

DATE: June 7, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-32597

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Esq., Department Counsel

FOR APPLICANT

Charles R. Lucy, Esq.

SYNOPSIS

Applicant was arrested and convicted for assaulting his girlfriend. He deliberately falsified his security clearance application by failing to list the incident. Applicant mitigated the criminal conduct security concern, but not the personal conduct security concern. 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 3 December 2003, DOHA issued a Statement of Reasons⁽¹⁾ (SOR) detailing the basis for its decision-security concerns raised under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in a writing notarized on 26 December 2003 and elected to have a hearing before an administrative judge. The case was assigned to me on 3 February 2004. On 24 March 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 5 April 2004.

FINDINGS OF FACT

Applicant is a 38-year-old software engineer for a defense contractor. By all accounts, he is a hardworking, skilled, reliable, and honest employee who, over an approximately 10-year period, possessed a security clearance without any adverse security incidents.

Applicant was unemployed between November 2001 and June 2002. On 22 February 2002, Applicant had an argument with his girlfriend, who was living with him. The argument escalated into a physical confrontation involving pulling of hair and slapping. Applicant's girlfriend, who was wearing only socks on her feet at the time, struck her head when she slipped and fell. Applicant left his house, went to a neighbor's house, and called the local police. The police arrested Applicant and charged him with harassment and third degree assault. He spent the night in "the facility" and was

released the following day. Tr. 129. Applicant pled guilty to third degree assault-recklessly causing injury-and the harassment charge was dismissed. Ex. 5 at 1. On 25 February 2002, he was granted a deferred sentence of 180 days in jail. The sentence was suspended and he was placed on unsupervised probation for 24 months. *Id.* at 2.

On 23 June 2002, for his new position with the defense contractor, Applicant completed a Questionnaire for National Security Position (QNSP). Ex. A. Question 23 asked Applicant to answer a number of questions concerning his police record. Applicant answered "no" to all of the questions including the last one (23(f))-if in the past seven years, he had "been arrested for, charged with, or convicted of any offenses not listed in response to" questions 23(a)-23(e). Applicant submitted the form to the facility security officer (FSO), who entered the information from the form into her computer and printed off a security clearance application (SCA), dated 9 July 2002. Ex. 1. Applicant signed the SCA. Question 26 asked Applicant if the in the previous seven years he had "been arrested for, charged with, or convicted of any offense(s) not listed" in answers to other questions on the SCA. Applicant answered "no." Both question 23 of the QNSP and question 26 of the SCA contained similar language indicating applicants were to "report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the record."

On 10 February 2004, in light of his successful completion of the probation and domestic violence counseling (Tr. 134-35), the charge was officially dismissed by the court. Ex. B.

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 personal 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

Guideline J-Criminal Conduct

In the SOR, DOHA alleged Applicant was arrested for assault and harassment in February of 2002 and pled guilty to third degree assault. 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, by substantial evidence and Applicant's admissions, the allegation contained in the SOR. Admissions of criminal conduct could raise a security concern. DC E2.A10.1.2.1. But the criminal behavior was not recent-the offense occurred over two years ago (MC E2.A10.1.3.1.); the crime appears to be an isolated incident (MC E2.A10.1.3.2.); and there is clear evidence of successful rehabilitation-Applicant completed the required domestic violence counseling and probation without adverse incident (MC E2.A10.1.3.6.). I find for Applicant.

Guideline E-Personal Conduct

In the SOR, DOHA alleged Applicant falsified material facts on his SCA by deliberately failing to disclose his arrest for and conviction of assault. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

The Government established by substantial evidence and Applicant's admissions that he should have listed the arrest for and conviction of third degree assault on his QNSP and SCA. But to be a disqualifying condition, Applicant's failure to list the arrest and conviction must have been deliberate. Applicant argues that he misunderstood the question (Answer), he was advised by the district attorney (DA) with whom he negotiated his plea agreement that it should not affect his security clearance (Tr. 132, 134), and that he was specifically advised by his FSO that he did not have to list the criminal incident in his QNSP (Tr. 139).

Applicant admits taking the QNSP home to work on it because he did not want to be rushed. Tr. 137. His claim that he stumbled over question 23(f) is inconsistent with his assertion that the DA told him his plea agreement would not affect his security clearance. If the DA had made such a statement, Applicant, who had almost 10 years of dealing with security clearances, would know better than to rely on representations concerning security clearances made by someone who is not a federal employee. And if the DA had made such representations and Applicant actually believed them, he should have completed the questions without any reservations or stumbling. Tr. 137. Applicant does not assert the DA told him he did not have to report the conviction on his QNSP.

Applicant's claim he relied on the FSO's opinion that he did not have to list the arrest and conviction is undermined by his own testimony and contradicted by the FSO. Under cross-examination, Applicant admitted he may have misled the FSO by not revealing to her he had been arrested, charged, pled guilty, and convicted. Tr. 158. It is just not credible that an applicant of his age, education, and experience would rely on the FSO's advice knowing he had not disclosed to her the full nature of the incident. More importantly, the FSO denied she ever gave or would give such advice. Her practice is to tell applicants who are unsure how much to disclose everything up front. After considering all of the evidence and closely observing the demeanor of the witnesses, I find the FSO was credible and Applicant was not. I conclude Applicant deliberately falsified his QNSP and SCA by failing to disclose his arrest and conviction. DC E2.A5.1.2.2. None of the mitigating conditions apply. Applicant still refuses to acknowledge his deliberate falsification. I find against Applicant.

FORMAL FINDINGS

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

Paragraph 1. Guideline J: FOR APPLICANT

Subparagraph 1.a.: For 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.