

DATE: September 15, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-24712

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Jason Perry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In January 2002, Applicant was arrested for multiple hunting violations committed in November-December 2001, including two felony counts of forging a public document pertaining to hunting. He was convicted of five misdemeanor hunting violations. The security concern based on criminal conduct is mitigated. Clearance is granted.

STATEMENT OF THE CASE

On January 10, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to revoke Applicant's security clearance. This action was taken under Executive Order 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). The SOR alleges security concerns under Guideline J (Criminal Conduct).

Applicant answered the SOR in writing on January 19, 2005, offered explanations, and requested a hearing. The case was assigned to me on June 15, 2005. On July 18, 2005, DOHA issued a notice of hearing setting the case for August 4, 2005. The case was heard as scheduled. DOHA received the transcript (Tr.) on August 17, 2005.

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I also make the following findings:

Applicant is a 52-year-old information system engineer who has worked for a defense contractor since February 1995. He retired from the USMC in 1995 after 20 years of active service. He first received a security clearance in 1978.

In January 2002, Applicant was charged with two felony counts of forging a public record or certificate, conspiracy to commit a wildlife violation, conspiracy to take wild game, killing two deer out of season, unlawful possession/transport

of six deer, and killing a wild turkey out of season. All the offenses occurred in November and December 2001.⁽¹⁾ At the time, Applicant was a member of a hunting club. He was a hunting licensing agent and operated a game check station for the state, for which he received no compensation.⁽²⁾

The felony counts of forging a public record were based on Applicant's action of listing himself as the person who bagged deer killed by other hunters. The conspiracy charges were based on the participation of multiple hunters in the offenses.

In accordance with a plea agreement, Applicant was convicted of conspiracy to commit a wildlife violation, conspiracy to take wild game out of season, killing two antlerless deer out of season, killing a wild turkey out of season, and possession of six illegally bagged deer. All the offenses of which he was convicted were misdemeanors. He was sentenced to two six-month jail terms, with all jail time suspended, fined a total of \$2,100.00, ordered to pay restitution of \$1,600.00, and placed on probation for three years. His game checking license was suspended for 20 years. He was ordered to surrender his state hunting license and to not obtain a new one for five years.⁽³⁾ As part of the plea bargain, Applicant was required to provide a roster of the hunt club members and to testify in the trials of other members.⁽⁴⁾ He is very concerned about the impact of his hunting violations on his security clearance.⁽⁵⁾

Applicant is an avid hunter. At the hearing, Applicant testified he and his fellow hunters hunted in multiple counties and it was difficult to keep up with what game were in season in each county on a given day.⁽⁶⁾ Applicant listed himself as the hunter who bagged antlerless deer out of season because of loyalty to his fellow hunters who had illegally shot them. Although he no longer has a local hunting license, he continues to hunt in other states and on his own property, where a license is not required.⁽⁷⁾

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), as amended and modified. 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.

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶ 6.3.1 through ¶ 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant'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 ¶¶ E2.2.1.1 through E2.2.1.9.

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 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, that conditions exist in the personal or professional

history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

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 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1. Disqualifying conditions may be based on allegations or an applicant's admission of criminal conduct, whether or not charged (DC 1). Directive, ¶ E2.A10.1.2.1. A single serious crime or multiple lesser offenses may also be disqualifying (DC 2). Directive, ¶ E2.A10.1.2.2. Applicant was charged with two felonies and convicted of multiple lesser offenses. I conclude DC 1 and DC 2 are established.

A security concern based on criminal conduct may be mitigated by showing the criminal behavior was not recent (MC 1) or was an isolated incident (MC 2). Directive, ¶ E2.A10.1.3.1., E2.A10.1.3.2. *See also* Directive, ¶ E2.2.1.3. (frequency and recency of conduct). I conclude MC 1 is established, because Applicant committed all the offenses in November and December 2001, and he has not engaged in any criminal conduct since then.

I conclude MC 2 is not established because there were multiple offenses over a one-month period. However, I have considered that all the offenses occurred during a brief time period and were aberrational in light of Applicant's 20 years of USMC service in a highly disciplined environment, and his 10 years of dedicated service to a defense contractor.

Acquittal is a mitigating condition (MC 5). Directive ¶ E2.A10.1.3.5. Although Applicant was not convicted of the two felony counts of forging a public document, I conclude MC 5 is not established because the disposition of the felony counts was the product of a plea agreement and not an adjudication on the merits.

Criminal conduct also may be mitigated by showing clear evidence of successful rehabilitation (MC 6). Directive ¶ E2.A10.1.3.6. *See also* Directive ¶ E2.2.1.6. (rehabilitation and behavioral changes). I conclude MC 6 is established, because Applicant has completed his three-year probation, made restitution, accepted responsibility for his actions, and has not committed any further violations.

Several other factors enumerated in the Directive are relevant. In accordance with Directive ¶ E2.2.1.1., I have considered the nature, extent, and seriousness of the conduct. While forgery of a public document is a serious offense, the remaining offenses appear to be minor wildlife violations. Applicant was a mature adult at the time of the offenses. Directive, ¶ E2.2.1.4. Regarding motivation for the conduct under Directive, ¶ E2.2.1.6., the evidence shows many of the offenses were inadvertent, unintentional violations. The forgery of public documents was motivated by Applicant's misguided sense of loyalty to his fellow hunters. There is virtually no potential for pressure, coercion, exploitation, or duress under ¶ E2.2.1.8., because all the conduct is a matter of public record and common knowledge among Applicant's colleagues, friends, and supervisors. Finally, the likelihood of recurrence under ¶ E2.2.1.9. is virtually nil. In addition to Applicant's apparent rehabilitation, deterrence is also a strong element, because Applicant realizes further misconduct will cost him his job as well as his ability to indulge his passionate love of hunting. After considering all the evidence and weighing the disqualifying and mitigating conditions, I conclude Applicant has mitigated the security concern based on criminal conduct.

FORMAL FINDINGS

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

Paragraph 1. Guideline J (Criminal Conduct): FOR APPLICANT

Subparagraph 1.a.: For Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to continue Applicant's security clearance. Clearance is granted.

LeRoy F. Foreman

Administrative Judge

1. Tr. 45-46.

2. Government Exhibits 4, 5.

3. Government Exhibit 3.

4. Tr. 51.

5. Tr. 63.

6. Tr. 32.

7. Tr. 64-65.