

DATE: May 25, 2005

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 02-12455

DECISION OF ADMINISTRATIVE JUDGE

ROBERT J. TUIDER

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

Applicant's history of drug involvement and minor criminal conduct that occurred primarily during his high school years has been mitigated due to passage of time and positive significant life changes. His subsequent marriage ended in a costly separation and divorce that precipitated a series of financial problems that have been mitigated by payment or payment arrangements. Personal conduct concerns arose over a discrepancy of past drug use, which Applicant demonstrated was an inadvertent error. Applicant has successfully mitigated drug involvement, criminal conduct, financial considerations, and personal conduct concerns. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On May 3, 2004, DOHA issued a Statement of Reasons (SOR) ⁽¹⁾ detailing the basis for its decision-security concerns raised under Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on May 24, 2004, and elected to have a hearing before an administrative judge. The case was assigned to me April 1, 2005. On April 8, 2005, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The government offered five documents, which were admitted without objection as Government Exhibits (GE) 1 through 5. The Applicant offered one document, which was admitted without objection as Applicant Exhibit (AE) A. I left the record open after the hearing to afford Applicant the opportunity to submit additional documents. The Applicant submitted five additional documents, which were admitted without objection as AE B through AE F. DOHA received the transcript on May 27, 2004.

FINDINGS OF FACT

Applicant's partial admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is a 30-year-old divorced man, who has two sons, ages 13 and 10. Applicant provides support for his two sons, who live with Applicant's ex-wife. He married in September 1995, separated in 1999, and divorced in September 2000. GE 1, Tr. 51-52. Applicant dropped out of high school in his junior year and earned his GED in August 1998. He has completed approximately 15 credit hours of college course work.

Since November 1998, Applicant has been employed as a security officer for a defense contractor. He has never held a security clearance, however, he seeks a clearance to enhance his employment potential. Applicant has held several jobs since May 1993, to include security guard, welder, sales representative, and security guard. GE 1.

Applicant used marijuana approximately once or twice a week from approximately 1991 to 1994, SOR ¶ 1.a. Applicant stated, "As far as use of illegal drugs, I have smoked marijuana, mostly before moving to [current town] in 1995. I might have smoked once or twice a week during my high school years. I purchased small amounts of marijuana for my own use." Signed, sworn statement, dated May 15, 2000, GE 3, p. 2, Tr. 18-19.

Applicant sold cocaine once in approximately 1994, SOR ¶ 1.b. In May, 2000, he stated, "I once sold a little bit of cocaine, around 1994, for about \$20.00 because I needed the money. My father found out about it, and that was the last time I ever did that." GE 3, p. 2, Tr. 18-19. Applicant was approximately 19-years-old at the time of this offense.

On March 8, 1995, Applicant was arrested for possession of a controlled dangerous substance (marijuana). He plead guilty and received a two month suspended sentence and six months probation, SOR ¶ 1.c. Answer to SOR, Tr. 18-19, 24-25.

Between 1995 and 1999, Applicant smoked marijuana approximately once every 6 to 12 months, SOR ¶ 1.d. Applicant stated, "Since 1995, I have smoked marijuana once every six months to a year, when friends light up and share with me. I don't exactly recall when I last smoked - maybe early last year." GE 3, p; 2, Tr. 18-19.

After Applicant's arrest for possession of marijuana, he was required to submit to drug testing during his six months of probation. Tr. 24-25. Additionally, Applicant has been employed as a security officer for the last seven years and during that time has been randomly drug-tested with negative results. Response to SOR.

The SOR alleges Applicant is in arrears on nine debts. The table below presents details about the debts alleged in the SOR, their current status, and cites to relevant parts of the record.

Debt	Nature & Amount in SOR	Current Status	Record
Debt 1/SOR ¶ 2.a.	Collection account in the amount of \$311.00.	Consolidated under Debt Management Program. Current on payments.	Response to SOR, AE A, AE D, Tr. 27-28, 29.
Debt 2/SOR ¶ 2.b.	Collection account in the amount of \$900.00.	Consolidated under Debt Management Program. Current on payments.	Response to SOR, AE A, AE D, Tr. 27-28, 29.
Debt 3/SOR ¶ 2.c.	Phone company collection account in the amount of \$207.00. Phone company.	Consolidated under Debt Management Program. Current on payments.	Response to SOR, GE 4, AE A, AE D, Tr. 27-28, 29. Tr. 34-42, 48.
Debt 4/SOR ¶ 2.d.	Charged off account in the amount of \$71.00.	Contacted creditor. Creditor has no record of debt.	Tr. 43, 66-68.
Debt 5/SOR ¶ 2.e.	Collection account in the amount of \$56.00.	Paid.	Tr. 43-46, AE C.
Debt 6/SOR ¶ 2.f.	Collection account in the amount of \$107.00.	Paid.	Response to SOR, AE A, AE B, AE D, Tr. 27-28, 46.

Debt 7/SOR ¶ 2.g.	Charged off account in the amount of \$900.00.	Paid.	Tr. 46-48, 64-65, AE F.
Debt 8/SOR ¶ 2.h.	Judgment in favor of phone company in the amount of \$600.00.	Paid.	Tr. 34-42, 48, GE 4.
Debt 9/SOR ¶ 2.i.	Back payments on home foreclosure in the amount of \$5,000.00.	Made payment arrangements.	Tr. 48-50, 64-65, AE E.

Applicant attributes his financial problems to his separation and divorce, and working in low paying jobs. Applicant and his wife separated in 1999. She moved out of the marital home with her three children born of a previous marriage and the two children born of her marriage to Applicant. As a result of costs associated with a separation and child support, Applicant fell behind on his house payments, and the bank foreclosed. Since being employed and experiencing a stable environment, Applicant's financial situation has improved and he is current on his debts. Tr. 53-65.

On July 20, 1994, Applicant was arrested for disturbing the peace, disorderly conduct, and assault and battery. On September 8, 1994, these charges were nol prossed, SOR ¶ 3.a. Applicant stated, ". . . the charge resulted in my attempts to defend my girlfriend (later my wife), from contact with an abusive ex-boyfriend. I was 19 years old at the time." Response to SOR.

In 1997, Applicant was arrested and charged with writing checks for insufficient funds in an amount exceeding \$1,000.00. Applicant negotiated a payment plan for these debts, SOR ¶ 3.c.

On April 16, 2003, Applicant responded to a DOHA Interrogatory and stated his last use of marijuana was 1994 or 1995. When interviewed earlier by the Defense Security Service (DSS) on March 15, 2000, he stated since 1995, he smoked marijuana once every six months to a year, ending in approximately 1999, SOR ¶ 4.a. Applicant denied he intentionally tried to deceive the government. He responded, "Okay. Well, that was an error on my behalf. I had smoke (sic) real heavy marijuana between like '91 and '95. After that, I was completely sober. I hadn't smoked no marijuana, except like once or twice during the year, probably in 1998, and, I mean, during that time, you know, it was a very stressful time, and I did forget about that. So, there really wasn't an every-day use for me. I just considered me being stopped, completely stopped, in '94 or '95, during that time." Tr. 24.

Regarding his past drug involvement, arrests and financial problems, Applicant stated, "I certainly admit that my past was not perfect. However, I would offer that my drug use was at a time in my life when I was young, immature, and lacking direction. I am not the same person now. Likewise, I incurred the debt as a very young adult, working at low paying jobs. My divorce contributed to my bad financial situation." Response to SOR.

Since, November 1998, Applicant has been steadily employed as a Security Officer assigned to positions of trust and responsibility. During this time, he has maintained an excellent employment record. Response to SOR.

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 fact(s) 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.

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.* 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*, 484 U.S. 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 the 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*, 484 U.S. at 531. Doubts are to be resolved against the applicant.

CONCLUSIONS

Guideline H - Drug Involvement

In the SOR, DOHA listed four allegations under drug involvement (SOR ¶¶ 1.a. through 1.d.) to include marijuana use, selling a user amount of cocaine one time during high school, and being arrested for possession of marijuana.

The Concern: Improper or illegal involvement with drugs, raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information. Directive ¶ E2.A8.1.1.1.

The government established its case under Guideline H in part by Applicant's admissions and evidence submitted for each of the allegations contained in the SOR under ¶ 1. There is no doubt that Applicant's involvement with drugs caused him considerable problems in the past. However, his involvement with drugs was primarily limited to a time-frame of 1991 to 1995, mostly during his high school years. Such conduct gives rise to Drug Involvement Disqualifying Condition (DI DC) ¶ E2.A.8.1.2.1. (*Any drug abuse*); and DI DC ¶ E2.A8.1.2.2. (*Illegal drug possession, including cultivation, processing, manufacturer, purchase, sale, or distribution*).

Fortunately, as Applicant matured, married, became a father, and found responsible employment, his drug involvement ceased and he has been drug-free for at least seven years. Although serious, his one-time sale of a user amount of cocaine in approximately 1994 occurred when he was in high school and was effectively dealt with by his father. He self-reported this drug involvement to DSS during the security clearance process. There is no evidence of further distribution offenses other than this one-time offense, which occurred approximately 11 years ago.

Since working for his current employer, Applicant has been randomly drug tested with negative results for seven years. Applicable mitigating conditions as a result of Applicant's turnaround behavior are Drug Involvement Mitigating Condition (DI MC) ¶ E2.A8.1.3.1. (*The drug involvement was not recent*); and DI C ¶ E2.A8.1.3.3. (*A demonstrated intent not to abuse any drugs in the future*).

Guideline F - Financial Considerations

In the SOR, DOHA alleged Applicant has nine delinquent debts (SOR ¶¶ 2.a. through 2.i.). *The Concern*: An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Directive ¶ E2.A6.1.1.

The government established its case under Guideline F by Applicant's admissions and evidence submitted for each of the allegations contained in the SOR under ¶ 2. His inability to satisfy his outstanding financial obligations gives rise to Financial Considerations Disqualifying Conditions (FC DC) E2.A6.1.2.1. (*A history of not meeting financial obligations*); and FC DC E2.A6.1.2.3. (*Inability or unwillingness to satisfy debts*).

As reflected above, Applicant submitted evidence at his hearing and after his hearing that he has paid or resolved all debts alleged. Applicant experienced several events that severely impacted his financial standing and ability to remain current on his debts. His financial situation deteriorated after going through a separation, divorce, maintaining two households, paying child support, and being employed in low paying jobs. Applicant has striven to advance in status and pay and has undertaken tangible steps to get his past debts behind him. These actions trigger Financial Considerations Mitigating Conditions (FC MC) E2.A6.1.3.3. (*The conditions that resulted in the behavior were largely beyond the person's control (e.g. loss of employment, a business downturn, . . . , divorce or separation)*); and FC MC E2.A6.1.3.6 (*The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*). Applicant's demonstrated actions affirm his commitment to return to financial stability.

Guideline J - Criminal Conduct

In the SOR, DOHA alleged two allegations under criminal conduct (SOR ¶¶ 3.a. and b.) to include a 1994 arrest for disturbing the peace, disorderly conduct, and assault and battery, and a 1997 arrest for writing checks on insufficient funds. Neither arrest resulted in a conviction. The 1994 arrest was nol prossed and Applicant negotiated a payment plan for the 1997 arrest.

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

The government established its case under Guideline J by Applicant's admissions and evidence submitted for each of the allegations contained in the SOR under ¶ 3. Such conduct gives rise to Criminal Conduct Disqualifying Conditions (CC DC) E2.A10.1.2.1. (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged*). Due to the passage of time and turnaround of Applicant's life Criminal Conduct Mitigating Conditions (CC MC) E1.A10.1.3.1. (*The criminal behavior was not recent*); and CC MC E2.A10.1.3.6. (*There is clear evidence of successful rehabilitation*) apply.

Guideline E - Personal Conduct

In the SOR, DOHA listed one allegation under personal conduct (¶ 4.a.), that Applicant provided two varying answers regarding past marijuana use.

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.

Posing potential security concerns are Applicant's differing accounts of his past marijuana usage. The SOR alleged Applicant's response to DOHA Interrogatories in 2003 varied from the account he gave to DSS when interviewed in

2000. Specifically, the 2003 response indicated his last use of marijuana was in 1994 or 1995. By contrast his 2000 response indicated that since 1995, he smoked marijuana once every six months to a year, ending in approximately 1999. Applicant credibly testified on this point and denied he intentionally tried to deceive the government. His explanation was that his frequent use of marijuana ended in 1994 or 1995 and his very infrequent use may have occurred once every six months to a year ending in approximately 1999. His differing account, however, is attributable to memory lapse and uncertainty over frequent use versus infrequent use. While Applicant could reasonably have been expected to be more diligent when responding to these inquiries, his judgment lapses are not enough to impute knowing and wilful falsification under Guideline E.

Applicant's explanations of his varying responses to past marijuana usage are persuasive enough to avert inferences of knowing and wilful omission. There being no misconduct substantiated, no need to show extenuation and mitigation arises. Applicant put the government on notice regarding past marijuana usage, and little could be gained from a wilful misrepresentation in this regard. His failure to exercise greater diligence in reconciling these discrepancies which covered a significant portion of his early life is sufficient to refute the allegation of falsification covered in subparagraph 4.a. by Guideline E.

In short, Applicant's early life stands in sharp contrast to the person he is today. He has been drug-free for at least seven years, has not been involved with law enforcement for at least eight years, is well on the road to financial recovery, and is gainfully employed as a security officer in a position of trust and responsibility.

Based on the totality of the circumstances to include his documented actions coupled with his credible testimony, I find for Applicant on SOR ¶ 1 and ¶¶ 1.a. through 1.d, SOR ¶ 2 and ¶¶ 2.a. through 2.i., SOR ¶ 3 and ¶¶ 3.a. through 3.c., and SOR ¶ 4 and ¶ 4.a.

FORMAL FINDINGS

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1. Guideline H: FOR APPLICANT

Subparagraphs 1.a. - 1.d: For Applicant

Paragraph 2: Guideline F: FOR APPLICANT

Subparagraphs 2.a. - 2.i. For Applicant

Paragraph 3: Guideline J: FOR APPLICANT

Subparagraph 3.a. - 3.c. For Applicant

Paragraph 4: Guideline E: FOR APPLICANT

Subparagraph 4.a.: For Applicant

DECISION

In light of all of the circumstances 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.

Robert J. Tuider

Administrative Judge

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

