

DATE: July 30, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-12043

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Jonathan A. Beyer, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The Applicant, when he completed a security clearance application, failed to include all his previous employment and failed to indicate he had left a job after being accused of sexual harassment. His false answers are felonious conduct and, because of this serious misconduct, there should be compelling reasons before a clearance is granted or continued. The record evidence is insufficient to mitigate or extenuate the negative security implications stemming from this conduct. Clearance is denied.

STATEMENT OF THE CASE

On December 18, 2002, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating that DOHA could not make the preliminary affirmative finding it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. [\(U\)](#) On January 15, 2003, the Applicant answered the SOR and requested a hearing. The case was assigned to me on March 20, 2003. A Notice of Hearing was issued on March 27, 2003, scheduling the hearing, which was held on April 30, 2003. The Government's case consisted of three exhibits (Gov Ex). The Applicant relied on his own testimony. The transcript (Tr.) of the hearing was received on May 8, 2003.

FINDINGS OF FACT

The SOR alleges personal conduct (Guideline E) and criminal conduct (Guideline J). The Applicant admits, with explanation, he failed to list three previous employers, failed to indicate he had left employment following accusations of sexual harassment, and was arrested for theft in 1984. 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 same, I make the following additional findings of fact.

The Applicant is 59-years-old, has worked for a defense contractor since July 2000, and is seeking a security clearance.

From June 1984 to February 1994, the Applicant worked for an aerospace company. He was laid off due to a reduction in force. From February 1994 to February 1996, the Applicant worked for a management service as a site manager. From February 1996 to November 1996, he worked for a law firm. The Applicant left his employment in November 1996 after being accused of sexual harassment. A coworker accused the Applicant of making sexual advances toward him. The Applicant, who was this coworker's manager, had previously reprimanded this coworker. Following the sexual harassment allegations, an investigation was conducted by the firm and the local office sought advice from the headquarters office. The headquarters office stated the firm could not have a manager who has been accused of sexual harassment.

The Applicant was never formally told he had to leave the job, but it was clear to him the firm intended to let him go. (Tr. 35-36) The Applicant's position with the law firm had involved long hours and much overtime, which included weekend work. The Applicant was unhappy and disappointed the firm failed to support him, so he gave a one week notice, finished the week, and left the firm. (Tr. 33) Prior to the sexual harassment allegations, the Applicant had no intention of leaving the firm.

From February 1997 to January 1999, the Applicant worked for a temporary service agency and was employed in a position with an aerospace company. In January 1999, after filling the job for a year and a half as a temporary employee, he was hired as a permanent employee of the company. This was the same aerospace company that he had worked for in the late 1980s and early 1990s. In July 2000, the Applicant secured his current job.

On November 12, 2001, the Applicant completed a Security Clearance Application, Standard Form (SF) 86, which asked about his previous employment activities. Question 6 asked him to list his previous employment. He listed only two employers. He listed his employment with a single employer--an aerospace company--from June 1986 through July 2000 and listed employment with his current employer from July 2000 to the date he completed the SF 86.

He failed to list his employment as a site manager from February 1994 to February 1996, his employment at the law firm during 1996, and his employment for a temporary service agency from February 1997 to January 1999. In his response to the SOR, the Applicant stated he failed to list his employment as a site manager because he believed it was beyond the seven-year time period called for by the question. The Applicant acknowledges that he should have taken more time and been more diligent in filling out the form. (Tr. 43)

In his sworn statement (Gov Ex 2) the Applicant said he did not list these employments, because he was "concentrating on my employment with [an aerospace firm] and did not believe these positions were relevant to a required security background check. I had no intention of leaving this information out, it simply slipped my mind." In the same SF 86 he was asked, in question 20, if he had ever been fired from a job, quit a job after being told he would be fired, left a job by mutual agreement following allegations of misconduct, left a job by mutual agreement following allegations of unsatisfactory performance, or left a job for other reasons under unfavorable circumstances. The Applicant answered "no" to this question.

In March 1984, the Applicant was arrested and charged with theft over \$200.00, a felony. (Gov Ex 3) He pleaded guilty to a lesser charge of theft of less than \$50.00 and received a deferred sentence, was ordered to pay a \$30.00 victims' compensation fee, and perform community service at a nursing home. The Applicant believes he was set up by the store detective. The Applicant was working as a sales clerk when an individual approached him to purchase a shirt. The individual attempted to use a credit card to pay for the shirt, but the card was rejected. The individual then put \$25.00 on the counter, took the shirt, and left the store without getting a receipt. The Applicant placed the \$25.00 in his pocket and assisted another customer. At that time, the Applicant was approached by a store security guard and arrested. The Applicant did not know the original charge was a felony (Tr. 44) and believed the matter had been dropped once he completed his community service. (Tr. 45)

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, Administrative Judges must

consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive. The government has the burden of proving any controverted facts alleged in the SOR, and the facts must have a nexus to an Applicant's lack of security worthiness.

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. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

Personal Conduct (Guideline E) The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

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

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. (E2.A5.1.2.2.)

Conditions that could mitigate security concerns include:

Not apply.

Criminal Conduct (Guideline J) The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

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

- a. Allegations or admission of criminal conduct, regardless of whether the person was formally charged.
- b. A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

- a. The criminal behavior was not recent.

BURDEN OF PROOF

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." 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.* 484 U.S. 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." Executive Order 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.

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*, at 531. All that is required is proof of facts and circumstances which 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. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, then the applicant has ultimate burden of establishing his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

Security clearances are granted only when "it is clearly consistent with the national interest to do so." *See Executive Orders 10865 § 2 and 12968 § 3.1(b)*. "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 "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." *See Egan*, at 531. Doubts are to be resolved against the applicant.

CONCLUSIONS

The Government has satisfied its initial burden of proof under Guideline E, (Personal Conduct). Under Guideline E, the security eligibility of an applicant is placed into question when that applicant is shown to have been involved in personal conduct which creates doubt about the person's judgment, reliability, and trustworthiness. Complete honesty and candor on the part of applicants for access to classified information is essential to make an accurate and meaningful security clearance determination. Without all the relevant and material facts, a clearance decision is susceptible to error, thus jeopardizing the nation's security. In November 2001, the Applicant completed in an SF 86 in which he failed to list three prior employers and failed to indicate he had left a job after being accused of sexual harassment. Because of these false answers, Disqualifying Condition (DC) 2 ⁽²⁾ applies.

The Applicant acknowledges he should have taken more time and been more diligent when he completed the form. He states his failure to include the information was inadvertent. The Applicant's explanation of innocent intent has been considered, but found to be unpersuasive. The Applicant failed to list three prior employers. He left one of these employers after allegations of sexual harassment had been made against him. He knew the firm would let him go, so he voluntarily chose to leave. The Applicant would have continued with the firm but for the allegations of sexual harassment. The matter was an upsetting event in the Applicant's life, sufficient that he should have remembered it when he completed his SF 86. The Applicant left the job following allegations of misconduct or left under undesirable circumstances and this should have been indicated in response to question 20 of the SF 86.

None of the Mitigating Conditions apply to this conduct. MC 2 ⁽³⁾ does not apply because, even though the falsifications may have related to only two questions on a single questionnaire, they occurred in November 2001, and, as such, are considered recent. Because DC 2 applies, and no mitigating conditions apply, I find against the Applicant as to SOR subparagraphs 2.a. and 2.b.

The Government has satisfied its initial burden of proof under Guideline J, (Criminal Conduct). Under Guideline J, the security eligibility of an applicant is placed into question when that applicant is shown to have a history or pattern of criminal activity creating doubt about his judgment, reliability, and trustworthiness. The Applicant was arrested in 1984 and charged with felony theft. Additionally, he provided false information on his SF 86. DC a ⁽⁴⁾ and b ⁽⁵⁾ apply.

In 1984, the Applicant was charged with theft of more than \$200.00 (a felony) and pleaded guilty to theft of less than \$50.00. This matter, having occurred more than 19 years ago, is not recent. MC a ⁽⁶⁾ applies to this criminal conduct. I find for the Applicant as to SOR subparagraph 2 a.

In November 2001, the Applicant gave false answers on his SF 86. By certifying falsely that his responses were true, complete and correct to the best of his knowledge and belief, and made in good faith, the Applicant violated Title 18, Section 1001 ⁽⁷⁾ of the United States Code. His false answers are felonious conduct under the laws of the United States. Because of this serious misconduct, there should be compelling reasons before a clearance is granted or continued.

Candor is important, and the Applicant was unable or unwilling to be candid about his background. The period of time from the most recent falsification--November 2001--to the closing of the record is less than two years. There is insufficient evidence to mitigate the Government's case. Accordingly, subparagraph 2.b. is resolved against the Applicant.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

The awarding of a security clearance is not a one time occurrence, but is based on current disqualifying and mitigating conditions. Under the Applicant's current circumstances a clearance is not recommended, but this decision should not be construed as a determination the Applicant could never justify the award of a DoD security clearance. Should the Applicant be afforded an opportunity to reapply for a security clearance, in the future, he may well demonstrate persuasive evidence of his security worthiness. A clearance at this time is not warranted.

FORMAL FINDINGS

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

Paragraph 1 Personal Conduct (Guideline E): AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Paragraph 2 Criminal Conduct (Guideline J): AGAINST THE APPLICANT

Subparagraph 2.a.: For the Applicant

Subparagraph 2.b.: 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 the Applicant. Clearance is denied.

Claude R. Heiny

Administrative Judge

1. Required by Executive Order 10865, as amended and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 as amended.
2. DC 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. (E2.A5.1.2.2.)
3. MC 2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily. (E2.A5.1.3.2.)
4. DC a. Allegations or admission of criminal conduct, regardless of whether the person was formally charged.
5. DC b. A single serious crime or multiple lesser offenses.

6. MC a. The criminal behavior was not recent.

7. Title 18, Section 1001 of the United States Code provides whoever, knowingly and willfully makes any materially false, fictitious, or fraudulent statement or representation, shall be fined under this title or imprisoned or both.