

DATE: December 14 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-24504

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esquire, Department Counsel

FOR APPLICANT

Robert J. Woofter, Esquire

SYNOPSIS

This 53-year-old employee of a defense contractor has a history of criminal conduct, in 1983, 1991, 1999, and 2002; numerous unresolved delinquent debts, some of which are 10 or more years old; and two instances of falsification of material facts on official documents. Documentation is generally lacking for Applicant's claims and they lack significant credibility. A pattern of questionable conduct, occurring over most of his adult life, has been established. litigation and extenuation have not been shown. Clearance is denied.

STATEMENT OF THE CASE

On July 30, 2004, 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, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons

why DOHA could not make the preliminary affirmative finding required under the Directive that it

is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and

determine whether a clearance should be granted, denied or revoked.

On September 13, 2004, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made by a DOHA Administrative Judge after a hearing. The case was first assigned to another Administrative Judge, but was reassigned assigned to me on June 22, 2005. An Amended Notice of Hearing was issued on September 15, 2005, setting the matter for October 11, 2005. ⁽¹⁾ At the hearing, the Government offered 14 exhibits (Government's Exhibits (GX) 1-14). Applicant testified and offered 34 exhibits (Applicant's Exhibits (AX) A-X). Applicant also submitted a post hearing exhibit (AX Y). The transcript was received on October 27, 2005.

FINDINGS OF FACT

This 53-year-old male works for a defense contractor. The SOR contains five allegations under Guideline J (Criminal Conduct); seventeen allegations under Guideline J (Financial Considerations); and two allegations under Guideline E (Personal Conduct). Applicant admitted allegations 1.a. - 1.d., but denied allegation 1.e. He admitted all 17 allegations, 2.a. - 2.q.; and he denied allegations 3.a and 3.b. All admitted allegations are accepted and made Findings of Fact.

After considering the totality of the evidence of record, I make the following FINDINGS OF FACT as to each SOR allegation:

Guideline J (Criminal Conduct)

1.a. - Applicant was charged on June 4, 1983, in State A, with four counts of Theft of U.S. Mail. He entered into a Plea Agreement on July 15, 1983 in which he pleaded guilty to all four counts. The U.S. Attorney recommended incarceration not to exceed three years on each count. He was sentenced to two years incarceration for each of the four counts, to run concurrently. He actually served slightly less than one year and two weeks (AX Y).

1.b. - Applicant was charged on January 28, 1991, in State A, with 18 counts of Unsworn Falsification. On April 29, 1991, he pleaded nolo contendere to amended charges of six counts of Unsworn Falsification and imposition of sentence was suspended for one year. He was ordered to pay a fine of \$250.00, complete 40 hours of community service, and pay restitution of \$2,263.00.

1.c. - Applicant was arrested on February 21, 1999, in State A, and charged with Driving While Intoxicated (DWI). His Breath Alcohol Content at the time of arrest was .21%. On April 20, 1999, he was found guilty and sentenced to 60 days in jail with 56 days suspended, ordered to pay a \$600.00 fine with \$300.00 suspended, his driver's license was revoked for 90 days, and he was placed on three years probation. He successfully completed an Outpatient Program in June 1999.

1.d. - Applicant falsified material facts on his March 12, 2002 security clearance application (SF 86) in his response to Question 27, as cited in 3.b., below.

1.e. - Pursuant to 10 U.S.C. 986, the facts alleged in subparagraph 1.a., above, disqualify Applicant from having a DoD security clearance granted or renewed. The statute also provides that

in a meritorious case, the Secretary of Defense may authorized an exception to the basic prohibition.

Guideline F (Financial Considerations)

Applicant has the following past due debts owed to the cited creditors, categorized as past due, placed for collection, written off, or reduced to judgment:

2.a. - Bank A - \$1,098.00

2.b. - Creditor B \$960.00

2.c. - Collection Agency C \$1,162.00

2.d. - Creditor D \$200.00

2.e. - Bank E \$409.00

2.f. - Creditor F \$502.00

2.g. - Collection Agency G \$206.00

2.h. - Collection Agency H \$207.00

2.i. - Credit Company I \$835.47

2.j. - Credit Company J \$1,162.00

2.k. - Bank K \$3,444.00

2.l. - Gasoline Company L \$281.00

2.m. - Collection Agency M \$5,209.00

2.n. - Collection Agency N \$4,516.00

2.o - Gasoline Company O \$674.00

2.p. - Collection Agency P \$1,361.00

2.q. - Applicant's Personal Financial Statement (PFS) of July 11, 2002, showed that Applicant was financially capable of making payments on the debts cited above, as evidenced by a monthly net remainder of \$1,178.00.

Guideline E (Personal Conduct)

3.a. - Applicant was injured on the job in about 1995 and received disability insurance payments. He continued to draw such payments after returning to full time employment. As a result, his employment was terminated and he had to repay the excess disability payments he had received.

His attempt to shift responsibility for the improper payments away from himself do not establish any confidence in his integrity and judgment.

3.b. - Applicant falsified material facts on his March 21, 2002 SF 86 in his answer to Question **27. Your Use of Illegal Drugs and Drug Activity - Illegal Use of Drugs** [Since the age of 16 or in the last seven years]. He answered "No" and intentionally omitted mentioning his cocaine use from about 1995 to about 1997. His explanation (Response to SOR, page 3) was that "I truly couldn't remember how far back I may have last committed an indiscretion and I feared that use from long ago might contaminate a polygraph test question on illegal drug use over the past seven years, I declined to take the polygraph examination." The last drug use was in "about 1997," which was only five years prior to the interview. Applicant's words do not establish any confidence in Applicant's integrity and judgement. I find his denial of an intentional falsification to lack credibility.

Applicant has received highly positive letters of support from his colleagues and work supervisors (AX A -AX X). Many know about his 1983 and 1999 convictions. All praise his work abilities and ethics in dangerous work involving tunneling and blasting (AX K) and he was made a Job Steward in May 2005. His operations manager views Applicant as a "model employee" (AX F and AX H).

POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant

in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation

for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of

whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either by the Applicant's admissions or by other evidence) and proves conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the Applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence

of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the Applicant.

CONCLUSIONS

Applicant is a 53-year-old laborer, born in October 1952. He has a history of the exercise of questionable judgment that comes within three separate Guidelines under DoD Directive 5220.6.

Guideline J (Criminal Conduct) - Applicant's criminal conduct includes three convictions, in 1983, 1991, and 1999, at ages 31, 39, and 47. Clearly, the criminal misconduct is not attributable to chronological immaturity, and just as clearly, it has continued into what might be called middle age, when chronological maturity may be expected to produce more commonsense and self control.

I have carefully considered each conviction and reached the following conclusions.

Allegation 1.a. - Applicant was working for a company that transported mail. The trial court commented on the seriousness of the mail theft violations, but reduced the sentence from three years to two years on each count, to run concurrently. The judge's rationale was that it was a first offense and he wanted to give Applicant an incentive to straighten out his life (GX 8 and GX 10). Applicant served more than one year in a federal penitentiary and six months in a halfway house (GX 8 and GX 10).

Allegation 1.b. - the unsworn falsifications in 1991 were on forms he used to obtain unemployment compensation during periods when he was actually working. There were originally 18 counts, reduced to six, and Applicant had to pay back the money illegally obtained (GX 8 at page 6). In his response to the SOR, he seeks to place at least some of the blame on his employer (Response, attachment, page 2, last paragraph).

Allegation 1.c. - this 1999 offense occurred when Applicant was driving in an urban area while substantially intoxicated (.21%).

The above record indicates a mind set that allowed Applicant to steal other people's mail, to lie with the intent to deceive a government agency and to obtain money to which he knew he was not entitled, and to ignore the danger he caused to others by driving while intoxicated.

Allegation 1.d. - the evidence shows he continued his pattern of poor judgment by lying on his SF 86 by intentionally omitting any reference to his cocaine use from about 1995 to 1997.

Disqualifying Conditions (1) any criminal conduct, regardless of whether the person was formally charged; and (2) a single serious crime or multiple lesser offenses are applicable, but none of the parallel mitigating conditions have been established by the record; e.g., (1) the last act of the overall history of criminal conduct is still recent, (2) was not an

isolated incident, and (5) there is as yet no clear evidence of successful rehabilitation.

Allegation 1.e. - Pursuant to 10 U.S.C. 986, the fact that Applicant was convicted and actually served more than one year in jail, means that he is not eligible to hold a DoD security clearance unless the Secretary of Defense finds a meritorious basis for granting a waiver of the statutory prohibition.

In addition, and without regard to the mandatory language of 10 U.S.C. 986, the overall record of Applicant's history of criminal and personal misconduct and his financial irresponsibility compels the conclusion that Applicant currently lacks the overall good judgment, reliability, and trustworthiness required of anyone seeking access to the nation's secrets. In reaching this conclusion, I have given careful consideration to the letters from his colleagues. I am compelled to conclude, however, that the sincere praise for his work ethic does not adequately mitigate the impact of his varied history of misconduct, all of which continues to raise serious security concerns.

Guideline F (Financial Considerations)

Applicant admits all of the 16 debts cite above in SOR 1.a-1.p., which total more than \$24,000.00. His explanations begin with an assertion that many of the debts were medical-related and that he was not aware of many of the debts until relatively recently. He also promises to spend "10%" of his earning to make payments on the delinquent debts (Attachment to Response to SOR). The only debt that Applicant has actually made any payments on is the \$1,098.00 owed to Bank A (SOR 1.a.) (Tr at 8). This information is not clear since Applicant states he "owed in the beginning \$7,500.00 more or less" and that he made perhaps six or seven payments before he stopped" and that "they are garnishing my dividend check this year" (Tr at 89).

I have carefully considered Applicant's testimony and Counsel's comments (Tr at 85-98). I understand that many of the debts were incurred ten years or more in the past and no longer appear on credit reports. This does not establish that the debts were resolved by any affirmative action by Applicant. In fact, based on the total record, I conclude that Applicant has done relatively little to pay off or otherwise resolve the delinquent debts cited in the SOR.

Disqualifying Conditions (1) a history of not meeting financial obligations and (3) inability or unwillingness to satisfy debts are applicable, but none of the parallel mitigating conditions are established by the record. It appears that some of the cited debts were incurred at least partially as a result of factors beyond Applicant's control, but he has had the time and available assets to make substantial steps in resolving those same debts, so (MC 3) is specifically not applicable.

In summary, I conclude that the Government's concerns about Applicant's finances remain valid and have not been adequately mitigated.

Guideline E (Personal Conduct)

When considered along with the other misconduct alleged in the SOR, Applicant's 1995 and 2002 falsifications suggest that Applicant has a historic tendency to seek, what evidently appears to him to be, the easy way out of troublesome situations. It is not clear that he considers the consequences and ramifications of his acts.

Disqualifying Conditions (1) reliable, unfavorable information [the disability insurance forms]; (2) the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire . . . [the SF 86]; and (5) a pattern of dishonesty or rule violations are clearly applicable, but none of the parallel mitigating conditions are shown by the record.

Applicant's varied conduct indicating questionable judgment have occurred for so long, so often and so recently, that it is as yet impossible to be confident that they are safely behind him. In summary, the record does not permit a finding that Applicant has demonstrated he presently possesses the good judgment, reliability, and trustworthiness required of anyone seeking access to the nation's secrets.

The adverse decision in this case is made on the basis of the SOR allegations made under all three Guidelines, and not solely on the basis of 10 U.S.C. 986. Therefore, pursuant to DOHA Operating Instruction No. 64, no waiver recommendation is made.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Guideline J (Criminal Conduct) Against the Applicant

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. Against the Applicant

Subparagraph 1.e. Against the Applicant

Guideline F (Financial Considerations)

Subparagraph 2.a. Against the Applicant

Subparagraph 2.b. Against the Applicant

Subparagraph 2.c. Against the Applicant

Subparagraph 2.d. Against the Applicant

Subparagraph 2.e. Against the Applicant

Subparagraph 2.f. Against the Applicant

Subparagraph 2.g. Against the Applicant

Subparagraph 2.h. Against the Applicant

Subparagraph 2.i. Against the Applicant

Subparagraph 2.j. Against the Applicant

Subparagraph 2.k. Against the Applicant

Subparagraph 2.l. Against the Applicant

Subparagraph 2.m. Against the Applicant

Subparagraph 2.n. Against the Applicant

Subparagraph 2.o. Against the Applicant

Subparagraph 2.p. Against the Applicant

Subparagraph 2.q. Against the Applicant

Guideline E (Personal Conduct) Against the Applicant

Subparagraph 2.a. Against the Applicant

Subparagraph 2.b. Against 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 Applicant.

BARRY M. SAX

ADMINISTRATIVE JUDGE

1. The hearing was originally scheduled for January 19, 2005, but was postponed pending resolution of an issue relating to the application of the newly amended language of 10 U.S.C. 986.