹¹⁾

In February 1996, Applicant was charged with battery.⁽¹²⁾ At the hearing he testified he acted in self-defense after he was attacked by several individuals who objected to Applicant's presence with a certain young woman. He testified the alleged victim withdrew the charge, and "they threw it out."⁽¹³⁾

In November 1996, Applicant and his friends were charged with possession of cocaine with intent to distribute, possession of cocaine, possession of a handgun, trespassing, resisting arrest, and removal or obliterating the serial number of the handgun. Applicant's charge of possession with intent to distribute was disposed of by nolle prosequi. The remaining charges were placed on the "stet" docket, conditioned on good conduct.⁽¹⁴⁾ Applicant successfully completed the period of probation. In an interview with a security investigator and at the hearing, Applicant maintained the cocaine and an unregistered handgun found in the automobile in which he and his friends were riding was not his.⁽¹⁵⁾ In July 2005, the records of Applicant's arrest and detention for this incident were expunged.⁽¹⁶⁾

Applicant testified he does not use drugs and has never used drugs. He has no friends who use drugs or deal in drugs. He has not associated with his old friends since his arrest in 1996.⁽¹⁷⁾

Applicant told a security investigator he did not list the felonies on his SF-86 because he was not sure they were felonies. He denied any intent to conceal information.⁽¹⁸⁾ At the hearing, Applicant seemed sincere, but his answers and overall demeanor - facial expressions, body language, and manner of speaking - indicated he was very confused about the disposition of his various arrests, the legal effects of charges being placed on the "stet" docket, what offenses were felonies, which sentences were imposed for his various offenses, and the periods of time covered by the various questions about his criminal record. He testified he found the SF-86 confusing, and in hindsight he realized he should

have asked his security officer for help in executing it. Applicant did not check his criminal record until after he received the SOR, and his search for records of his arrests and convictions was complicated by the filing of some of the records under the wrong social security number. ⁽¹⁹⁾

In May 2003, after submitting his SF-86, Applicant applied for Chapter 7 bankruptcy. He received a discharge in September 2003. ⁽²⁰⁾ His credit report dated ay 4, 2004, reflected an unresolved cell phone bill, a child support arrearage of about \$13,000 and three state tax liens totaling about \$6,436. ⁽²¹⁾ One lien was filed in January 2002 and two in October 2002. Although three separate liens were filed, they all have the same case number, suggesting multiple liens may have been filed for a single indebtedness. ⁽²²⁾ At the hearing, Applicant admitted that when he was younger and working in fast-food restaurants or clubs, he sometimes filed his state tax returns late, and sometimes he did not file at all, resulting in tax delinquencies and tax liens. He testified he did not realize until recently that filing late or not filing results in penalties and "they keep going up, up, up." ⁽²³⁾

Applicant was paying the child support arrearage and delinquent taxes by payroll deduction until he was terminated. ⁽²⁴⁾ If he receives a clearance, his former employer is willing to reinstate him, enabling him to resume payments on the child support and taxes.

In his answer to the SOR, Applicant stated he paid the cell phone bill in July 2004. At the hearing, he testified he had documentary proof he paid it, but he could not produce it. ⁽²⁵⁾

Applicant testified the debts discharged by his bankruptcy were jointly incurred by him and his wife. His wife left him and Applicant was responsible for many of their joint debts, including the loan for the purchase of her automobile. He and his wife are now in the process of obtaining a divorce. ⁽²⁶⁾

Applicant testified he has changed since his criminal conduct occurred, and he now realizes the consequences of his youthful misconduct. ⁽²⁷⁾ He has been living within his means since his discharge in bankruptcy. After he and his wife separated and he was suspended from work because of his lack of a clearance, he began living with his brother to save money.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

The Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant'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 ¶¶ E2.2.1.1 through E2.2.1.9.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

Guideline J (Criminal Conduct)

A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1. A single serious crime or multiple lesser offenses may raise a disqualifying condition (DC 2). Directive, ¶ E2.A10.1.2.2. Applicant's record of arrests and convictions establishes DC 2.

The SOR ¶ 1.e. alleges falsification of the SF-86. It is a felony, punishable by a fine or imprisonment for not more than five years, or both, to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of the executive branch of the Government of the United States. 18 U.S.C. § 1001. Security clearances are within the jurisdiction of the executive branch of the Government of the United States. *See Egan*, 484 U.S. at 527. A deliberately false answer on a security clearance application is a serious crime within the meaning of Guideline J. I am satisfied, however, for the reasons set out below under Guideline E (Personal Conduct), that Applicant did not deliberately falsify his SF-86.

The SOR ¶ 1.f. alleges Applicant is disqualified from holding a clearance under 10 U.S.C. § 986. Absent a waiver from the Secretary of Defense, any applicant who "has been sentenced by a U.S. court to confinement for more than one year, and was incarcerated as a result of that sentence for not less than one year" is disqualified from obtaining or holding a clearance by 10 U.S.C. § 986 as amended. Applicant was sentenced to confinement in 1989 and again in 1993, but each time he actually served less than one year. Accordingly, I conclude Applicant is not disqualified from holding a clearance under 10 U.S.C. § 986, because he has never served more than one year of confinement as a result of any single sentence.

A security concern based on criminal conduct may be mitigated by showing the criminal behavior was not recent (MC 1) or was an isolated incident (MC 2). Directive, ¶ E2.A10.1.3.1., E2.A10.1.3.2. *See also* Directive, ¶ E2.2.1.3. (frequency and recency of conduct). I conclude MC 1 is established, because Applicant's last offenses occurred in November 1996, more than nine years ago, and he has not engaged in any criminal conduct since then. MC 2 is not established, because Applicant was involved in multiple offenses between September 1989 and November 1996.

An acquittal is a mitigating condition (MC 5). Directive ¶ E2.A10.1.3.5. The charge of battery in February 1996 did not result in an acquittal after a trial on the merits. Nevertheless, I conclude the withdrawal of the complaint and dismissal of the charge is a mitigating condition.

Criminal conduct may be mitigated by showing clear evidence of successful rehabilitation (MC 6). Directive ¶ E2.A10.1.3.6. *See also* Directive ¶ E2.2.1.6. (rehabilitation and behavioral changes). I conclude MC 6 is established, because Applicant completed his two-year probation after the November 1996 offenses, accepted responsibility for his actions, and has become a hard-working, well-respected member of society. He appears to have found his niche after a less than exemplary young adulthood. The likelihood of recurrence is low.

Several other factors enumerated in the Directive are relevant. Applicant committed multiple offenses, some of them serious, during a seven-year-period. Directive ¶ E2.2.1.1 (nature, extent, and seriousness of conduct). The offenses were in large part the product of a bad choice of friends. Directive ¶ E2.2.1.2. (circumstances surrounding conduct). Applicant was 17 years old when he was first arrested, and 25 years old at the time of his last arrest. Directive ¶ E2.2.1.4. (age and maturity). The potential for pressure, coercion, exploitation, or duress by threats to disclose his record is nil because his arrests and convictions are a matter of public record. Directive ¶ E2.2.1.8.

Applicant misspent his youth, associating with bad friends and paying the price. In November 1996, he was given an opportunity to change his life, and he took it. He stopped associating with his old friends, found employment, and started becoming a productive member of society. In evaluating whether he should receive a security clearance, I placed considerable weight on his demeanor and credibility at the hearing and the glowing testimonials he received from colleagues and supervisors. After evaluating all the evidence in the context of the whole person and weighing the disqualifying and mitigating factors, I conclude Applicant has mitigated the security concern based on criminal conduct.

Guideline E (Personal Conduct)

Under this guideline, conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate the person may not properly safeguard classified information. Directive ¶ E2.A5.1.1. A disqualifying condition (DC 2) applies where there has been a deliberate omission or falsification of relevant and material facts from any personal security questionnaire. Directive ¶ E2.A5.1.2.2..

When, as in this case, a falsification allegation is controverted, Department Counsel has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred. ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004).

I conclude DC 2 is not established. Applicant is a man of limited education. At the hearing, he appeared to be sincere and relatively unsophisticated. It was obvious he found the SF-86 very confusing. He denied intentionally falsifying it, and I believe him. I conclude he has rebutted the allegations of falsifying three answers on his SF-86.

Guideline F (Financial Considerations)

Under this guideline, "[a]n individual who is financially overextended is at risk of having to engage in illegal acts to generate funds." Directive ¶ E2.A6.1.1. A person who fails or refuses to pay long-standing debts or is financially irresponsible may also be irresponsible or careless in his or her duty to protect classified information.

Two disqualifying conditions (DC) under this guideline could raise a security concern and may be disqualifying in this case. DC 1 applies where an applicant has a history of not meeting his or her financial obligations. Directive ¶ E2.A6.1.2.1. DC 3 applies where an applicant has exhibited inability or unwillingness to satisfy debts. Directive ¶ E2.A6.1.2.3. Applicant's financial history establishes DC 1. His discharge in bankruptcy based on inability to otherwise resolve his debts establishes DC 3. Since his discharge in bankruptcy, Applicant has lived within his means and demonstrated ability and willingness to be financially responsible.

A security concern based on financial problems can be mitigated by showing the delinquent debts were not recent (MC 1) or an isolated incident (MC 2). Directive ¶¶ E2.A6.1.3.1., E2.A6.1.3.2. MC 1 is not established because Applicant's delinquent taxes and child support arrearage are not yet fully resolved. C 2 is not established because Applicant accumulated numerous delinquent debts over a substantial time period.

Security concerns arising from financial problems can be mitigated by showing they are the result of conditions beyond the person's control (MC 3). Applicant's delinquent taxes arose because of carelessness rather than circumstances beyond his control. However, most of his other financial difficulties arose because of the breakup of his marriage and his inability to discharge jointly-incurred debts that his ex-wife failed to pay. I conclude MC 3 is applicable in part.

A mitigating condition (MC 4) applies when an applicant "has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control." Directive ¶ E2.A6.1.3.4. MC 4 is applicable in part for the debts discharged in bankruptcy, because Applicant realized he was financially overextended, sought legal advice, and gave himself a fresh start by having his old debts discharged.

A security concern arising from financial problems can be mitigated by showing a good-faith effort to resolve debts (MC 6). Directive ¶ E2.A6.1.3.6. The concept of good faith "requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation." ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). Although Applicant's discharge in bankruptcy does not constitute a good-faith effort to resolve his debts, it is relevant because Applicant is no longer vulnerable to coercion or temptation to engage in illegal conduct to generate funds. Until he was recently terminated because of his lack of a clearance, he was systematically paying his delinquent taxes and the child support arrearage. He lives modestly and within his means. He testified he resolved the delinquent cell phone bill. Although he could not produce documentation regarding the cell phone bill, I attribute his inability to produce documentation to poor record management rather than financial irresponsibility or false testimony. I conclude MC 6 is established.

After weighing the disqualifying and mitigating conditions and evaluating the evidence in the context of the whole person, I conclude Applicant has mitigated the security concern based on financial considerations.

FORMAL FINDINGS

The following are my findings as to each allegation in the SOR:

Paragraph 1. Guideline J (Criminal Conduct): FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Paragraph 2. Guideline E (Personal Conduct): FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: For Applicant

Subparagraph 2.d.: For Applicant

Paragraph 3. Guideline F (Financial Considerations): FOR APPLICANT

Subparagraph 3.a.: For Applicant

Subparagraph 3.b.: For Applicant

Subparagraph 3.d.: For Applicant

Subparagraph 3.e.: For Applicant

Subparagraph 3.f.: For 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 Applicant a security clearance. Clearance is granted.

LeRoy F. Foreman

Administrative Judge

1. Transcript (Tr.) 17-18.
2. Applicant's Exhibit (AX) H.
3. Tr. 17, Appellate Exhibit I.
4. AX A through E; AX O..
5. Government Exhibit (GX) 1.
6. Tr. 41.
7. GX 5.
8. GX 8.
9. GX 9.
10. Tr. 42.
11. Tr. 43.
12. GX 5.
13. Tr. 72.
14. GX 6, 7.
15. GX 2 at p. 1; Tr. 46-49.
16. AX N.
17. Tr. 49.
18. GX 2 at p. 2.
19. Tr. 51-58.
20. GX 4.
21. GX 3 at pp. 4, 6.
22. Tr. 75-76.
23. Tr, 63-64.
24. AX J, K, L.

25. Tr. 65-66.

26. Tr. 59-61.

27. Tr. 39.