

DATE: October 28, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-23451

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant deliberately falsified his security-clearance application by minimizing his use of marijuana and by omitting a 1996 arrest for possession of marijuana. In addition, he is unable to successfully mitigate the security concerns stemming from (1) a child-support arrearage for more than \$35,000.00, and (2) willfully failing to file state and federal income tax returns for several years. Clearance is denied.

STATEMENT OF THE CASE

On January 10, 2005, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. [\(1\)](#) The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline E for personal conduct (falsification), Guideline F for financial considerations, and Guideline J for criminal conduct. Applicant replied to the SOR on February 1, 2005, and again on March 4, 2005. He admitted the allegations in the SOR subparagraphs, provided an explanation, and included a character reference. Also, he indicated he did not desire a hearing.

On April 8, 2005, Department Counsel submitted her written case consisting of all relevant and material information that could be adduced at a hearing. This so-called File of Relevant Material (FORM) was mailed to Applicant and it was received by him on April 26, 2005. Applicant did not submit any information within the 30-day period after receiving the FORM. The case was assigned to me on June 15, 2005. Issuing a decision in this case was delayed due to a heavy caseload.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the record, I make the following findings of fact:

Applicant is a 50-year-old man employed as a Drafter II for a defense contractor doing business at a naval weapons

station. It appears Applicant is seeking to obtain a security clearance for the first time.

On or about September 18, 2002, Applicant completed and signed a security-clearance application. In doing so, he was required to certify that his statements on the form were true, complete, and correct to the best of his knowledge and belief and made in good faith. Applicant has a history of illegal drug involvement and answered certain questions on his security-clearance application as follows:

- In response to Question 24, ⁽²⁾ Applicant answered "no" thereby denying any drug- or alcohol-related offenses.
- In response to Question 27, ⁽³⁾ Applicant answered "yes" and indicated he had used marijuana on a monthly basis from January 1, 1997, to August 1, 1997.

The ensuing background investigation revealed derogatory information about Applicant in the following areas: (1) marijuana use; (2) a drug-related arrest; (3) failure-to-file state and federal income tax returns for several years; and (4) a substantial child-support arrearage. Applicant addressed these four subjects in September 2003 when he provided a sworn statement during the background investigation.

Concerning marijuana use, he admitted providing inaccurate information about his marijuana use on his security-clearance application. As described by Applicant, his marijuana use was on a periodic basis over several years:

I first used marijuana while a senior in high school. I consumed marijuana in cigarette form while attending parties and other social type functions. I smoked marijuana about a dozen times during the school year on weekends. I began smoking marijuana again beginning at age 24. I would smoke it infrequently, usually in the company of friends on the weekends; sometimes I would be alone. At this point my use of marijuana was infrequent. I always kept a small personal amount of marijuana for my use when I had a desire to smoke the drug. I cannot recall how often I smoked marijuana. My last use of marijuana was spring 2000. I smoke marijuana because this was my choice of vices. I did smoke marijuana monthly from Jan 97 to Aug 97 to get relief from my ocular migraine headaches. I would spend \$10.00 to \$20.00 monthly to purchase marijuana during this period.

Applicant stopped using marijuana in 2000 when he recommitted his life to his God. He explained he did not list the full extent of his marijuana use on his security-clearance application because he was afraid doing so would prevent him from obtaining a security clearance.

Applicant also explained the circumstances surrounding his arrest in 1996 for possession of marijuana. Applicant and a friend were both arrested while sitting in Applicant's car. The friend had the marijuana, but both were arrested and taken to jail. As a first-time offender, Applicant's case was handled via a pretrial diversion program, which he successfully completed. Applicant believes the marijuana possession charge was expunged from his record, but he has not provided documentary proof of his belief. He did not list this matter in response to Question 24 because he did not read the whole question and did not realize he was required to report it.

The SOR alleges and Applicant admits willfully failing to file federal income tax returns for the years 1992, 1993, 1994, 1995, and 2002. Likewise, he willfully failed to file state income tax returns for the years 1992 and 1993. Applicant addressed his failure-to-file in his sworn statement as follows:

After my former wife left me in 1992, I also lost my job due to my company closing and relocating. I could no longer pay my bills and after a year of struggling, I moved back to [State B] in 1993. I was under a lot of stress and filing my taxes was just not a priority. I did file my federal income tax return in 1996. In 2001 I began working with the IRS to straighten out my back tax obligation. In May 02, the IRS took my refund of \$8,380.21 and forwarded it to the [State A child-support agency] to apply to my child support arrearage. I have not filed my federal income tax return for tax years ended 31 Dec 02. I realize that I am required by law to file my state and federal taxes each year. However, I have consciously decided not to file these tax returns because I realize my refund will be held and sent to my former wife as payment on my child support arrearage. I intend to file my federal income tax return next year (2004) for tax year 2002 and 2003. By this time we should have the child support agreement worked out. I have not filed my state income taxes as required in [State A] for tax years 1992 and 1993. I have filed personal income tax returns in [State B] since moving here in 1993.

Applicant has not provided any documentary proof that he has resolved the issues stemming from his failure-to-file state and federal income tax returns.

The SOR alleges and Applicant admits to owing a substantial child-support arrearage stemming from his divorce from his first spouse. His arrearage has been as high as \$48,695.00. As of August 31, 2003, his arrearage was \$36,237.11. In his Answer to the SOR, Applicant claimed that his ex-wife would cancel or forgive the arrearage, but she had not yet done so. He also indicated he was paying his current child support obligation as well as paying some toward the arrearage. Applicant has not provided any documentary proof to support his claim, and so, I presume the arrearage is still outstanding.

Applicant and his spouse are members in good standing of a ministry, and Applicant submitted a character reference from the ministry's pastors. The character reference describes Applicant in positive terms, and the pastors believe Applicant demonstrates stability and integrity.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1. through ¶ 6.3.6. of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.⁽⁴⁾ Instead, it is determination that the applicant has not met the strict guidelines the President has established for granting a clearance.

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽⁵⁾ There is no presumption in favor of granting or continuing access to classified information.⁽⁶⁾ The government has the burden of proving controverted facts.⁽⁷⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.⁽⁸⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽⁹⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽¹⁰⁾ Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against him.⁽¹¹⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹²⁾

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹³⁾ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

Personal conduct under Guideline E is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the

Government when applying for a security clearance or in other official matters is a security concern. It is deliberate if it is done knowingly and willfully.

An omission of relevant and material information, for example, is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or thought the arrest had been expunged from the record and did not need to be reported.

Here, based on the record evidence as a whole, the government established its case under Guideline E. I conclude Applicant deliberately provided false and misleading information about his history of illegal drug involvement when he completed his security-clearance application. Concerning Question 27, Applicant sought to minimize his marijuana use by providing false and misleading information about his marijuana use. He admitted providing inaccurate information about his marijuana use in his sworn statement. Concerning Question 24, Applicant admits providing the wrong answer, but denies any intent to falsify or mislead. His denial is not credible in light of the plain language of the question coupled with his admitted false answer to Question 27. I conclude Applicant provided a false answer to Question 24 for the same reason he provided a false answer to Question 27--he was concerned that telling the truth would prevent him from obtaining a security clearance. Considering the totality of facts and circumstances, I cannot conclude Applicant made a good-faith effort to answer Questions 24 and 27 in an accurate and truthful way. Accordingly, DC 2-(14) applies against Applicant. His falsification of his security-clearance application creates doubt about his judgment, reliability, and trustworthiness.

I reviewed the mitigating conditions under Guideline E and conclude none apply. Falsification of a security-clearance application is a serious matter, not easily mitigated or extenuated. Accordingly, Guideline E is decided against Applicant.

Under Guideline F, a security concern typically exists for two different types of situations--significant unpaid debts and unexplained affluence; this case involves the former. An individual who is financially overextended is at risk of having to engage in illegal or unethical acts to generate funds to meet financial obligations. Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information.

Here, based on the record evidence as a whole, the government established its case under Guideline F. The child-support arrearage of more than \$35,000.00 demonstrates a history of not meeting financial obligations as well as inability or unwillingness to pay one's just debts. (15) The same facts and circumstances demonstrate financial irresponsibility. Of special concern here is the nature of the obligation, because his failure to pay child support indicates a refusal to accept responsibility for the consequences of his actions. This character trait does not enhance Applicant's suitability for access to classified information.

I reviewed the mitigating conditions under the guideline and conclude none apply. Although Applicant experienced a divorce and a period of unemployment, those events took place years ago and he has not provided any information showing why those events continue to prevent him from resolving his ongoing child-support arrearage. Likewise, Applicant has not provided any information to substantiate his claim that his ex-wife has cancelled or forgiven the arrearage. Accordingly, Guideline F is decided for Applicant.

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

Here, based on the record evidence as a whole, the government established its case under Guideline J. Applicant engaged in criminal conduct (a misdemeanor offense) by willfully failing to file state and federal income tax returns for several years. In addition, Applicant's falsification of his security-clearance application is in violation of 18 U.S.C. § 1001, which is a felony offense. Given these circumstances, both DC 1-(16) and DC 2-(17) apply against Applicant. His criminal conduct creates doubt about his judgment, reliability, and trustworthiness. No mitigating conditions apply. In particular, there is not solid proof that Applicant has successfully resolved his state

and federal tax obligations. Accordingly, Guideline J is decided against Applicant.

In reaching my decision, I considered the evidence as a whole, both favorable and unfavorable, the whole-person concept, the clearly-consistent standard, and other appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

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

SOR ¶ 1-Guideline E: Against Applicant

Subparagraph a: Against Applicant

Subparagraph b: Against Applicant

SOR ¶ 2-Guideline F: Against Applicant

Subparagraph a: Against Applicant

SOR ¶ 3-Guideline J: Against Applicant

Subparagraph a: Against Applicant

Subparagraph b: Against Applicant

Subparagraph c: Against Applicant

Subparagraph d: Against Applicant

Subparagraph e: Against Applicant

Subparagraph f: Against Applicant

Subparagraph g: Against Applicant

Subparagraph h: Against 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. Clearance is denied.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

2. Question 24 states "Have you ever been charged with or convicted of any offense(s) related to drugs or alcohol? For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607."

3. Question 27 states "Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any

controlled substance, for example, marijuana, cocaine, crack cocaine, . . . or prescription drugs?"

4. Executive Order 10865, § 7.

5. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

6. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.

7. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

8. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

9. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

10. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

11. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

12. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

13. *Egan*, 484 U.S. at 528, 531.

14. E2.A5.1.2.2. The deliberate omission, concealment, of 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.

15. E2.A6.1.2.1. A history of not meeting financial obligations;" and E2.A6.1.2. 3. Inability or unwillingness to satisfy debts.

16. E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.

17. E2.A10.1.2.2. A single serious crime or multiple lesser offenses.