

DATE: February 26, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-13426

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Rita O'Brien Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's illegal bet making operation, lasting from approximately 1996 to January 2001, falls within the disqualifying conditions (DC) of the criminal conduct guideline. Given the pattern of illegal activity of more than four years, a commensurate track record of rehabilitation (that comprises more than simply the passage of time) is necessary to confidently conclude the past conduct will not recur. Applicant has not presented enough evidence to carry his ultimate burden of persuasion in demonstrating he merits a security clearance. Clearance is denied.

STATEMENT OF CASE

On July 17, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6, dated January 2, 1992, as reissued through Change 4 thereto, dated April 20, 1999, issued an SOR to the Applicant detailing reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. On July 29, 2003, Applicant responded to the SOR and requested a hearing before an Administrative Judge.

The case was assigned to me on September 16, 2003. On November 14, 2003, this case was set for hearing on December 3, 2003. The Government submitted six exhibits and Applicant submitted two exhibits. Testimony was taken from Applicant. The transcript was received on December 11, 2003.

FINDINGS OF FACT

The SOR alleges criminal conduct. Applicant admitted the factual allegation and requested a hearing.

Applicant is 46 years old and has been employed as a production control analyst since June 1980. He seeks a secret security clearance.

Applicant began taking bets on sporting events in approximately 1996 by installing an extra telephone line in his house and taking bets from friends. He was an ardent sports fan and thought he could earn some money by accepting wagers. During the football season, he took bets on days or nights professional football was played. He took bets every night of the week during basketball season. On November 8, 2000, an application for a wire tap was applied (and granted) to listen to transmissions on Applicant's unpublished telephone number, for the purpose of gathering information concerning Applicant's book making activities. On January 4, 2004, an application for a search warrant was requested to seize additional book making evidence such as assorted gambling records, \$10,000.00 in cash and two safety deposit keys situated close to the cash.

As a result of book making items already seized, Applicant was charged on January 3, 2001 with two felony counts of possession of gambling records and one misdemeanor count of promoting gambling because of his bet taking on sporting events. As a result of a plea bargain, Applicant pled guilty to two Class A misdemeanors of promoting gambling in the second degree. He was fined an unknown amount and received no jail sentence. However, he was required to relinquish all gambling proceeds (\$40,000.00), and his car was impounded. (Tr. 22)

Applicant knows his book making operation was illegal but he equated the activity to collecting money in an office pool for a sports event. He did not consider his bet making operation as a large scale activity. (Tr. 23) Applicant is certain he will not resort to betting in the future although he still plays golf at the same golf course as one of the criminal collaborators (Tr. 31) and where Applicant collected bets on at least one occasion.

Applicant's job performance evaluation reflects a rating as a valuable contributor for the period July 2001 to June 30, 2002 and very good rating for July 2002 to June 30, 2003. Applicant has no gambling debts.

POLICIES

Enclosure 2 of the Directive sets forth disqualifying conditions (DC) and mitigating conditions (MC) that must be given binding consideration in making security clearance determinations. These conditions must be considered in every case according to the pertinent guideline; however, the conditions are in no way automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense. Because each security case presents its own unique facts and circumstances, it should not be assumed that the conditions exhaust the entire realm of human experience or that the conditions apply equally in every case. In addition, the Judge, as the trier of fact, must make critical judgments as to the credibility of witnesses. Conditions most pertinent to evaluation of the facts in this case are:

Criminal Conduct

Disqualifying Conditions (DC):

1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
2. A single serious crime or multiple lesser offenses.

Mitigating Conditions (MC):

1. The criminal behavior was not recent;
2. The crime was an isolated incident;
6. There is clear evidence of successful rehabilitation.

General Policy Factors (Whole Person Concept)

Every security clearance case must also be evaluated under additional policy factors that make up the whole person concept. Those factors (found at pages 16 and 17 of Enclosure 2 of the Directive) include: (1) the nature, extent, and

seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 behavioral changes; (7) the motivation for the conduct; and, (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Burden of Proof

As set forth in the Directive, every personnel security determination must be a fair and impartial overall commonsense decision based upon all available information, both favorable and unfavorable, and must be arrived at by applying the standard that the granting (or continuance) of a security clearance under this Directive may only be done upon a finding that to do so is clearly consistent with the national interest. In reaching determinations under the Directive, careful consideration must be directed to the actual as well as the potential risk involved that an applicant may fail to properly safeguard classified information in the future. The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature.

The Government must establish a *prima facie* case under criminal conduct (Guideline J) by proving controverted facts. Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation that is sufficient to overcome the Government's *prima facie* case and demonstrates Applicant presently qualifies for a security clearance.

CONCLUSIONS

A history or pattern of criminal behavior creates doubt about a person's judgment, reliability and trustworthiness. If a person demonstrates a pattern of repeatedly violating the criminal law, the chances are too high he may demonstrate the same pattern towards security rules and regulations he decides he does not want to follow. In 1996, Applicant decided he wanted to earn some extra money by taking bets over his phone. While Applicant claimed his operation was only small, he described a fairly extensive activity which took place everyday in the week from at least September through March of each year. Since Applicant was receiving bets everyday in the week, Applicant probably accepted a conservative estimate of at least 250 bets during the football and basketball seasons for at least 30 professional games.

That portion of Applicant's bet making he was not indicted for falls within DC 1 as he admitted he had been accepting bets since 1996. The remaining criminal conduct covered by the original charges (possessing gambling records and promoting gambling) that he pled guilty to falls within the scope of DC 2 as constituting multiple lesser offenses.

The first mitigating condition (MC 1) is not applicable to the facts of this case as the criminal behavior occurred less than four years ago. MC 2 mitigates criminal conduct that was isolated. MC 2 must be removed from consideration because Applicant engaged in this illegal enterprise for approximately five years. Based on Applicant's surprise at being arrested in early January 2001, it is reasonable to infer Applicant would have continued taking the bets indefinitely had he not been apprehended.

MC 6 of the criminal conduct guideline recognizes clear evidence of successful rehabilitation. Probative evidence of successful rehabilitation includes structural changes in a person's lifestyle that dramatically reduce the chances of criminal behavior recurring in the future. Applicant's job performance evidence weighs in Applicant's favor but sheds little light on whether Applicant will engage in future bet taking or similar behavior. In sum, Applicant's evidence in rehabilitation is insufficient to find in his favor under MC 6. Applicant still frequents the golf course where at least one of the co-conspirators plays golf. Applicant has not provided any other probative evidence indicating constructive changes in his lifestyle that will allow for ultimate findings in Applicant's favor under the criminal conduct guideline and the whole person concept.

FORMAL FINDINGS

Formal Findings required by Paragraph 25 of Enclosure 3 are:

Paragraph 1 (Criminal Conduct, Guideline J): AGAINST THE APPLICANT.

a. 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 Applicant.

Paul J. Mason

Administrative Judge