

KEYWORD: Criminal Conduct

DIGEST: Applicant is 27 years old. He works for a defense contractor and at a national home improvement company's local store to support his wife and two children. Applicant had an arrest as a juvenile for putting toilet paper on a neighbor's property, non-judicial punishment in the Navy in 1999 for failing to tag properly a valve in a submarine, and a Special Court-Martial conviction for theft from the submarine of a bell. Applicant mitigated the Criminal Conduct security concerns. Clearance is granted.

CASENO: 02-32056.h1

DATE: 09/27/2004

DATE: September 27, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-32056

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 27 years old. He works for a defense contractor and at a national home improvement company's local store to support his wife and two children. Applicant had an arrest as a juvenile for putting toilet paper on a neighbor's property, non-judicial punishment in the Navy in 1999 for failing to tag properly a valve in a submarine, and a Special Court-Martial conviction for theft from the submarine of a bell. Applicant mitigated the Criminal Conduct security concerns. Clearance is granted.

STATEMENT OF THE CASE

On February 3, 2004, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons under the personnel security Guideline J (Criminal Conduct) 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. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked.

In a signed and sworn statement, dated February 26, 2004, Applicant responded to the allegations set forth in the SOR. He requested his case be decided on the written record, in lieu of a hearing. Applicant submitted 13 character statements and letters of recommendation, and two exhibits with his Answer.

On July 15, 2004, Department Counsel submitted the Department's written case. A complete copy of the file of relevant material (FORM) [\(1\)](#) was provided to the Applicant, and he was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. He submitted an additional sworn statement and supporting

documentation on August 4, 2004. The case was assigned to me August 13, 2004.

FINDINGS OF FACT

Applicant admitted all of the allegations contained in subparagraph 1.a. and 1.b. of the SOR, and denied some of the allegations in subparagraph 1.c. Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is 27 years old, married and the father of two young children. He works for a defense contractor as an electronics technician/maintenance worker. He also has a second job in the receiving department of the local outlet of a nationwide home improvement company. (Answer; Response; Item 2)

Applicant was arrested in 1992 in his hometown at the age of 15 for trespassing and destruction of property. Applicant had strewn toilet paper over a neighbors trees and landscaping. The charges were later dismissed. (Answer in Item 2)

Applicant joined the U.S. Navy and served on submarines. His term of service was from 1995 until 2000, when he was administratively discharged with a general discharge certificate. During his term of service Applicant attempted to obtain a commission through the Reserve Officer Training Corps program, but his application package was lost in transmission. During this time period, in 1998 or 1999, Applicant's wife became pregnant with their first child and Applicant decided not to reenlist so he could spend more time with his family. In August 1999, Applicant failed to properly tag a valve on the submarine to which he was assigned during the preparation period for a voyage. The valve was tagged as being in one position but it was actually in the opposite position. For this mistake and inattention to duty, Applicant received non-judicial punishment under the Uniform Code of Military Justice (UCMJ). Applicant was fined \$200 and received a suspended reduction in grade. (Items 2 and 6; Response)

In 2000, Applicant was court-martialed at a Special Court-Martial on two charges under the UCMJ, the first charge for a statement made with the intent to deceive, and the second charge of theft of military property. Applicant took carved wooden dolphins and the submarine's bell as he was leaving the ship one night as it was about to deploy on a mission. Applicant admits the theft and that he did it to get back at his captain for the non-judicial punishment Applicant received in 1999. Applicant admits it was a foolish act. Applicant was acquitted of the intent to deceive charge and specification. Applicant was fined \$100, confined for five days in the brig, and reduced to pay grade E-1. His administrative discharge occurred after the court-martial. (Items 2, 6, 7 and 8; Response)

Applicant submitted 13 letters of recommendation and character statements with his Answer and three more statements of support from his employers and supervisor. Applicant's pastor submitted a letter confirming Applicant's charitable activities in the community and great participation in the church community. Applicant's Answer and Response contain his declarations that his past transgressions were mistakes that he will not repeat and he is contrite about these past actions. (Response and Item 2)

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 restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgement, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicted upon the applicant meeting the security guidelines contained in the Directive.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines that must be carefully considered according to the pertinent Guideline in making the overall common sense determination required.

Each adjudicative decision must also include an assessment of:

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation;
- (3) how recent and frequent the behavior was;
- (4) the individual'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 (See Directive, Section E2.2.1. of Enclosure 2).

Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

Initially, the Government must establish, by substantial evidence, that conditions exist 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. All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance.: ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Exec. Or. 12968 § 3.1(b).

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

Guideline J - Criminal Conduct

E2.A10.1.1. The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

E2.A10.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person the person was formally

charged;

E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

E2.A10.1.3. Conditions which could mitigate security concerns include:

E2.A10.1.3.1. The criminal behavior was not recent;

E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions above, I conclude the following with respect to each allegation set forth in the SOR:

With respect to Paragraph 1 and Guideline J, DC 1 and DC 2 apply. Applicant was arrested as a juvenile for a typical prank involving toilet paper on a neighbor's property. Later, in a one year time period from 1999 to 2000, while serving in the Navy, he received progressive military disciplinary action for two acts he committed, the first non-judicial and the second offense went to a criminal court proceeding. The last act was in 2000. Applicant has a federal court conviction with his Special Court-Martial conviction for theft. The Government proved its case of these allegations.

I find two Mitigating Conditions (MC) apply in this case. MC 1 applies because the last offense took place in 2000, four years ago. Applicant's juvenile offense even the Government concedes is "not of great significance". MC 6 applies because Applicant has settled down with his family, which now includes two children and two jobs Applicant has to work to support them. Applicant has not been in any criminal trouble since 2000, and working two jobs he would seem to have little time for any foolish or criminal actions. Applicant's two more serious offenses occurred in the Navy, the second offense when he seems to have had a "bad attitude" because of the previous non-judicial punishment and his desire to separate from the Navy and be with his family. That environment is now in the past, and given Applicant's commitment to his family and his involvement with work, his church, and the community, there is little likelihood of recurrence. I conclude this guideline for Applicant.

FORMAL FINDINGS

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline J: For Applicant

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

DECISION

In light of all the circumstances and facts presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Philip S. Howe

Administrative Judge

1. The Government submitted eight items in support of its contention.