

DATE: September 21, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-31601

DECISION OF ADMINISTRATIVE JUDGE

CAROL G. RICCIARDELLO

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 60 years old and works for a federal contractor. Applicant has a long criminal history of fraud dealing with bad checks. Applicant also had a driving under the influence charge. Applicant falsified information on his security clearance application when he failed to divulge his DUI, delinquent debts, garnishments, and a tax lien. Applicant failed to mitigate the security concerns regarding his criminal conduct and personal conduct. Clearance is denied.

STATEMENT OF CASE

On January 23, 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.⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline J, criminal conduct, and Guideline E, personal conduct.

In statements dated January 28, 2004, and April 18, 2004, Applicant responded to the SOR allegations, admitting all of them. Applicant elected to have his case decided on the written record. A file of relevant material (FORM) was submitted by Department Counsel on November 18, 2004, and received by Applicant on December 8, 2004. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not object to the FORM and did not provide additional material. The case was originally assigned to another judge, but due to a conflict was reassigned to me on September 6, 2005. The decision in this case was delayed due to a moratorium on cases where Title 10 U.S.C. 986 (the Smith Amendment) applied. The case was held in abeyance until the moratorium was lifted. Department Counsel conceded that the Smith Amendment did not apply because, although Applicant was sentenced to more than a year in jail, he did not serve more than a year. Department Counsel moved to withdraw the allegation in subparagraph 1.j. alleging the Smith Amendment. Applicant did not comment or object and I granted Department Counsel's motion.

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 60 years old and has worked as a custodian for a federal contractor since 1980. It appears Applicant also works a second job in the same capacity for a non-federal contractor. Applicant has been married since 1968 and has two grown children.

Applicant was arrested on April 28, 1963, and charged with Permitting Unlicensed Person to Drive. He pled guilty and was sentenced to 30 days of incarceration or pay a fine of \$20.00. Applicant paid the fine.

Applicant was arrested on December 13, 1963, and charged with Attempted Armed Robbery by Knife. The charges were never prosecuted.

Applicant was arrested on May 1, 1969, and charged with Fraud Check \$30.00. He paid the check and court costs. Applicant was arrested on January 15, 1975, and charged with Fraud-Bad Check. No information was provided as to the specific disposition of this charge.

Applicant was arrested on March 24, 1979, and charged with Fraud-Bad Check. He paid court costs and the case was dismissed.

Applicant was arrested on June 3, 1984, and charged with Driving Under the Influence (DUI). He pled nolo contendere and was sentenced to 40 days in jail or pay a \$400.00 fine. Applicant paid the fine and attended traffic school.

Applicant was arrested on December 3, 1992, and charged with six counts of Deposit Account Fraud-Bad Checks. He pled guilty and was sentenced to 36 months of incarceration that was suspended, and was ordered to pay \$710.00 in fines and \$284.00 in restitution.

Applicant was arrested on December 17, 1992, and charged with three counts of Deposit Account Fraud-Bad Checks. He pled guilty and was sentenced to 24 months of incarceration (suspended), and was ordered to pay \$360.00 in fines and \$130.00 in restitution.

Applicant was again arrested on June 1, 1996, and charged with Violation of Probation-Bad Checks. The charge was dismissed. Applicant's explanation for his bad checks is that he would think his paycheck was posted at the bank, but actually the funds were not yet available and he would write checks that would get returned from the bank.⁽²⁾ He admitted that sometimes he would get them paid off and sometimes he would not and warrants would be issued.⁽³⁾

On May 20, 2002, Applicant completed his security clearance application (SF 86). Question 24, inquired about his police record and whether he had ever been charged with or convicted of any offense related to alcohol or drug offenses. He answered "No." Applicant did not report that he had pled nolo contendere to a DUI charge in 1984. Applicant also answered "No" to Question 26, that asked, regardless of whether the record had been sealed, if in the last seven years he had been arrested for, charged with, or convicted of any offenses not listed in previous questions. Applicant did not report his last arrest in June 1996, which occurred within the seven year window.

In Question 34, Applicant was asked if in the past seven years if he had had his wages garnished for any reason. Applicant answered "No" when in fact he did have his wages garnished by two different entities. In Question 26, Applicant was asked if in the past seven years he had a lien placed against his property for failing to pay taxes or other debts. Applicant responded "No," when in fact there was a lien placed against his property for failing to pay state taxes. The lien was for \$2,428.00 for taxes, penalties and interest. The notice of the state tax lien was filed against Applicant in August 1995 for non-payment of his state tax debt.

In Question 38, Applicant was asked if in the past seven years he had been delinquent over 180 days on any debt. In Question 39, Applicant was asked if he was currently over 90 days delinquent on any debt. Applicant answered "No" to both questions when in fact he was over 180 days delinquent on debts to several creditors. Applicant admitted the delinquent debts listed below. The chart also lists the debts' status.

Debt	Nature & Amount	Status	Record
SOR 2.e. (1)	Bank, \$456.00 charged off, bad debt, December 1996.	Claims included in Chapter 7 Bankruptcy. No documents to verify.	Item 7 at 7.
SOR 2.e. (2)	Telephone, \$740.00, charged off, bad debt, June 1997.	Not paid.	Item 7 at 7.
SOR 2.e. (3)	Finance Company, \$542.00, charged off, bad debt, November 1999.	Claims included in Chapter 7 Bankruptcy. No documents to verify.	Item 7 at 7.
SOR 2.e. (4)	Dentist, \$770.00, collection, in November 2000.	Not paid.	Item 7 at 6.
SOR 2.e. (5)	Telephone, \$196.00, collection, September 2001.	Not paid.	Item 7 at 7.
SOR 2.e. (6)	Car loan, \$5,077.00, charged off, bad debt, January 2002.	Claims resolved and paid. No proof provided.	Item 7 at 7.

Although Applicant later admitted to his criminal arrests, tax liens, and garnishments in his statement, he failed to disclose this information on his SF 86 as required.⁽⁴⁾ Applicant also admitted in his answer and statement that he had debts that were delinquent over 90 and 180 days, but failed to disclose this information on his SF 86 as required.

Applicant claimed the reason he failed to provide the requested information on his SF 86 was because he was rushed for time. Applicant claimed he was under the assumption that the report (SF 86) was for seven years of his life and he did not understand the questions included his entire life.⁽⁵⁾

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.⁽⁶⁾ The government has the burden of proving controverted facts.⁽⁷⁾ The burden of proof is something less than a preponderance of evidence.⁽⁸⁾ 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.⁽⁹⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁰⁾

No one has a right to a security clearance⁽¹¹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹²⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽¹³⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽¹⁴⁾ 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) 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 charges*) apply. Applicant has a history of criminal arrests, charges, and convictions dating from 1963 through 1996.

I have considered all the mitigating conditions and especially 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 that all of Applicant's offenses took place minimally 9 years ago and are not recent. The offenses are obviously not isolated due to the frequency and repeated charges, in some situations, for the same offense, i.e. bad checks. Regarding Applicant's arrests/charges/convictions in SOR 1.a, 1.b, and 1.f I find they are mitigated by the passage of time. With regards to Applicant's offenses in SOR 1.c, 1.d, 1.e, 1.g, 1.h, and 1.i, I find there is a pattern of untrustworthy behavior. Although Applicant's last charge related to bad checks was in 1996, the fact is there is consistent fraudulent behavior starting in 1969 and going through 1996, a period of 26 years with intermittent involvement in this type of activity. Based on the incidents occurring in 1969, 1975, 1979, 1992, (two occasions that year) and 1996, there is no clear evidence that this activity will not happen again, especially considering that Applicant repeatedly would be arrested for bad checks after years of refraining from activity. There is no clear evidence of successful rehabilitation. I find Applicant has failed to mitigate the security concerns regarding his criminal conduct.

Based on all the evidence, Personal Conduct Disqualifying Condition (PC 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*), and PC 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 falsified his SF 86 by failing to disclose the requested information. The questions are clear. Applicant was aware of his DUI arrest and police record and failed to provide the information requested. Applicant knew he had delinquent debts, a tax lien, and garnishments, yet answered the questions falsely.

I have considered all the mitigating conditions and especially 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 by failing to divulge information requested on numerous questions. His actions were not an oversight as reflected by the numerous questions in which he gave false information. Applicant's actions in falsifying his SF 86 were deliberate and intentional, and although he eventually provided correct information there is no evidence to show he did so promptly before being confronted with the fact and of his own accord. Applicant has provided no information to show he has reduced his vulnerability to coercion or exploitation. I find none of the mitigating conditions apply under Guideline E and it is decided against Applicant.

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 fraud/bad check offenses Applicant was arrested, charged, or convicted of, when considering the whole person. These offenses show a pattern of untrustworthiness along with his deliberate falsification of his SF 86. I find Applicant has a history of untrustworthy behavior and 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 Guideline 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: Criminal Conduct (Guideline J) AGAINST THE APPLICANT

Subparagraph 1.a. For the Applicant

Subparagraph 1.b. For the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. Against the Applicant

Subparagraph 1.e. Against the Applicant

Subparagraph 1.f. For the Applicant

Subparagraph 1.g. Against the Applicant

Subparagraph 1.h. Against the Applicant

Subparagraph 1.i. Against the Applicant

Paragraph 2: Personal Conduct (Guideline E) AGAINST THE APPLICANT

Subparagraph 2.a. Against the Applicant

Subparagraph 2.b. Against 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 7 at 3.

3. *Id.*

4. Item 3 and 7.

5. Item 3.

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

7. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, ¶ E3.1.14.

8. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

9. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, ¶ E3.1.15.

10. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, ¶ E3.1.15.

11. *Egan*, 484 U.S. at 531.

12. *Id.*

13. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.

14. Executive Order 10865 § 7.