

DATE: November 1, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-29373

DECISION OF ADMINISTRATIVE JUDGE

JOSEPH TESTAN

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Department Counsel

FOR APPLICANT

Robert A. Bitonte, M.D., J.D.

SYNOPSIS

Applicant's knowing and wilful falsification of material facts on a Security Clearance Application (SCA) he executed in 2001, and his inability or unwillingness to admit this act of dishonesty, requires a denial of his security clearance request. Clearance is denied.

STATEMENT 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, 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.

Applicant responded to the SOR in writing on March 29, 2004. The case was assigned to the undersigned on June 28, 2004. A Notice of Hearing was issued on July 9, 2004 setting the hearing for August 17, 2004. Applicant requested a continuance, which was granted. An Amended Notice of Hearing was issued on August 10, 2004, and the hearing was held on September 30, 2004. The transcript was received on October 14, 2004.

FINDINGS OF FACT

Applicant is a 41 year old engineer. He has worked for the same defense contractor since 1985.

Applicant attended High School overseas and earned a GPA of approximately 3.4. He also played Quarterback on his school's football team. He earned a B.S. degree in engineering from a U.S. university in 1985. In 2001, he earned an MBA from a different U.S. university. His GPA in graduate school was 3.8.

In 1997, applicant was arrested and charged with Corporal Injury-Cohabitant. In exchange for attending a 90 day

program, which included an alcohol and anger management component, paying \$500.00 in court costs, and paying \$500.00 to a victims/witness emergency fund, the charge was dismissed (Exhibit 4).

In May 1999, applicant was arrested and charged with Battery Against Spouse or Cohabitant. In July 1999, a Protective Order was filed against applicant. In September 1999, he was ordered to complete eight anger management classes and donate \$300.00 to a victims/witness emergency fund. In December 1999, the case was dismissed and the Protective Order was terminated (Exhibits 5 and 6).

In his response to the SOR, applicant, after discussing the two aforementioned incidents of domestic violence, stated, "There is no previous or subsequent history of like behavior or similar offenses of any nature." In fact, approximately two weeks before the first arrest, there was a similar incident, although applicant was not arrested (TR at 77; Exhibit 3).

The foregoing incidents involved the same woman who was living with applicant in his house. They "parted ways" in 1999. She has since married and moved to a different State (Exhibit 2). Applicant is remorseful and embarrassed over the incidents (TR at 36).

In 2000, applicant allegedly bumped his vehicle into another vehicle. He talked with the female driver of the other car, and they agreed there was little or no damage done and "there wasn't going to be any further action" (TR at 64). No information was exchanged (TR at 81). During their conversation, applicant became enamored with the woman. After he left the scene, he called his insurance company ostensibly to report the "accident." His real purpose was to give the insurance company the woman's license plate number so he could obtain her phone number. He wanted to contact the woman because he was interested in her, not because of any accident-related issues. (u) After applicant obtained the phone number from the insurance company, he called and left a message for the woman on her answering machine. His call was returned by the woman's boyfriend, who advised applicant not to call again. Although applicant never tried to contact the woman again, an incident and/or crime report was prepared by the local police department regarding applicant's alleged Unauthorized Use of Personal Identifying Information. No charges were ever filed against applicant. He didn't learn of the existence of this report until he met with a DSS investigator in 2002.

Applicant completed an SCA in July 2001 (Exhibit 1). Question 26 of said SCA asked applicant if he had been arrested for, charged with, or convicted of any offenses during the previous seven years. (He was allowed to exclude any arrests, charges or convictions that he disclosed in response to previous questions on the SCA). Applicant responded "no." His response was false because he had been arrested twice within the previous seven years, and he had not disclosed these arrests in response to any previous question on the SCA.

Applicant admits that his response was false, but denies that he intentionally provided it. He maintains that he misinterpreted it. He testified that he has "struggled with this for the better part of three years now to figure out how - how [he] got this question wrong" (TR at 69-70). He speculates that he might have read the question to read arrested, charged **and** convicted, which would, of course, have made his "no" response correct (TR at 87-88).

Applicant offered into evidence a Neuropsychological Consultation Report (Exhibit B). This report, prepared by a psychologist, was based on an 18 hour clinical neuropsychological examination of applicant, a review of the SCA, and a comprehensive neuropsychological assessment. The purpose of the examination was "to determine if there were neurocognitive or other factors, which explained [applicant's] aberrant response to [Question] 26 on the [SCA]." I read the report in detail. In essence, the psychologist found that applicant has a developmental learning disability or disorder, compounded by a comorbid attention deficit disorder, which is complicated by his interpersonal style, which includes being psychologically naive and having a capricious, laissez-faire appreciation of what he considers minutiae. The psychologist opined that these findings (and other findings not specifically mentioned in this Decision) "are reasonable explanations substantiating [applicant's] explanation (i.e., he misinterpreted the question) for his aberrant response to [Question 26] on the [SCA]."

A personal friend of applicant appeared at the hearing. He is a CEO and President of a company. He has known applicant for ten years and described him as straightforward, direct, reliable, trustworthy, and "a real friend" (TR at 23-24). When asked by applicant's attorney if he ever had the opportunity "to call on [applicant] where reliability and trustworthiness would come into play . . .," the witness described a recent incident involving a DVD player. In short, the

witness and his wife spent months trying to hook up a DVD player, but were unable to do so. Applicant "drove all the way up [to the witnesses's house]," and after reviewing two different manuals and sets of instructions, completed the "really kind of difficult" installation (TR at 24, 28).

CONCLUSIONS

With respect to Guideline E, I have carefully considered all of the evidence presented, including Exhibit B. Based on this evidence, I conclude that applicant intentionally provided false, material information in response to Question 26 of the SCA.

Applicant's explanation that he somehow misinterpreted the question was not credible. His personal history is full of accomplishments which substantially undercut both his explanation and the conclusions reached by the psychologist. His High School and Graduate school GPA, incredibly successful career in a challenging field - where attention to detail is extremely important, his correct responses to all other questions on the SCA, and his installation of his friend's DVD system by reading two sets of manuals and instructions, something his friend could not do after two months of trying, are just some examples of applicant's accomplishments that belie his explanation. Further undercutting the credibility of applicant's explanation is his history of misrepresenting facts when he feels it is in his interests to do so. ⁽²⁾

This falsification of material facts on the SCA is extremely troubling. 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 or she nevertheless possesses the good judgment, reliability and trustworthiness required of clearance holders. Applicant's intentional falsification requires application of Disqualifying Condition E2.A5.1.2.2 (*the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire . . .*). No Mitigating Conditions apply. ⁽³⁾ Based on the foregoing, Guideline E is found against applicant.

With respect to Guideline J, the evidence establishes that applicant was arrested in 1997 and 1999 for Battery on his then girlfriend. Without minimizing seriousness of these incidents, they were essentially caused by an unhealthy relationship between two individuals, and both applicant and the woman were at fault. Because applicant has not been involved in any similar conduct involving any other person, and his relationship and contact with this woman ended in 1999, I conclude that these incidents are mitigated. However, as noted above, applicant intentionally provided false, material information in response to Question 26 on the SCA he executed in July 2001. This conduct, which constitutes a felony under 18 U.S.C. 1001, requires application of Disqualifying Condition E2.A10.1.2.2 (*a single serious crime or multiple lesser offenses*). The recency and seriousness of applicant's felonious conduct precludes application of any mitigating factors under Guideline J, and requires a denial of his security clearance request.

FORMAL FINDINGS

PARAGRAPH 1: AGAINST THE APPLICANT

Subparagraphs 1a, 1b and 1c found for applicant

Subparagraph 1d found against applicant

PARAGRAPH 2: 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.

Joseph Testan

Administrative Judge

1. Applicant admitted that had the other driver been a 6' 9", 600 pound man, he would not have called his insurance company to report the accident (TR at 83).
2. For example, (1) his untrue statement in his SOR Response that, with respect to his two arrests, there were no other incidents "of like behavior or similar offenses of any nature," and (2) his misrepresentation to his insurance company regarding the reason he was reporting the "accident" and why he wanted the other driver's personal information.
3. Mitigating Condition E2.A5.1.3.2 doesn't apply because the falsification was recent. Mitigating Condition E2.A5.1.3.3 doesn't apply because there is no credible evidence that applicant made a good-faith effort to correct his falsifications before being confronted with the facts.