

DATE: July 28, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-30368

DECISION OF ADMINISTRATIVE JUDGE

CAROL G. RICCIARDELLO

APPEARANCES

FOR GOVERNMENT

Candace Le' i, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 57 years old and has worked for his present employer, a federal contractor, since 1996. Applicant was arrested in 1985 and 1987 for alcohol related offenses and he has successfully mitigated those issues. Applicant was arrested on two occasions for shoplifting. Applicant failed to list his last shoplifting offense on his security clearance application and then made contradictory statements as to the reason. Applicant failed to mitigate the security concerns regarding his criminal conduct and personal conduct. Clearance is denied.

STATEMENT OF CASE

On June 30, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance. (u) The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline J, criminal conduct, and Guideline E, personal conduct considerations. It is noted that the last name on the SOR incorrectly lists Applicant's name, however the social security number is consistent with the Applicant's and all other documents, including Applicant's own signature which correctly identifies him.

In a statement, dated September 14, 2004, and sworn to September 17, 2004, Applicant responded to the SOR allegations, admitting the allegations in Subparagraphs 2.a thru 2.d and denying the allegations in Subparagraph 1.a. and 2.e., and provided an explanation in extenuation and mitigation. Applicant provided an additional sworn statement dated September 14, 2004, and sworn to on October 5, 2004, and elected to have his case decided on the written record. Department Counsel submitted the government's case on March 24, 2005. A file of relevant material (FORM) was received by Applicant on April 5, 2005. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant submitted an additional statement dated May 26, 2005. This date is in obvious error because the case was assigned to me on May 10, 2005. Department Counsel had no objection to Applicant's document and the notation in the file is dated April 29, 2005. It is likely that Applicant's letter should have been dated April vice May 26, 2005.

FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and statements, I make the following findings of fact:

Applicant is 57 years old, married and has worked for his present employer, a federal contractor, since June 2000. Prior to then he had been employed by other federal contractors since 1996. Applicant served in the military from 1967-1987 and retired as an E7.

Applicant was arrested in 1985 and charged with driving under the influence of intoxicating liquors and/or drugs. Applicant admitted this occurred, denying some of the facts, but claimed it was administratively disposed of by the Army. Applicant was arrested in 1987 and charged with driving under the influence. Applicant was found guilty and sentenced to 90 days confinement, ordered to perform 120 hours of community service, attend an Alcohol and Drug Safety Action Program, fined \$1,000, and had his driver's license suspended for one year. No information was provided whether Applicant completed the sentence.

Applicant was arrested on June 4, 1997 and charged with shoplifting. He was found guilty and fined \$760 or serve 30 days in jail. No information was provided whether Applicant completed this sentence. Applicant admitted he walked out of a department store with a basketful of merchandise without paying for it. Applicant stated "I did it because I thought I could get away with it. I was wrong and I apologize for my shortcomings."⁽²⁾

Applicant completed out public trust position applications (SF 85) on February 23, 2000, and April 5, 2000. On both documents, Question 16 (*In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s)?*) was answered in the affirmative by Applicant. He listed the offense of "trespassing, monetary fine" in May 1997 (no specific day was provided).

Applicant was arrested on April 15, 2000, and charged with shoplifting. He was found guilty and fined \$500. Applicant claimed he was with his wife who shoplifted merchandise from a department store and they both were arrested, charged, and found guilty.⁽³⁾ He claims he did not know she was shoplifting, however he states "My wife and I have learned our lessons the hard way. Our shoplifting arrests were very humiliating to us. And my confessions during this interview were very embarrassing for me. I will never shoplift again because the minimal gain can never be worth jeopardizing my career. I know if I were arrested again I would certainly lose my security clearance and job."⁽⁴⁾

Applicant completed a security clearance application (SF 86) on April 29, 2002. Applicant answered "Yes" to Question 26 (*In the last 7 years, have you been arrested for, charged with, or convicted or any offenses(s) not listed in modules 212, 22,23,24, or 25? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.) For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607.*) Applicant listed an offense of shoplifting dated August 8, 1999. Applicant did not list the shoplifting offense of April 2000, his shoplifting offense from 1997, nor the trespassing offense he previously listed.

The SF 85 applications where Applicant listed he was arrested for trespassing in 1997 are inconsistent with his SF 86 application where he only lists one shoplifting arrest in 1999, no shoplifting arrest in 2000 and no trespassing arrest in 1997.

Applicant stated "I did not list my fifth and last arrest (the April 2000 shoplifting arrest) because I believed the police records had been expunged. I did not want to volunteer unfavorable

information that might jeopardize my security clearance. I hoped the arrest would not be disclosed during the course of the investigation."⁽⁵⁾

Applicant later claimed in his answer to the SOR, that when he completed his SF 86 in 2002 he believed he had previously submitted other "ESQL[s]"⁽⁶⁾ for a different company and the resubmission of the ESQL with his current

company was in addition to his previous submissions he believed were currently on file with his new company.⁽⁷⁾ Applicant stated "I deny I deliberately failed to list the shoplifting charge of April 15, 2000. During the previous 4 years I had submitted the ESQL for a different company other than [Company A], it was my belief that resubmission of the ESQL with [Company A] was in fact and addition to the previous ESQL that your organization currently had on file. I thought I cleared this matter up with your investigator, because he had in his possession both ESQL filings and was at a loss as to this and asked if it was one offense or two, I explained to him it was two separate offenses, but I believed that one was for trespass not shoplifting."⁽⁸⁾ This statement contradicts Applicant's other statement as to why he failed to list the last shoplifting arrest because he did not want to jeopardize his security clearance.

Applicant claims he told the Defense Security Service (DSS) special agent there were two offenses, one for trespassing and one for shoplifting and he had a bad memory about the dates.⁽⁹⁾

Applicant claims he is a "non-practicing alcoholic" and has remained so since 1987.⁽¹⁰⁾ Applicant stated "I did omit pertinent facts and/or significant information in my SCA. I apologize for that error in judgment."⁽¹¹⁾

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Considering the evidence as a whole, Guideline J, criminal conduct, and Guideline E, personal conduct considerations, with their respective DC and MC, apply in this case. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽¹²⁾ The government has the burden of proving controverted facts.⁽¹³⁾ The burden of proof is something less than a preponderance of evidence.⁽¹⁴⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against

him.⁽¹⁵⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁶⁾

No one has a right to a security clearance⁽¹⁷⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁸⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽¹⁹⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽²⁰⁾ It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon consideration of the evidence, I find the following adjudicative guidelines most pertinent to the evaluation of the facts in this case:

Guideline J - Criminal Conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling

classified information.

Guideline E-Personal Conduct is a security concern when an individual's conduct involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, pertaining to the adjudicative guideline are set forth and discussed in the conclusions below.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a *prima facie* case for disqualification under Guideline J and Guideline E.

Based on all the evidence Criminal Conduct Disqualifying Condition (CC DC) AE.A10.1.2.2 (*A single serious crime or multiple lesser charges*) applies. Applicant was arrested for alcohol related driving offenses in 1985 and 1987. Applicant was also arrested for shoplifting in 1997 and 2000.

I have considered all the mitigating conditions and specifically considered Criminal Conduct Mitigating Condition (CC MC) E2.10.1.2.1 (*The conduct was not recent*); CC MC E2.10.1.2.2 (*The crime was an isolated incident*); CC MC E2.10.1.2.4 (*The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*); and CC MC E2.10.1.3.6 (*There is clear evidence of successful rehabilitation.*). I conclude with regards to the two alcohol related offenses that the conduct took place 18-20 years ago and Applicant is a "non-practicing alcoholic". Although that term is somewhat ambiguous, I conclude it means that Applicant no longer drinks alcohol. These offenses are not recent and there is clear evidence Applicant no longer drinks. Therefore, with regards to the alcohol related offenses, Applicant has mitigated the concerns.

With regard to the shoplifting offense in 1997, Applicant admitted he was wrong and apologized for his shortcomings. However, he was again arrested in 2000 for shoplifting. The boldness of walking out of store with a basketful of merchandise, because he thought he could get away with it, is a great concern. Regarding his second shoplifting arrest, Applicant claims he was caught with his wife who was actually shoplifting. However, in his statement Applicant says he and his wife have learned "their" lesson and he will not shoplift again because the minimal gain can never be worth jeopardizing his career. Applicant seems to be balancing the gain vice the risk and does not seem to grasp that his act was a violation of the law. The fact Applicant proceeded to be involved in a second shoplifting incident a couple of years after his first arrest for shoplifting leads me to believe he is not rehabilitated. Applicant's behavior is too unpredictable to determine if there is a likelihood violations may occur in the future. These incidents can not be characterized as isolated. The second incident occurred on April 15, 2000, very shortly after Applicant had filled out his SF 85 on April 5, 2000. He should have been on notice that criminal activity was a concern. Applicant has failed to mitigate the security concerns regarding his criminal conduct related to his shoplifting offenses. Applicant's criminal conduct regarding the allegation he falsified his SF 86 is addressed below.

Based on all the evidence, Personal Conduct Disqualifying Condition (PE DC) E2.A5.1.2 (*The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities*), PC DC E2.A5.1.2.4 (*Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail*), and PE DC E2.A5.1.2.5 (*A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency*) apply in this case.

Applicant admitted he did not provide information about his April 2000 shoplifting arrest because he thought it was expunged. Question 26 is quite clear and unambiguous that "any" offense, regardless if it was sealed, should be listed. There was no evidence provided that in any way indicated Applicant's offense was expunged. Applicant also stated he failed to provide the information because he did not want to volunteer unfavorable information that would jeopardize his

security clearance, and he hoped it would not be disclosed during the course of the investigation. Applicant deliberately falsified and concealed information. Later in his sworn answer, Applicant claims there was confusion concerning listing his offenses. Clearly that is not the case. Applicant admitted he was arrested and convicted of shoplifting in 1997, but later listed it as trespassing. Applicant provided no documents to verify he was charged with trespassing. By his own admission he had shoplifted in 1997.

Applicant knew he had been arrested and convicted of shoplifting in April 2000. He admitted he was embarrassed and humiliated about it and he intentionally did not want the investigators to know. This is confirmed by his own statement of July 12, 2002. However, in his answer to the SOR he alleges he thought his latest SF 86 was included with his prior "ESQLs" and this was merely a resubmission. There is no evidence on the form or in the record that Applicant was advised he did not have to fill out his SF 86 completely and honestly with all the information requested, or this form was an addendum to others. Applicant's explanation is misguided because the two SF 85s that he submitted are dated prior to his offense of April 2000. Therefore, at a minimum he had an obligation to update and make current his SF 86. In addition, prior to his answer, Applicant already admitted he did not want to volunteer unfavorable information and hoped it would not be disclosed. It is disingenuous to later claim the investigator was confused. Applicant perhaps exacerbated any confusion that might have occurred by referring to his first shoplifting offense as trespassing. Applicant deliberately failed to list his offenses and provided inconsistent explanations for his reasons.

I have considered all the mitigating conditions and specifically considered Personal Conduct Mitigating Condition (PC MC) E2.A5.1.3.2 (*The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*), PC MC E2.A5.1.3.3 (*The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*), and PC MC E2.A5.1.3.5 (*The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*). I conclude none of the mitigating conditions apply. Applicant falsified his SF 86 and later contradicted himself in his

answer to the SOR. Applicant admitted he is embarrassed by his past conduct so failed to divulge it. This is the type of conduct that could make Applicant vulnerable to exploitation.

In all adjudications, the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I have considered the whole person and I find Applicant has failed to mitigate the security concerns regarding his criminal conduct and personal conduct. Applicant's concealment and disregard for the truth is a grave and serious concern that reflects poorly on his character and judgment. Therefore, I am persuaded by the totality of the evidence in this case, that it is not clearly consistent with the national interest to grant Applicant a security clearance. Accordingly, Guidelines J and E are decided against Applicant.

FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

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

Subparagraph 1.a. Against the Applicant

Paragraph 2.: Criminal Conduct (Guideline J) AGAINST THE APPLICANT

Subparagraph 2.a. For the Applicant

Subparagraph 2.b. For the Applicant

Subparagraph 2.c. Against the Applicant

Subparagraph 2.d. Against the Applicant

Subparagraph 2.e. 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. Clearance is denied.

Carol. G. Ricciardello

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Item 9 at 3.
3. *Id.*
4. *Id.*
5. *Id.* at 2.
6. Presumably Applicant is referring to the Electronic Personnel Security Questionnaire that is abbreviated as EPSQ.
7. Answer to SOR dated September 14, 2004.
8. Item 4.
9. *Id.*
10. *Id.*
11. Item 9 at 2.
12. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
13. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, ¶ E3.1.14.
14. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
15. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, ¶ E3.1.15.
16. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, ¶ E3.1.15.
17. *Egan*, 484 U.S. at 531.
18. *Id.*
19. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
20. Executive Order 10865 § 7.