

DATE: August 31, 2005

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 02-21087

REMAND DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was arrested for family violence-assault in 1997. He had been drinking prior to the incident and continues to drink two to three beers a day. Applicant mitigated the criminal conduct and alcohol consumption security concerns raised by his conduct. He failed to mitigate personnel conduct security concerns raised by his dismissal from a court-ordered substance abuse program because of his unexcused absences and his deliberate falsification of his security clearance application. 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 10 November 2003, DOHA issued a Statement of Reasons⁽¹⁾ (SOR) detailing the basis for its decision—security concerns raised under Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on 23 December 2003, but failed to elect whether or not he wanted a hearing. "To be entitled to a hearing, the applicant must specifically request a hearing in his or her answer." Directive ¶ E3.1.4. Although there is no authority in the Directive to do so, apparently a DOHA personnel security specialist asked Applicant to elect whether he wanted a hearing. On 1 arch 2004, Applicant requested a hearing. On 15 June 2004, Applicant changed his mind and decided to have his case decided without hearing. Department Counsel submitted the Government's written case on 24 June 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 13 July 2004 and did not respond. The case was submitted to another administrative judge for a determination without hearing on 23 August 2004. But Applicant's 15 June 2004 request for a decision without hearing was not in the case file. The judge returned the case to Department Counsel on 27 September 2004 because the record showed only that Applicant had requested a hearing. Department Counsel filed Applicant's request for a decision without a hearing on 16 May 2005. The case was assigned to me on 19 May 2005. I issued an opinion on 27 May 2005. The Appeal Board remanded the case on 19 August 2005

THE REMAND

In SOR ¶ 3, DOHA made three allegations under Guideline E (Personal Conduct): (1) Applicant was discharged from a mental health and substance abuse program for six unexcused absences; and he falsified his security clearance application (SCA) by deliberately failing to disclose he had been (2) arrested for family violence-assault; and (3) his use of alcohol had resulted in alcohol-related treatment or counseling. In his answer to the SOR, Applicant provided a copy of the SOR on which he wrote "deny" after the first allegation and "admitt" (sic) after the second and third allegations. He initialed each of these answers. In a separate letter, dated 23 December 2003, Applicant claimed his arrest for family violence had been expunged from his record and he did not deliberately "fail to indicate it in Form 86."

In my original opinion, I found for Applicant on the Criminal Conduct and Alcohol Consumption allegations. I found against him on each of the three Personal Conduct allegations.

The Appeal Board remanded solely on the issue of ¶ 3.b-whether he deliberately falsified his SCA by failing to report he had been arrested for family violence-assault.

FINDINGS OF FACT

Applicant is a 35-year-old vehicle dispatcher for a defense contractor. He is married and has six children. He appears to perform his duties well.

In December 1997, Applicant was arrested for family violence-assault. He was ordered to attend Alcoholics Anonymous and anger management classes. Ex. 10 at 4. Applicant was dismissed from the anger management classes in September 2000 for missing six group sessions without excuse. Ex. 11. Nevertheless, on 26 January 2001, a judge dismissed the case and ordered all records relating to it expunged and sealed to persons outside the local law enforcement agencies and federal agencies entitled to such documents. Ex. 6 at 2.

In December 2003, Applicant tried to enroll in a 6-week government-sponsored aftercare program. Because he had medical insurance, he was referred to a private health care provider, instead. Ex. 8. He enrolled in a private substance abuse program that same day. Ex. 7.

Applicant completed his SCA on 9 February 2001. In it, he certified that his statements were "true, complete, and correct" to the best of his knowledge and belief and acknowledged that a knowing and willful false statement could be punished by a fine, imprisonment, or both. Ex. 4 at 7. Question 24 asked if he had ever been charged with or convicted of any offense related to alcohol. Question 26 asked if, in the previous seven years, Applicant had been arrested for, charged with, or convicted of any offenses not listed elsewhere in the SCA. It required him to report information regardless of whether the record had been sealed or otherwise stricken from the record, unless it involved convictions under the Federal Controlled Substances Act. Question 30 asked if, in the previous seven years, Applicant's use of alcohol had resulted in any alcohol-related treatment or counseling. Applicant answered "no" to all three questions.

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 December 1997 for family violence--assault (¶ 1.a). Applicant admitted the allegation. A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1.

The evidence establishes Applicant was arrested for family violence--assault. Allegations of criminal conduct raise security concerns and may be disqualifying. DC E2.A10.1.2.1. But his arrest is not recent- it was more than seven years ago. MC E2.A10.1.3.1. It appears the offense was an isolated incident. MC E2.A10.1.3.2. Considering all of the evidence, I find for Applicant.

Guideline G--Alcohol Consumption

In the SOR, DOHA alleged Applicant admitted he had been drinking alcohol before his arrest for family violence (¶ 2.a); and he continues to consume two or three beers a day (¶ 2.b). Applicant admits both allegations. Excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness. Directive ¶ E2.A7.1.1.

The evidence establishes Applicant was drinking before his arrest. It is unclear how much he had to drink before the incident. The judge evidently concluded he had enough of a drinking problem to refer him to Alcoholics Anonymous. Therefore, I conclude this was an alcohol-related incident away from work. DC E2.A7.1.2.2. Applicant admits he continues to drink two to three beers a day. But there is no evidence he was ever diagnosed with alcohol abuse or dependence, or that his current use of alcohol will result in impaired judgment or unreliability. There is no pattern (MC E2.A7.1.3.1) and the problem occurred a number of years ago and there is no indication of a recent problem (MC E2.A7.1.3.2). Under all the circumstances, I find for Applicant.

Guideline E--Personal Conduct

In the SOR, DOHA alleged Applicant was discharged from mental health counseling because he had six unexcused absences (¶ 3.a); and he falsified material facts on his SCA by failing to list his arrest for family violence as an "other" offense (¶ 3.b); and his alcohol-related treatment or counseling (¶ 3.c). Applicant denied the allegation in ¶ 3.a, admitted the allegation in ¶ 3.c, and for SOR ¶ 3.b, he admitted omitting the material, but denied it was knowing or willful. 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.

There is clear evidence Applicant was discharged from anger management classes because he missed six group meetings without excuse. Applicant denies he was discharged and relies on the court order expunging the incident from his records from the court. There are a number of reasons the court may have expunged the record. Applicant had the burden of demonstrating the official record of the Department of Mental Health claiming he was discharged from the program is incorrect. He failed to do so. Such unfavorable information-that he failed to complete a court-ordered program- could raise a security concern and may be disqualifying because it demonstrates his unreliability and unwillingness to comply with rules and regulations. DC E2.A5.1.2.1.

The deliberate omission of relevant and material facts from any SCA 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 him a clearance and his failure to disclose such information would impede a thorough investigation of his background.

Applicant admits he falsified a material fact on his SCA by failing to report his arrest and the court order requiring him to attend AA. He both admits and denies that he deliberately failed to report his arrest for family violence-assault. He admits he was arrested for family violence, but denies he intentionally falsified the SCA. An applicant's history of arrests is relevant and material to a determination of his security worthiness. Thus, the only issue is whether his failure to provide the correct information concerning question 26 was deliberate.

I conclude Applicant deliberately falsified his answer to question 26 by denying he had been arrested for any offense not listed elsewhere on the SCA. He deliberately omitted the relevant and material information about his arrest for family violence-assault. This was obviously a serious incident in his life that occurred a little more than three years before he completed his SCA. Applicant does not contend he forgot about the offense. It would be hard to do so in light of the court order of expungement that was issued only two weeks before he completed the SCA. Instead, he claims he did not include this arrest because it was expunged from the record. But question 26 specifically required him to include offenses that had been "sealed or otherwise stricken from the record," except for convictions under the Federal Controlled Substances Act. Applicant's arrest was not under the Federal Controlled Substances Act.

None of the mitigating conditions apply. An applicant may mitigate such a security concern if the falsification was an isolated incident, was not recent, and the individual subsequently provided correct information voluntarily. MC E2.A5.1.3.2. The falsifications were not recent-they occurred over four years ago- and Applicant has subsequently provided correct information. But as he made two separate and distinct falsifications on the same SCA, I was unable to conclude the falsification was isolated. The mitigating condition does not apply. I find against Applicant on ¶ 3.

FORMAL FINDINGS

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

Paragraph 1. Guideline J: FOR APPLICANT

Subparagraph 1.a: For Applicant

Paragraph 2. Guideline G: FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

Paragraph 3. Guideline E: AGAINST APPLICANT

Subparagraph 3.a: Against Applicant

Subparagraph 3.b: Against Applicant

Subparagraph 3.c: 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).

