

DATE: November 17, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-11547

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Marc Curry, Esq., Department Counsel

FOR APPLICANT

F. Sullivan Callahan, Esq.

SYNOPSIS

Applicant was convicted of two counts of forgery and one count of obtaining money by false pretenses. He was sentenced to imprisonment for two years (suspended) on each count. Applicant's criminal conduct creates doubt about his judgment, reliability, and trustworthiness that has not been sufficiently mitigated by the passage of five years since the date of the offenses. In addition, absent a waiver from the Secretary of Defense, the Department of Defense is prohibited from granting Applicant a clearance. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 8 July 2003, under the applicable Executive Order ⁽¹⁾ and Department of Defense Directive, ⁽²⁾ DOHA issued a Statement of Reasons (SOR), detailing the basis for its decision-security concerns raised under Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on 17 July 2003 and elected to have a hearing before an administrative judge. The case was assigned to me on 2 September 2003. A hearing was scheduled for 28 October 2003 but was delayed at the request of Applicant's attorney. On 3 November 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the transcript (Tr.) of the proceeding on 12 November 2003.

FINDINGS OF FACT

Applicant is a 38-year-old welder for a defense contractor. In 1998, Applicant became a part owner and President of a welding and repair business. To expand the business, the corporation needed additional equipment. As president of the corporation, Applicant signed an agreement with an equipment leasing corporation under which the leasing corporation loaned Applicant's corporation money in exchange for an ownership interest in auto shop equipment either currently in the possession of Applicant's corporation or to be purchased by it. Applicant sent to the equipment leasing corporation an invoice dated 15 December 1998, for the purchase of a welder/generator from TP in the amount of \$3,500. TP did

not create the invoice and had no arrangement with Applicant to sell him the welder/generator. In response to the invoice, the leasing corporation issued a check for \$3,500 payable to TP and Applicant's corporation. Applicant endorsed the check with his signature and forged the signature of TP. Applicant deposited the check in his corporation's account on 4 January 1999 and, on the same day, made cash withdrawals from the account in the amount of \$3,000 and made a payment of \$2,315.76 on his home mortgage. Ex. 5 at 7.

Also in December 1998, Applicant sent to the leasing corporation an invoice for the purchase of assorted auto shop equipment, purported to be from RF, in the amount of \$17,500. RF did not prepare the invoice. In response to the invoice, the leasing corporation issued a check payable to RF and Applicant's corporation. Applicant endorsed the check, forged the signature of RF, and deposited the check into the business account. By the end of January 1999, Applicant had made cash withdrawals of \$14,200 over and above the \$3,000 he had withdrawn earlier that month. Ex. 5 at 7-8.

On 1 September 1999 a felony indictment was returned alleging Applicant "did fraudulently sell, pledge, pawn, remove or otherwise dispose of auto shop equipment with a value of \$200.00 or more, which by written agreement belonged to [the leasing company]." Ex. 3 at 1. On 1 December 1999, six additional felony indictments were returned against Applicant. In the indictments, Applicant was charged with forging two checks, uttering the same two checks, obtaining money by false pretenses, and embezzlement. Ex. 4. On 7 March 2000, the court, on motion of the state's attorney, ordered that a nolle prosequi be entered on the 1 September count. Ex. 3 at 4. Pursuant to an agreement, Applicant pled guilty to both forgery counts and obtaining money by false pretenses. The court ordered a nolle prosequi be entered on the remaining counts and sentenced Applicant to incarceration for two years on each of the three counts of which he was convicted, for a total sentence of six years. The entire sentence to incarceration was suspended. Ex. 5. Applicant has served his probation and made the court ordered restitution. Tr. 39-40.

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 judgment, 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 predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. 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.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

CONCLUSIONS

In the SOR, DOHA alleged Applicant was arrested and convicted of forgery and obtaining money by false pretenses and sentenced to two years imprisonment (suspended) for each count (¶ 1.a.); arrested for fraudulent conversion (¶ 1.b.), and is disqualified from holding a security clearance under 10 U.S.C. § 986. A history of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1.

The Government established, and Applicant admits, that he was arrested and convicted of forgery and obtaining money by false pretenses, that he was sentenced to two years imprisonment on each of three counts, and he was arrested for failure to return rented property (fraudulent conversion). These are admission of criminal conduct involving serious crimes. DC E2.A10.1.2.2. The criminal behavior was not recent, having occurred almost five years ago. MC E2.A10.1.3.1. Applicant failed to establish any of the other mitigating conditions under the guideline. After carefully weighing the disqualifying and mitigating conditions, I find against Applicant on ¶¶ 1.a., 1.b. The criminal offenses of which he was charged or convicted go to the heart of a person's judgment, reliability, and trustworthiness.

Absent a waiver from the Secretary of Defense, the Department of Defense may not grant or continue a security clearance for any applicant who has been sentenced by a U.S. court to confinement for more than one year. 10 U.S.C. § 986. Applicant is subject to the provisions of 10 U.S.C. § 986 by virtue of being sentenced to two years confinement on each of the three offenses to which he pled guilty. The provisions of that statute apply even though Applicant did not serve any time in prison for that offense. ISCR Case No. 01-13566 at 5 (App. Bd. Apr. 15, 2003). Under the circumstances, I am required to find against Applicant on ¶ 1.e. As the findings on ¶¶ 1.a., 1.b. are against Applicant, a recommendation on waiver of 10 U.S.C. § 986 is not appropriate. *See* DOHA Operating Instruction 64, ¶ 3 (Jul. 10, 2001).

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

DECISION

In light of all of 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.

James A. Young

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.