

DATE: June 29, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-31149

DECISION OF ADMINISTRATIVE JUDGE

CAROL G. RICCIARDELLO

APPEARANCES

FOR GOVERNMENT

Rita O'Brien, Esq., Department Counsel

FOR APPLICANT

Joseph Johnson, Esq.

SYNOPSIS

Applicant is a 36-year-old truck driver employed for the last four years by a defense contractor. Applicant was arrested for some minor criminal offenses in 1996 and 1997 that he successfully mitigated. However, Applicant failed to divulge these arrests when he completed his security clearance application and later in sworn statements. Applicant failed to mitigate the security concerns arising from his personal conduct and his violation of Title 18 United States Code Section 1001. Clearance is denied.

STATEMENT OF CASE

On August 19, 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.

In a sworn statement, dated September 27, 2004, Applicant responded to the SOR allegations, and requested a hearing. In his SOR response, Applicant admitted some of the allegations in the SOR and denied others. Applicant filed an amended answer to the SOR on January 24, 2005, whereby he admitted the allegations in subparagraphs 1.a. and 1.b. of the SOR, but provided an explanation. Applicant also admitted the allegations in subparagraphs 2.a., 2.b., and 2.c.

The case was assigned to me on March 23, 2005. A notice of hearing was issued on April 1, 2005, scheduling the hearing for May 11, 2005. The hearing was conducted as scheduled. The government submitted six exhibits that were marked as Government Exhibits (GE) 1-6, and were admitted into the record without objection. The Applicant testified on his own behalf, and had one witness testify for him. Applicant submitted one exhibit that was marked as Applicant's Exhibit (AE) A and was admitted into the record without objection. The transcript was received on June 21, 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 testimony, I make the following findings of fact:

Applicant is a 36-year-old married man who is employed by a federal contractor as a truck driver. Applicant has worked as a truck driver for seven years and for his current employer for four years. Prior to working as a truck driver, he worked on the family farm. Applicant did not graduate from high school and does not have an equivalency diploma. Applicant has dyslexia that was diagnosed in high school. In June 1998, Applicant received a diagnosis from the Department of Health and Human Services of State A, advising that Applicant's dyslexia was no longer a disabling condition.

Applicant was arrested on March 27, 1992, in State A and charged with shoplifting. On August 20, 1992, the case was dismissed. Applicant admits he shoplifted cigarettes and the incident did happen, but he did not remember the date.

Applicant was arrested on December 11, 1996, in State A, and charged with shoplifting cigarettes from a grocery store. On March 6, 1997, Applicant pled guilty and was sentenced to three days in jail and was fined \$125.00. His jail time and fine were suspended on a conditional release for 24 months. Applicant claims he does not remember the court hearing in this case.

It is alleged that Applicant was charged on August 13, 1997, in State B, with a misdemeanor offense, Fighting in Public. A man with the same name and different middle name was actually the

offender in this case and it was incorrectly placed on Applicant's record. Applicant was not responsible for the offense listed in allegation 1.a. (2).

Applicant was charged on August 20, 1997, in State B, with False Report of a Crime. He was found guilty and the imposition of the sentence was suspended. Applicant was granted a conditional release for 18 months and ordered to pay a \$100.00 fine.

Applicant completed a security clearance questionnaire on November 30, 2001. Applicant answered "No" to Question 23 f: *In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in response to a, b, c, d, or e above? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.* Applicant had been arrested at least three times, on August 20, 1997, December 11, 1996 and March 27, 1992. Applicant was not required to divulge the 1992 arrest because it was past the seven year limit.

Applicant made a sworn statement to a Special Agent of the Defense Security Service (DSS) on February 4, 2002. In that statement, Applicant claimed he had never been arrested, whereas he had been arrested. Applicant admitted he did not disclose the shoplifting charge of December 11, 1996, and it was a stupid thing to do. He claimed he did not remember the second shoplifting offense, so therefore he did not disclose it. Applicant never divulged to the DSS agent during his interview and statements that he did not understand the question asking him about his arrest record. Applicant did not volunteer the information about his arrests until specifically asked by the DSS agent. Applicant was not sure why he said he had never been arrested.

Applicant made a second sworn statement on January 22, 2004, and claimed he had admitted in his February 4, 2002 sworn statement to his arrest in October 1997 for filing a false report of a crime. Applicant's statement of February 4, 2002, does not mention this charge and only addresses one shoplifting charge in 1990. Also in his February 4, 2002 statement, Applicant states, "Concerning my arrest record. Although I have never been arrested, I was involved in an incident in Feb 97 in [State A]." Applicant also states "I have had no further adverse involvement with any law enforcement agency with the exception of minor traffic violations. I did not list this incident on my PSQ because I did not feel that it applied since I was not formally arrested or charged with any offense." Applicant is referring to a different incident that is not part of the allegations in the SOR.

Applicant made conflicting statements about whether he believed he had actually been arrested regarding the incidents alleged. Applicant believed in order to be arrested he had to be handcuffed. However, Applicant admitted he was handcuffed at least two times by the police and believed he was arrested, but he did not divulge the incidents. When questioned Applicant would initially not remember the incidents or the facts surrounding them. However, when pressed

Applicant would vaguely remember part of the incident, but would minimize or attempt to mitigate it with other facts. Applicant would claim not remembering going to court on an incident, but then would recall what the judge had told him regarding the offense. Applicant's testimony regarding his arrests and failure to accurately and timely disclose them was not credible.

Applicant received social security disability benefits from 1991 to 1997, because he was unable to work. In 1997, Applicant returned to work and contacted the Social Security Administration (SSA) and advised them to stop the disability payments. Applicant was on the road during this period driving his truck. Applicant had his mail delivered to a friend who was suppose to forward it to Applicant. Applicant's friend did not forward his mail. Applicant was not receiving his mail regularly. Applicant continued to receive social security disability benefits and was overpaid approximately \$8,000. When Applicant learned of the overpayment, he set up a payment plan to repay the money. Applicant had difficulty remembering to make the payments so the payment plan was stopped. Applicant worked with the SSA and his tax return refunds were taken to repay the overpayment. The \$8,000 has been repaid.

Applicant's supervisor testified that he has had no problems with Applicant. Applicant is always timely on his delivery dates and he has not received any complaints about Applicant.

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, pertaining to criminal conduct, and Guideline E, pertaining to personal conduct, 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.⁽²⁾ The government has the burden of proving controverted facts.⁽³⁾ The burden of proof is something less than a preponderance of evidence.⁽⁴⁾ 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.⁽⁵⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁶⁾

No one has a right to a security clearance⁽⁷⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽⁸⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽⁹⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽¹⁰⁾ 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 all the evidence, I find the following adjudicative guidelines most pertinent to the evaluation of the facts in this case:

Guideline J - Criminal Conduct: A security concern exists 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: A security concern may exist 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 guidelines 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) E2.A10.1.2.1 (*Allegations or admissions of criminal conduct, regardless of whether the person was formally charged*); and CC DC E2.A10.1.2.2 (*A single serious crime or multiple lesser offenses*), apply in this case. Applicant was arrested on two occasions in 1996 to 1997. He was charged with shoplifting and filing a false report of a crime. Applicant pleaded guilty to the charges.

I have considered all the mitigating conditions in the case and specifically considered Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1 (*The criminal behavior was not recent*); CC MC E2.A10.1.3.2 (*The crime was an isolated incident*); and CC MC E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*), and conclude they all apply in this case.

Applicant's behavior happened in 1996 and 1997. The last offense occurred approximately eight years ago. Since that time he has not been in any trouble. He is now married and appears to have settled down. Although there are three incidents alleged, due to their minor nature and a five-year interval from the first incident to the second, and a one year interval from the second to third, I find these incidents were isolated. Applicant has been a steady driver for his employer and is focused on doing a good job. I find Applicant is successfully rehabilitated with regards to the three offenses alleged in subparagraphs 1.a. (1), and 1.a.(3) and 2.a.⁽¹¹⁾ I find the allegation in subparagraph 1.a.(2) pertains to a different person and is therefore not applicable in this case and is decided in favor of the Applicant. Applicant deliberately provided false information on his SF 86 and later in his sworn statements, which is a serious criminal offense and is a violation of federal law.⁽¹²⁾ Applicant has mitigated the criminal conduct concerns in subparagraph 2.a and 2.b., but failed to mitigate the concern as to subparagraph 2.c.

Based on all the evidence, Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.2 (*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*); and PC DC E2.A5.1.2.3 (*Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination*), apply in this case. Applicant falsely answered Question 23 f of his SF 86, indicating he had never been arrested in the last seven years, which was untrue. Applicant then made a statement to the DSS agent on February 4, 2002, and again claimed he had never been arrested, which was also untrue. Applicant also affirmatively stated "I have had no further adverse involvement with any law enforcement agency with the exception of minor traffic violations." Applicant was referring to a different incident that was not alleged in the SOR. Again Applicant failed to divulge his arrests. In his statement of January 22, 2004, Applicant admits to the arrest in October 1997, but again fails to divulge the other incident.

I have considered all the mitigating conditions in this case 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.A5.1.3.4 (*Omission of*

material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided), and conclude none apply. Applicant had three opportunities to provide accurate and truthful information prior to the hearing. Each time he would divulge some information, but never all of it. While testifying, Applicant again, would go back and forth about what he remembered and did not remember and whether he thought he had been arrested. I find Applicant was not credible when testifying about why he did not reveal his prior arrests. I find Applicant's omissions were intentional and meant to be misleading. Applicant has failed to mitigate the personal conduct concerns in subparagraphs 1.a and 1.b. by failing to disclose this information.

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 considered Applicant's credibility, appearance and demeanor while testifying. I considered all the evidence provided. I also considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. Applicant has failed to mitigate all the concerns arising from his criminal conduct and personal conduct. 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.

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

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. For 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

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. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

3. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, ¶ E3.1.14.
4. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
5. ISCR Case No. 94-1075 (August 10, 1995) at pp.3-4; Directive, Enclosure 3, ¶ E3.1.15.
6. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, ¶ E3.1.15
7. *Egan*, 484 U.S. at 531.
8. *Id.*
9. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
10. Executive Order 10865 § 7.
11. Subparagraph 2.b. includes the subparagraphs listed in 1.a.
12. 18 U.S.C. § 1001.