

DATE: November 3, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-22853

ECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez Jr., Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was arrested for transporting over a pound of marijuana from Canada into the U.S. Applicant claimed he was delivering a package for a man he met in Canada and was unaware it contained marijuana. Neither Applicant nor his story is credible. Applicant failed to mitigate the criminal conduct and 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 19 April 2004, DOHA issued a Statement of Reasons⁽¹⁾ (SOR) detailing the basis for its decision-security concerns raised under Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on 9 September 2004 and elected to have a hearing before an administrative judge. The case was assigned to me on 30 July 2004. On 21 September 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 30 September 2004.

RULINGS ON PROCEDURE

On 29 July 2004, Department Counsel moved to amend the SOR by adding a security concern under Guideline E (Personal Conduct). On 5 August 2004, Department Counsel moved to require Applicant to submit an answer to the SOR. As the motion to amend was unopposed, it was granted. Applicant answered the amended SOR and the Department Counsel accepted that as the answer to the original SOR as well.

FINDINGS OF FACT

Applicant is 24-year-old electronics engineer for a defense contractor. He was given an interim secret clearance on 7 April 2003. Ex. 2 at 5. He graduated from college with a degree in electrical engineering and was on the Dean's list for

two years.

On 3 April 2003, Applicant completed his security clearance application. Ten days later, on 13 April 2003, members of the U.S. Custom Service stopped the rental car Applicant was driving as he entered the U.S. from Canada. An inspection of the vehicle revealed 496 grams⁽²⁾ of marijuana under the spare tire. The state where he entered the U.S. issued a felony complaint alleging Applicant possessed more than 16 ounces (a pound) of marijuana. On 7 August 2003, Applicant's case was adjourned in contemplation of dismissal. Ex. B at 3-4. Under the state statute, if the case is not "restored" within six months, it is "deemed to have been dismissed by the court in furtherance of justice." *Id.* at 5.

On 17 September 2003, Applicant completed a signed, sworn statement to a Defense Security Service (DSS) agent in which he denied knowing he had marijuana in his vehicle when he entered the U.S.

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

Applicant denies he knowingly brought marijuana into the U.S. He claims he met a man in a bar who asked him to deliver some personal affects to his brother who lived in the same U.S. city as Applicant. Before he returned to the U.S., Applicant went to a restaurant to meet the man, who threw a bag in the trunk, but was unable to tell Applicant where to deliver it. He told Applicant he would contact him by cell phone when he learned of his brother's address. At the border, the marijuana was discovered under the spare tire. Neither the story nor Applicant are credible. Applicant was a 23-year-old college graduate at the time. His story changed in subtle ways when cross-examined by Department Counsel. After observing Applicant's demeanor and carefully evaluating his testimony, I conclude Applicant knew he was transporting marijuana.

Guideline J--Criminal Conduct

In the SOR, DOHA alleged Applicant transported 496 grams of marijuana into the U.S. from Canada on 13 April 2003 (¶ 1.a). A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1.

The Government established the allegation by substantial evidence. Applicant was charged with felony possession of more than 16 ounces of marijuana--a serious offense. DC E2.A2.1.2.1; DC E2.A2.1.2.2. Three of the mitigating conditions could possibly apply: The crime was an isolated incident (MC E2.A10.1.3.2); Applicant did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur (MC E2.A10.1.3.4); and there is clear evidence of successful rehabilitation (MC E2.A10.1.3.6). Although the importation of marijuana was an isolated incident, his criminal activity was not. He knowingly made a statement under oath in which he acknowledged that a knowing and willful failure to tell the truth could be punished under 18 U.S.C. § 1001. It is unclear whether the violations are likely to recur. As he still denies his culpability, there is no clear evidence of rehabilitation. I conclude none of the mitigating conditions apply. I find against Applicant.

Guideline E--Personal Conduct

In the SOR, DOHA alleged Applicant deliberately falsified material facts in a signed, sworn statement he gave to a DSS agent by denying that he intentionally brought marijuana across the border from Canada into the U.S (¶ 2.a). 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 Government established by substantial evidence that Applicant transported marijuana into the U.S. and denied he knowingly did so. After considering Applicant's testimony and demeanor, I am convinced he deliberately falsified his statement to the DSS agent. After carefully reviewing all of the evidence and observing Applicant's demeanor during his testimony, I am convinced he knew there was marijuana in his vehicle when he tried to cross from Canada into the U.S. and that he deliberately falsified his signed, sworn statement to the DSS agent. DC E2.A5.1.2.3. The evidence does not support a finding that any of the mitigating conditions apply. I find against Applicant.

FORMAL FINDINGS

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

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a: 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).

2. There are 454 grams to a pound.