

DATE: February 4, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-32168

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

This 50 year old security guard was involved in seven criminal/alcohol/domestic violence incidents between 1992 and October 2001. He also falsified his answer to Question 26 in his 2001 Security Clearance Application by intentionally omitting any mention of the two 1999 arrests. No mitigation has been established. Clearance is denied.

HISTORY OF THE CASE

On December 4, 2003, 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, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding required under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether a clearance should be granted, denied or revoked.

By a reply to the SOR that was dated January 6, 2004, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made by a DOHA Administrative Judge on the written record, i.e., without a hearing. Department Counsel issued a File of Relevant Material (FORM) on April 14, 2004. The Form instructed Applicant that any response to the FORM had to be submitted within 30 days of its receipt by Applicant. Any response was due by May 18, 2004. Applicant responded to the FORM on May 14, 2004. [\(1\)](#) The matter was assigned to me for resolution on August 23, 2004.

FINDINGS OF FACT

Applicant is a 50-year-old security officer for a defense contractor. The December 4, 2003 SOR contains seven allegations under Guideline J (Criminal Conduct) and two allegations under Guideline E (Personal Conduct). In his January 6, 2004 Response to the SOR, Applicant *denies* allegations 1.a. - 1.d., *admits* allegations 1.e. -1g, and *denies*

allegations 2.a and 2.b. He adds lengthy explanations. The admitted allegations are accepted and incorporated herein as Findings of Fact.

After considering the totality of the evidence derived from the FORM and its attachments, including Applicant's responses to the SOR and the FORM, I make the following additional FINDINGS OF FACT as to the status, past and present, of each SOR allegation:

Guideline J (Criminal Conduct)

Applicant was arrested, charged, and/or convicted of the following offenses on the date(s) cited:

1.a. - October 8, 2001 - charged with domestic violence. The charge was refiled on February 4, 2002, but the matter was dismissed when the victim failed to appear;

1.b. - August 27, 1999 - charged with domestic violence - 2nd offense. The state was not ready to proceed and the charges were dismissed;

1.c. - June 24, 1999 - charged with domestic violence. The charge was dismissed when the victim failed to appear.

1.d. - March 1, 1998 - charged with Driving Under the Influence (DUI) and Hit and Run. Applicant was found guilty and fined \$200, an Alcoholics Anonymous fee of \$70, and an \$60 analysis fee, for a total of \$370. He was also ordered to attend DUI school, attend a Victim Impact Panel; and spend two days in jail (credit for time served), the Hit and Run charge was dismissed;

1.e. - January 10, 1998 - charged with Domestic Violence. He attended court ordered counseling, and was to stay out of trouble for six months, after which the charges were dismissed;

1.f. - 1993 - Refused to take a Breath Test at an MP station in a military facility. He was placed on probation for three years. He had been consuming alcohol prior to the arrest (GX 3).

1.g. - 1992/1993 - volunteered for Stress Management and Domestic Violence classes at a Naval hospital.

Guideline E (Personal Conduct)

Applicant falsified material facts on a March 8, 2001 Security Clearance Application (SF 86) when he:

2.a. - answered "No" to Question **26 "Your Police Record - Other Offenses** In the last seven years," ++++++ and intentionally omitted any mention of the arrests in October 2001, August 1999, and June 1999 for domestic violence;"

2.b. - answered "No" to Question **38 "Your Financial Delinquencies - 180 Days** In the last seven years" and intentionally omitted any mention that, of July 2003, he was more than 180 days delinquent on a debt for \$180 reported in September 2000.

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POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing participation; (3) the frequency and recency of the conduct; (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 (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Because each security case presents its own facts and circumstances, it should not be assumed that the factors cited above exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable financial judgment and conduct. Because Applicant chose to have this matter decided without a hearing, all credibility determinations and findings of fact are necessarily based entirely on the contents of the FORM and applicant's response.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination based on the "whole person" concept required by the Directive, the Administrative Judge is not permitted to speculate, but can only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses, here based solely on the written record.

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted on to safeguard classified information and material twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an applicant for a security clearance, in his or her private life or connected to work, may be involved in conduct that demonstrates poor judgment, untrustworthiness, or unreliability. These concerns include consideration of the potential, as well as the actual, risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either by the Applicant's admissions or by other evidence) and proves conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the Applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the Applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended, at E2.2.2., "any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

CONCLUSIONS

Since this matter is being decided without a hearing, my evaluation is necessarily limited to the contents of the various documents that are found in the case file, the latest of which is Applicant's response to the FORM.

Guideline J (Criminal Conduct) - The concern stated in the SOR is that" a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness.

Applicant is 50 years old. The criminal conduct alleged in the SOR begins in 1992/1993, when he was about 38 and continues to at least October 2001, when he was about 47. I conclude from this that Applicant's questionable conduct was not the result of chronological immaturity.

Applicant admits only SOR 1.e. (domestic violence in 1998), 1.f. (refusal to take a breath test), and 1.g. (Attending Stress Management and Domestic Violence classes a Naval Hospital). Notwithstanding Applicant's denials, I conclude that all of the Guideline J allegations are supported by one or more of the Government's exhibits that are part of the FORM (GX 3 - 14). As to the domestic violence-related offenses, 1.a., 1.b., 1.c., 1.e., and 1.g., they form a pattern that has continued over eight or nine years. I have considered Applicant's explanations about his wife getting drunk and starting fights with him and then refusing to prosecute, which resulted in dismissals, "without prejudice" (GX 3, attachment 2), which means the charges could be refiled.

A reluctance to prosecute is not uncommon in domestic violence cases, and may be based on fear or a feeling of helplessness as well as by the defendant's innocence of the charge. Considering the record evidence surrounding five such arrests over a nine year period, I conclude it is more likely than not that Applicant committed the offenses alleged. Nothing he has said comes close to refuting the adverse evidence contained in the Government's exhibits.

The problems caused by Applicant's use of alcohol and his marriage to a woman he portrays as a habitual problem drinker are a longstanding and serious part of Applicant's life. According to the SF 86, Applicant has been married to his present wife since May 1997 and that he was married and divorced his first wife in 1980 and 1992, respectively (GX 6). Comparing his arrest record with these dates, it is apparent that the earliest arrests (1.f. and 1.g.) occurred near the end of his first marriage and that the later arrests (1.a. - 1.e.) started shortly after he remarried. This evidence suggests both an explanation for the absence of any problems with the law during the four to five year period between marriages and the risk that the problems might reemerge.

Security clearance cases are not decided on the standard of "beyond a reasonable doubt"

used in criminal cases or the "clear and convincing" or "preponderance of the evidence" used in civil cases. The standard in DOHA adjudication is whether it is clearly consistent with the national interest" for an applicant to have access to the nation's secrets

I note also Applicant's recent response to the FORM, in which Applicant admits for the first time that he has a serious problem with alcohol abuse and domestic violence and is seeking professional help through attendance at Alcoholics Anonymous meetings and a course in domestic violence. Applicant's recent conduct is praiseworthy and suggests he is on the right path to regaining his integrity. At the same time, he has no record of success in completing the course or sticking with AA. Experience and common sense dictate that, as a rule, the longer and more extensively a person is involved in a particular type of negative conduct, the longer the period of time must be without recurrence before an acceptable comfort level can be reached by the Government. My concern is whether Applicant's new and positive conduct is the result of a fundamental change of outlook and character and not simply a reaction to the pressure of the present adjudication. I conclude it is simply too soon to tell. In the year that must pass before Applicant can reapply for a clearance, he will have the opportunity to show that he can maintain the positive course he has just begun.

Disqualifying and Mitigating Factors:

Conditions that could raise a security concern and may be disqualifying include:

1. Any criminal conduct, regardless of whether the person had been charged or not;
2. A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

None that are applicable under the facts of this case.

Guideline E (Personal Conduct)

Disqualifying and Mitigating Factors:

Conditions that could raise a security concern and may be disqualifying include:

1. Any criminal conduct, regardless of whether the person had been charged or not;
2. A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

None that are applicable under the facts of this case.

Guideline E (Personal Conduct)

In his SF 86 he reported only the February/March 1998 DUI (Question 24 -alcohol-related arrests - have you ever been charged with or convicted of. . .) (cited in 1.d.) and the January 1998 Domestic Violence arrest cited in 1.e. (Question 26 Police Record - other offenses in the past seven years, have you been arrested for, charged with, or convicted of . . . other offenses).

2.a. - The criminal activity and record reflected by the entire evidence clearly shows that Applicant omitted a number of arrests that should have been reported in the SF 86. His main defense as to 1.a., 1.b., and 1.c., is that the victim failed to appear and declined to prosecute in each case. None of this has anything to do with the fact that he was arrested, which is enough to trigger the SF 86's reporting requirements. I note Applicant's statement in his response to the SOR that he simply misunderstood the question. Considering the simplicity of the question and all the other evidence of record, I cannot give much weight to his unsupported claim.

2.b. - I have considered the evidence presented by both sides. Based on his final explanation in the Response to the FORM, I am satisfied that we are talking about the same small debt, and that it is documented as having been paid off before Applicant completed the SF 86.

Disqualifying and Mitigating Factors:

Condition that could raise a security concern and may be disqualifying:

2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire

Conditions that could mitigate security concerns include:

None that are applicable under the facts of this case.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Guideline J (Criminal Conduct) Against the Applicant

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. Against the Applicant

Subparagraph 1.e. Against the Applicant

Subparagraph 1.f. Against the Applicant

Subparagraph 1.g. Against the Applicant

Guideline E (Personal Conduct) Against the Applicant

Subparagraph 2.a. Against the Applicant

Subparagraph 2.b. For 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.

Barry M. Sax

Administrative Judge

1. The response is dated 20 February 2004, in context obviously a typo. I have used the date stamp of May 14, 2004 as the date of submission.