

DATE: December 30, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-24709

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant committed a number of criminal offenses between 1991 and 2002. He also used his position of trust as a mental health technician to have sexual intercourse with a patient who was 15 or 16 years old. Applicant failed to mitigate security concerns raised by his sexual behavior, criminal conduct, and personal 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 7 February 2005, DOHA issued a Statement of Reasons⁽¹⁾ (SOR) detailing the basis for its decision—security concerns raised under Guideline J (Criminal Conduct), Guideline D (Sexual Behavior), and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on 3 March 2005 and elected to have a hearing before an administrative judge. The case was assigned to me on 21 July 2005. On 14 September 2005, 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 27 September 2005.

FINDINGS OF FACT

Applicant is a 33-year-old quality assurance configuration specialist for a defense contractor. He has been married since 2002. He has adopted his wife's son, who is eight years old, and the couple has a four-year-old son and an 18-month-old daughter. Applicant also has a four-year-old son by another woman.

Applicant began consuming alcohol, in the form of beer, in about 1987, when he was in ninth grade. He and his friends would get together on weekends, and he would consume six or seven beers. From 1988-91, he consumed 24 beers on the weekends. From 1991-95, he drank four or five mixed drinks and 10 or fewer beers on weekends. From 1995-2000, he consumed a six-pack of beer and some mixed drinks on weekends.

In November 1991, while in college, Applicant used a fire extinguisher to break out the window of a car. He took a

leather coat and a purse containing \$65 in cash and eyeglasses. He was arrested for burglary of a motor vehicle. Applicant pled guilty and the court deferred imposing the sentence for three years, two of which Applicant was to be under supervision. Ex. 3 at 6. Applicant asserts he was under the influence of alcohol at the time. Ex. 2 at 3.

After an automobile accident in February 1994, Applicant was arrested for driving under the influence of alcohol (DUI) and negligent driving. His breath test revealed an alcohol content of .12%. Applicant was convicted of the offense and the court deferred imposing a sentence for six months. Applicant was also fined and ordered to attend an alcohol awareness class.

Applicant was visiting his sister in April 1995 when a fight broke out between the sister and her boyfriend. The boyfriend struck the sister, and Applicant struck the boyfriend. Applicant had been drinking alcohol. The police arrived and Applicant screamed obscenities at him. The police officer was unable to subdue him even after striking him several times with a baton. Applicant was arrested for assault and interfering with a police officer. Ex. 5. Applicant was convicted of interfering with a police officer and fined \$235. Applicant never paid the fine.

In 1996, Applicant was arrested for assault and battery after a fight in the bathroom of a bar. Applicant had punched a man in the face, causing his lip to bleed. Ex. 6; Tr. 26. The charge was later dismissed.

Between December 1994 and March 2000, Applicant was employed by a hospital as a mental health technician/storeroom coordinator. Ex. 1 at 3; Tr. 32. As a mental health technician, he "oversaw the interaction between the children . . . and made sure they followed the regimen of groups." Tr. 32. A 15-year-old girl became a patient at the hospital in September 1999. Tr. 33. She was being treated for depression and skipping school. The girl was released from the hospital, but readmitted in February 2000. Applicant had sexual intercourse with this girl twice at her home over a period of 14 days. He believes "this was set up by her parents as her Father was about to lose his job and they were just seeking a means of getting money." Ex. 2 at 5. He left his job by mutual agreement with the hospital because of his misconduct. Ex. 1 at 4. As a result of his relationship with the patient, Applicant and the hospital were named defendants in a civil suit the girl's parents filed in March 2001. Service was never perfected against Applicant. Ex. A. It appears the age of consent in the state was 16.

In September 2000, Applicant was walking down the street after consuming several drinks. He was stopped by police. His sister saw the police lights, convinced the police to release Applicant to her custody, and took him home. In his 10 June 2003 statement to an agent from the Defense Security Service, Applicant claimed he stopped consuming alcoholic beverages that night and has "not drank since that evening." Under cross-examination at the hearing, Applicant admitted that "there's been wine at dinner at times, but that's probably the most of the alcohol that I will consume." Tr. 32.

Applicant completed a security clearance application (SCA) on 25 July 2002 by certifying that his statements were "true, complete, and correct" to the best of his knowledge and belief, and by acknowledging that a willful false statement could be punished by fine and/or imprisonment under 18 U.S.C. § 1001. Question 20 asked if, in the previous seven years, Applicant had been terminated from employment under unfavorable circumstances. Applicant answered "yes," and listed his departure from the hospital in March 2000 for misconduct. Question 40 asked if, in the previous seven years, Applicant had been a party to any public record civil court action not listed elsewhere in the SCA. Applicant answered "no."

On the night before his wedding in January 2002, some of his friends took him out to a bar. On his way out, one of the other patrons started yelling at him and his friends. The patron took two swings at Applicant, who promptly punched him in the face. The victim fell back onto a car. Ex. 2 at 2. Applicant was issued a summons by the police. When he appeared in court, the victim of the assault did not. The judge dismissed the charge after Applicant agreed to pay \$100 in damages to the owner of the vehicle that was damaged. The charge was dismissed after Applicant paid the \$100.

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 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). 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.

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 the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

Guideline J-Criminal Conduct

In the SOR, DOHA alleged Applicant was convicted of burglary of an automobile in November 1991 (¶ 1.a); charged with DUI and negligent driving in February 1994 (¶ 1.b); convicted of interfering with a police officer in 1995 (¶ 1.c); charged with assault and battery in October 1996 (¶ 1.d); and charged with assault and battery in January 2001 (¶ 1.e). Applicant admitted each of the allegations. Answer. A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1.

Although Applicant admitted each of the allegations in ¶ 1 of the SOR, he denied actually committing some of the criminal offenses for which he was arrested. Under Guideline J, a security concern is raised that may be disqualifying when there are "[a]llegations or admissions of criminal conduct, regardless of whether the person was formally charged" (DC E2.A10.1.2.1) and an applicant commits a serious crime or multiple lesser offenses (DC E2.A10.1.2.2). Applicant has a series of arrests between 1991 and 2002. Especially disturbing is the string of three assaults charged between 1995 and 2002.

An applicant may mitigate criminal conduct by showing the criminal behavior was not recent (MC E2.A10.1.3.1), 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). Applicant contends he has given up alcohol (at least drinking in bars), he is married, and now has a different outlook on life. The latest offense occurred almost four years ago, so MC E2.A10.1.3.1 applies. However, after the long string of offenses between 1991 and 2002, I am not convinced he has a sufficient track record of stability to find a violation is not likely to recur or there is clear evidence of rehabilitation. After considering all of the evidence, I find against Applicant on ¶ 1.

Guideline D-Sexual Behavior

In the SOR, DOHA alleged Applicant had been named as a defendant in a petition alleging he had sexual relations with a 15-year-old girl (¶ 2.a); and he had sexual relations with an underage girl when he was 28 years old (¶ 2.b). Applicant admitted both allegations, but denied making sexual advances as alleged in ¶ 2.a. Sexual behavior is a security concern if it involves a criminal offense, indicates a personality or emotional disorder, may subject the individual to coercion, exploitation, or duress, or reflects lack of judgment or discretion. Directive ¶ E2.A4.1.1.

The Government's evidence established that, when Applicant was 28 years old, he had a sexual relationship with a patient of the mental health clinic where he was employed. The evidence is insufficient to establish he had sexual intercourse with the girl while she was under the age of 16, the age of consent in the state. Although there is some evidence the girl was 15 when she was first admitted to the hospital in September 1999, there is no evidence of her age at the time Applicant had sexual intercourse with her in February 2000. Nevertheless, even if the girl was 16 years of age at the time of the sexual relationship, it still reflects Applicant's lack of discretion and judgment. DC E2.A4.1.2.4. Applicant was a mental health technician entrusted with assisting patients. He violated that trust by becoming sexually involved with a girl who was already emotionally troubled and whom he was supposed to be assisting in her treatment.

An applicant may mitigate sexual behavior security concerns by showing the behavior was not recent and there is no evidence of subsequent conduct of a similar nature. MC E2.A4.1.3.2. Applicant's sexual relationship with the patient occurred more than five years ago and there is no evidence of subsequent conduct of a similar nature. Nevertheless, Applicant has shown such a pattern of poor judgment over the years, I am unable to find for him on ¶ 2.b.

In ¶ 2.a, DOHA alleged Applicant was named as a defendant in a civil court action. Being named a defendant in a civil action is not a disqualifying condition under Guideline D. Furthermore, the civil action cites the same facts alleged in ¶ 2.b. Therefore, I find for Applicant on ¶ 2.a.

Guideline E-Personal Conduct

In the SOR, DOHA alleged Applicant had sexual relations with an underage girl (¶ 3.a) and falsified material facts on his SCA by denying he had been the subject of a civil court action (¶ 3.b). Applicant did not answer ¶ 3.a and denied ¶ 3.b. 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's evidence established potentially disqualifying conditions under Guideline E. Although there is no evidence the patient with whom he had sex was actually under the age of 16, his conduct shows his questionable judgment and unreliability. DC E2.A5.1.2.1. He violated the duty of trust he owed to the patient. After considering all of the circumstances, I find against Applicant on ¶ 3.a.

In ¶ 3.b, DOHA alleged Applicant deliberately falsified his SCA by failing to acknowledge the civil court action that had been filed against him. I find for Applicant on ¶ 3.b. Applicant was not trying to hide this action from security officials. As he was never served with process, there is no reason to believe he knew of the action until after he completed his SCA. Furthermore, in answer to question 20, Applicant disclosed that he had left his employment at the hospital by mutual agreement after allegations of misconduct. Thus, the Government would have been able to fully investigate the matter.

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

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: Against Applicant

Paragraph 2. Guideline D: AGAINST APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: Against Applicant

Paragraph 3. Guideline E: AGAINST APPLICANT

Subparagraph 3.a: Against Applicant

Subparagraph 3.b: For Applicant

DECISION

In light of all of the circumstances 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. As required by 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).