

DATE: October 13, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-12789

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Esq., Department Counsel

FOR APPLICANT

Thomas R. Lujan, Esq.

SYNOPSIS

In 1992, Applicant used marijuana and deserted from the U.S. Army. After his apprehension, he submitted a request for discharge in lieu of court-martial. The Army accepted the request and discharged Applicant under other than honorable conditions. Applicant failed to mitigate personal conduct security concerns raised by his conduct. 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 23 May 2003, DOHA issued a Statement of Reasons ⁽¹⁾ (SOR) detailing the basis for its decision-security concerns raised under Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in a notarized writing on 26 September 2003 and elected to have a hearing before an administrative judge. The case was originally assigned to another administrative judge, but was reassigned to me on 2 June 2004. On 8 July 2004, 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 hearing transcript (Tr.) on 23 July 2004.

FINDINGS OF FACT

Applicant is a 35-year-old firearms instructor for a defense contractor. He is married and has three children, two by his first wife. He and his second wife are expecting their second child. Applicant is well respected by his supervisors and clients for his dedication, commitment, and duty performance.

Applicant joined the U.S. Army in 1987. In 1990-91, he served in Operations Desert Storm and Desert Shield. In 1992, during his second enlistment, Applicant used marijuana. His use was detected in a urinalysis conducted on 8 September 1992. On 14 October 1992, Applicant was interviewed by military police concerning the positive urinalysis. He invoked his right to speak to an attorney and the interview was terminated.

One week later, on 21 October 1992, Applicant left his unit in State 1 without lawful authority. He was apprehended by police in State 2 on 5 April 1993 and returned to military control. Applicant submitted a request for discharge in lieu of court-martial and was discharged under other than honorable conditions (UOTHC), in absentia, on 14 July 1973.

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 personnel 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

Guideline E--Personal Conduct

In the SOR, DOHA alleged Applicant tested positive by urinalysis for marijuana (¶ 1.a) and deserted his military unit resulting in a discharge under other than honorable conditions(UOTHC) (¶ 1.b).

The Government established by substantial evidence and Applicant's admissions each of the allegations in the SOR. Such conduct involved questionable judgment and demonstrated a lack of reliability. Applicant was 23 years old and on his second enlistment in the U.S. Army when he used marijuana and deserted. Although Applicant has matured and been a success in the civilian business world, he failed to convince me that his judgment or reliability has improved.

Applicant testified that he only used marijuana one time in his life and shortly thereafter he was required to take a urinalysis, which revealed his use. After observing his demeanor and listening carefully to his testimony, I found him not credible. Several other aspects of his testimony were similarly disturbing. Applicant claims he admitted his marijuana use to the military police. The evidence is contrary. Applicant stopped the interview and requested legal counsel immediately after being advised of his rights. There is no doubt from his testimony that Applicant left his unit because of the pending marijuana charge. Yet in his security clearance application, Applicant claimed he left because of family problems. He testified that he did not leave with the intent to stay away from his unit permanently, but rather just to stay away until he could qualify for a discharge.

He asserts that the idea of leaving his unit came from a barracks mate who told him he would be dropped from the rolls and given an honorable or general under honorable conditions discharge if he went absent without leave for 30 days. It is difficult to believe that this battle-hardened, second-term soldier would accept the word of a "barracks lawyer" without checking it out. Evenso, Applicant did not return in 30 days. It was over 160 days before he returned and he did so only after being apprehended by civilian police. Applicant and his wife claim he was apprehended by the police the same day he had made arrangements to turn himself into the military the following day. I found their testimony not credible.

Applicant claims he was never charged with a criminal offense and he did not realize he could get a UOTHC discharge. But he submitted a request for discharge in lieu of court-martial. To do so, he had to be under charges. He also had to acknowledge, in writing, he understood the offense charged and the elements of the offense. He had to admit that he committed the offense charged or a lesser-included offense and acknowledge that he could receive a UOTHC discharge. *See Army Regulation 635-200, Chapter 10.*

After considering all of the circumstances in this case, I conclude Applicant failed to mitigate personal conduct security concerns and demonstrate it is clearly in the national interest to grant him a clearance. Applicant refused to accept responsibility for his actions in 1992 when he deserted. In 2004, Applicant tried to minimize the security concerns raised by his 1992-93 conduct by being less than candid.

FORMAL FINDINGS

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

Paragraph 1. Guideline E: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: 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. 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 (Directive).