

DATE: September 15, 2005

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 02-19309

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant had a lengthy history of criminal conduct, including several drunk driving offenses, two burglaries, grand theft, and inflicting corporal injury on his spouse. He failed to list all of his felonies and alcohol-related offenses on his Questionnaire for National Security Positions. Applicant failed to mitigate criminal conduct and personal conduct security concerns. 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 14 April 2004, DOHA issued a Statement of Reasons⁽¹⁾ (SOR) detailing the basis for its decision—security concerns raised under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on 20 May 2004 and elected to have the case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's written case on 5 November 2004. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant received the FORM on 3 December 2004 and did not respond. The case was assigned to me on 21 January 2005.

In the FORM, the Government moved to amend the SOR by deleting the allegations in ¶¶ 1.a, 1.c, and 1.d. In addition, the Government moved to amend the allegation contained in ¶ 1.f to add the following: "You were incarcerated as a result of that sentence from about June 11, 1990 until July 2, 1991, a period of 386 days." There being no objection from the Applicant, the motion is granted.

Effective 28 October 2004, amendments to 10 U.S.C. §986 became effective. On 14 December 2004, the Director, DOHA, ordered a moratorium on all cases involving that statute until the effect of the amendments on processing of security clearance cases could be determined. The moratorium was lifted effective 15 August 2005.

FINDINGS OF FACT

Applicant is a 48-year-old aircraft mechanic for a defense contractor. He is married and has one child and two stepchildren. He has won praise for his expertise and work ethic from his peers and the government agency for which he works. He served in the U.S. Army from 1976-78 and received an honorable discharge.

In 1977, Applicant was apprehended (arrested) by military police for possession of marijuana and obstruction of justice by throwing a marijuana smoking device out of the window of his barracks. Ex. 18.

In July 1978, Applicant was arrested for speeding and driving under the influence of alcohol (DUI). He pled guilty to the charges, was sentenced to 90 days in jail, suspended for one year, and fined. Ex. 17.

In April 1980, Applicant was arrested for grand theft auto. He was convicted and sentenced to 45 days in jail and 4 years of probation. Answer. That conviction was later set aside.

In March 1981, he was arrested for vandalism. In August 1981, he was arrested and charged with falsely reporting a crime.

Applicant was arrested in June 1982 and charged with burglary, a felony. He was convicted in February 1984 and sentenced to 365 days in jail and 5 years of probation.

In October 1985, Applicant was arrested for drunk driving. He was convicted and sentenced to 10 days in jail.

Applicant was arrested in June 1989 and charged with inflicting injury on a spouse or cohabitant. He was convicted and sentenced to 10 days in jail. That same month, Applicant was also arrested for burglary, a felony, and receiving stolen property. In May 1990, an additional felony charge of grand theft was lodged against him. He was convicted of the burglary and grand theft, and sentenced to two years in jail and to pay restitution. As a result of that sentence he was incarcerated from at least 11 June 1990 until 28 June 1991, a total of 382 days. Exs. 10-12.

Applicant was arrested in February 1990 and charged with inflicting corporal injury on his spouse. Applicant pled guilty to this felony and was sentenced to probation for three years.

In May 1997, Applicant was arrested and charged with possession of a firearm by a felon and possession/manufacture/selling a dangerous weapon. Both offenses are felonies. In August 1997, he was convicted of both charges.

Applicant completed a Questionnaire for National Security Positions (QNSP) on 20 September 1999 by certifying that his answers were "true, complete, and correct" to the best of his knowledge and belief and acknowledging that "a knowing and willful false statement" can be punished by fine and/or imprisonment. Ex. 4 at 9. Question 23(a) asked if he had ever been charged with or convicted of any felony offense. Questions 23(b) asked if he had ever been charged with or convicted of a firearms of explosive offense. Applicant answer "yes" to both questions and listed a 1997 conviction for possession of an illegal firearm. Ex. 4 at 7. In another section of the QNSP, his work history, Applicant listed that he had been incarcerated from 1990-June 1991. Ex. 4 at 3-2.

Question 23(d) asked if he had been charged with or convicted of any offenses related to alcohol or drugs. Applicant answered "no." Ex. 4 at 7.

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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the

Directive. 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.

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.

CONCLUSIONS

Guideline J-Criminal Conduct

In the SOR, DOHA alleged Applicant was arrested in September 1997 and later convicted of carrying a concealed weapon, a felony (¶ 1.a); convicted in August 1997 of possession of a firearm by a felon and possessing/manufacturing/selling a dangerous weapon (¶ 1.b); arrested in July 1991 for inflicting corporal injury (¶ 1.c); arrested in May 1990 for inflicting corporal injury (¶ 1.d); convicted of inflicting corporal injury on his spouse in March 1990 (¶ 1.e); convicted of burglary and grand theft in May 1990 (¶ 1.f); disqualified from holding a security clearance by 10 U.S.C. § 986 (¶ 1.g); convicted of inflicting injury on a spouse or cohabitant in June 1989 (¶ 1.h); convicted for drunk driving in April 1986 (¶ 1.i); convicted for drunk driving in October 2005 (¶ 1.j); convicted of June 1982 burglary in February 1984 (¶ 1.k); arrested in August 1981 for falsely reporting a crime (¶ 1.l); arrested in March 1981 for vandalism (¶ 1.m); arrested in April 1980 and subsequently convicted of grand theft auto (¶ 1.n); arrested in July 1978 and subsequently convicted of speeding and DUI (¶ 1.o); arrested in 1977 by military police for using marijuana and destroying evidence (¶ 1.p). Applicant admitted each of the allegations. A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1.

The Government's evidence and Applicant's admissions establish potentially disqualifying conditions under Guideline J. Applicant admitted engaging in criminal conduct (DC E2.A10.1.2.1) involving multiple lesser offenses and at least one serious crime (DC E2.A10.1.2.2). An applicant may mitigate criminal conduct security concerns. In this case, Applicant's criminal behavior is not recent-the last offense alleged occurred in 1997. MC E2.A10.1.3.1. But the record is not sufficient to conclude there is clear evidence of rehabilitation (MC E2.A10.1.3.6) or that the factors leading to the violation are not likely to recur (MC E2.A10.1.3.4).

Absent a waiver from the Secretary of Defense, the Department of Defense may not grant or continue a security clearance for any applicant who, as a result of a conviction by any court in the U.S., has been sentenced to confinement for more than one year and served at least one year. 10 U.S.C. § 986 (2004). Applicant is subject to 10 U.S.C. § 986 as a result of serving more than 380 days in confinement for burglary and grand theft (SOR ¶ 1.f). Under the circumstances, I am required to find against Applicant on ¶ 1.g. As my adverse security decision against Applicant is not based solely on the requirement of 10 U.S.C. § 986, it is inappropriate for me to make a recommendation as to whether Applicant's case should be considered for waiver. ISCR Case No. 02-00500 at 6 (App. Bd. Jan. 16, 2004) (citing DOHA Operating Instruction 64 ¶ 3.e.).

Guideline E-Personal Conduct

In the SOR, DOHA alleged Applicant falsified material facts on his security clearance application by failing to list all of his felony offenses (¶ 2.a) and denying he had ever been charged or convicted of any offenses related to alcohol or drugs (¶ 2.b). Applicant denied both allegations. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate the applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

The deliberate omission of relevant and material facts from any security clearance application is a security concern and may be disqualifying. DC E2.A5.1.2.2. Information is material if it would affect a final agency decision or, if incorrect, would impede a thorough and complete investigation of an applicant's background. ISCR Case No. 01-06870, 2002 WL 32114535 at *6 (App. Bd. Sep. 13, 2002). An applicant's criminal history is a matter that could affect a final agency

decision on whether to grant the applicant a clearance and his failure to disclose it would impede a thorough investigation of the applicant's background.

In the SOR, DOHA alleged that, in responding to question 23(a), Applicant listed the offense alleged in ¶ 1.a, but not those listed in ¶¶ 1.b, 1.e, 1.f, and 1.k. But the Government amended the SOR to show the allegation contained in ¶ 1.a is the same as that in ¶ 1.b. Furthermore, Applicant listed his incarceration for over a year as a result of his 1990 conviction for burglary and grand theft (¶ 1.f) in the employment history section. Ex. 4 at 4. However, that does not relieve Applicant from responsibility for failing to list his 1984 conviction for burglary (¶ 1.k), for which he was sentenced to 365 days in the county jail and probation for five years, and his conviction for inflicting corporal injury on his spouse (¶ 1.e).

In question 23(d), Applicant was asked if he had ever been charged with or convicted of any offenses related to alcohol or drugs. Applicant answered "no," but had been convicted of drunk driving three times—for arrests in July 1978, October 1985, and April 1986. Although Applicant was arrested for possession of marijuana, as alleged in ¶ 1.p, there is no evidence he was formally charged with any offense for the incident. I conclude Applicant falsified his QNSP by deliberately failing to admit he had been convicted of three drunk driving offenses.

I have considered all of the mitigating conditions listed under Guideline E and conclude none of them apply.

FORMAL FINDINGS

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

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a: Withdrawn

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Withdrawn

Subparagraph 1.d: Withdrawn

Subparagraph 1.e: Against Applicant

Subparagraph 1.f: Against Applicant

Subparagraph 1.g: Against Applicant

Subparagraph 1.h: Against Applicant

Subparagraph 1.i: Against Applicant

Subparagraph 1.j: Against Applicant

Subparagraph 1.k: Against Applicant

Subparagraph 1.l: Against Applicant

Subparagraph 1.m: Against Applicant

Subparagraph 1.n: For Applicant

Subparagraph 1.o: Against Applicant

Subparagraph 1.p: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

DECISION

In light of all of the circumstances 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).