

DATE: February 12, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-21583

DECISION OF ADMINISTRATIVE JUDGE

DARLENE LOKEY ANDERSON

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's deliberate falsifications on his security clearance application concerning his arrest history have not been mitigated by sufficient evidence of reform and rehabilitation. Clearance is denied.

STATEMENT OF THE CASE

On September 15, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed 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 the Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

The Applicant responded to the SOR in writing on October 11, 2003, in which he elected to have the case determined on a written record in lieu of a hearing. Department Counsel submitted the Government's File of Relevant Material (FORM) to the Applicant on November 25, 2003. The Applicant was instructed to submit information in rebuttal, extenuation or mitigation within 30 days of receipt. Applicant received the FORM on December 4, 2003, and he submitted no reply.

The case was assigned to the undersigned for resolution on January 29, 2004.

FINDINGS OF FACT

The Applicant is 59 years old. He is employed by a defense contractor as a Trades Assistant, and he is seeking to retain his security clearance in connection with his employment.

The Government opposes the Applicant's request for a continued security clearance, on the basis of allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the

SOR:

Paragraph 1 (Guideline J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he engaged in criminal conduct.

The Applicant admitted all of the allegations set forth in the SOR under this guideline. The Applicant was arrested on February 1, 1997, for (1) Driving Under the Influence of Intoxicating Liquor, a misdemeanor, and (2) No Permit to Carry, a felony. The Applicant explained that he had attended a party where he had consumed alcohol. While he was driving home, he was involved in a traffic accident and the police were summoned. The police smelled alcohol on the Applicant's breath and the Applicant underwent a field sobriety test. The Applicant had a .44 handgun under his shirt in the waistband of his pants and a pocketknife. Both items were confiscated by the police. The Applicant's blood/alcohol level exceeded the legal limit and he was arrested. The Applicant states that after spending the night in jail, he showed the registration for the handgun to the police and he was released. (*See*, Government Exhibits 3 and 6).

Paragraph 2 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because he intentionally falsified material aspects of his personal background during the clearance screening process.

The Applicant admitted all of the allegations set forth in the SOR under this guideline. The Applicant completed a Security Clearance Application (Standard Form 86) dated February 4, 2002. Question 21, of the application asked the Applicant if he had ever been charged with or convicted of a felony offense. The Applicant answered "NO". (*See*, Government Exhibit 4). This was a false answer. The Applicant was arrested on February 1, 1997, and charged with Count 2, No Permit to Carry, a felony, as discussed above. The Applicant explained that he answered "NO" to this question because he had not been convicted of the charge.

The same questionnaire, at Question 22, asked the Applicant if he had been charged with or convicted of a firearms or explosives offenses. The Applicant answered "NO". (*See*, Government Exhibit 4). This was a false answer. The Applicant was arrested on February 1, 1997, and charged with Count 2, No Permit to Carry, a felony. The Applicant explained that he again answered "NO" to this question because he had not been convicted of the charge.

In response to Question 24, which asked if he had ever been charged with or convicted of any offenses related to alcohol or drugs, the Applicant answered "NO". (*See*, Government Exhibit 4). Here, the evidence is mixed. The Applicant's own statement states that he was charged with Driving Under the Influence of Alcohol. (*See*, Government Exhibit 6). The FBI records do not indicate that he was criminally charged with this offense. (*See*, Government Exhibit 5). However, attached to his answer, the court records show that the arrest for Driving Under the Influence was administratively handled. (*See*, Government Exhibit 3). Therefore, it is unclear whether the Applicant was ever criminally charged with Driving Under the Influence. Accordingly, I find for the Applicant under subparagraph 2.(c).

The Applicant's excuses for failing to answer these questions truthfully are unacceptable. In evaluating the Applicant's credibility concerning his intent, while it has not been alleged, it must be noted that he answered "NO" to question 26, which specifically asked him whether or not he had ever been arrested within the last seven years. Title 18 of the United States Code makes it a criminal offense to knowingly and wilfully make any false statement or to intentionally provide false information to the Government. I find that the Applicant violated this federal statute when he was not truthful in answering the questions on his security clearance application, as he sought to conceal his 1997 felony charge.

POLICIES

Enclosure 2 and Section E.2.2. of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

Guideline J (Criminal Conduct)

Conditions that could raise a security concern:

1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;

2. A single serious crime or multiple lesser offenses.

Condition that could mitigate security concerns:

6. There is clear evidence of successful rehabilitation.

Guideline E (Personal Conduct)

Condition that could raise a security concern:

2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Conditions that could mitigate security concerns:

None.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature and seriousness of the conduct and surrounding circumstances
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have 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. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned."

CONCLUSIONS

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for clearance may be involved in criminal conduct and dishonesty that demonstrates poor judgment or unreliability.

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation, which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant he a security clearance.

In this case the Government has met its initial burden of proving that the Applicant has engaged in criminal conduct (Guideline J); and dishonesty (Guideline E). This evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with his security clearance eligibility.

Considering all of the evidence, the Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case under Guidelines J and E of the SOR.

The Applicant's criminal history, includes an arrest in 1997, for Driving Under the Influence of Alcohol, a misdemeanor, and No Permit to Carry, a felony. Given the fact that the Applicant's criminal activity occurred, over seven years ago, and there is no indication of recent criminal problems, sufficient rehabilitation and mitigation has been shown under subparagraph 1(a).

Most troubling, however, is the fact that the Applicant did not reveal his 1997 felony charge in response to questions 21 and 22 on his security clearance application. With the particular evidence that I have been provided there is no reasonable excuse for his failure to answer these questions truthfully. Consequently, the evidence shows that the Applicant was not completely honest with the Government and sought to conceal the truth. None of the mitigating factors set forth in the Directive under Guideline E apply. I find that the Applicant deliberately failed to reveal this information to the Government.

The Government relies heavily upon the integrity and honesty of clearance holders. It is a negative factor for security clearance purposes when an Applicant has deliberately provided false information about material aspects of his personal background. This Applicant has not demonstrated that he is trustworthy, and does not meet the eligibility requirements for access to classified information. Accordingly, I find against the Applicant under Guidelines E (Personal Conduct) and J (Criminal Conduct).

The Applicant has not provided this Administrative Judge with sufficient evidence in mitigation that would negate the negative impact his falsifications have on his security worthiness. At this time, I cannot find that it is clearly consistent with the national interests to grant the Applicant a security clearance.

On balance, it is concluded that the Applicant has failed to overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the SOR.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: Against the Applicant.

Subpara. 1.a.: For the Applicant.

Subpara. 1.b.: Against the Applicant.

Paragraph 2: Against the Applicant.

Subpara. 2.a.: Against the Applicant.

Subpara. 2.b.: Against the Applicant.

Subpara. 2.c.: For 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 the Applicant.

Darlene Lokey Anderson

Administrative Judge