

DATE: March 16, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-33312

DECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

APPEARANCES

FOR GOVERNMENT

Jason Perry, Esq., Department Counsel

FOR APPLICANT

Joseph P. Casale, Esq.

SYNOPSIS

Applicant failed to report to federal and state authorities income earned as an employee of his brother between 1993 and 1996. While employed by and paid in cash by his brother, he was also at times collecting unemployment compensation from his state, but he did not inform the state of his employment. He lied about his personal and criminal conduct in three interviews with special agents of the Defense Security Service because he feared he would lose his job if he told the truth. 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 June 3, 2004, under the applicable Executive Order ⁽¹⁾ and Department of Defense Directive, ⁽²⁾ DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision-security concerns raised under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) of the Directive. Applicant provided a complete written response to the SOR on August 13, 2004. He requested his case be determined on the record in lieu of a hearing. The Government compiled its File of Relevant Material (FORM) on November 3, 2004. The FORM contained documents identified as Items 1 through 8. On November 10, 2004, a copy of the FORM was forwarded to Applicant, with instructions to submit any additional information and/or objections within 30 days of receipt. Applicant did not receive the FORM until December 14, 2004. He submitted information within 30 days after receiving a copy of the FORM. On January 6, 2005, the case was assigned to me for a decision.

FINDINGS OF FACT

The SOR contains six allegations of disqualifying conduct. Five allegations relate to conduct alleged under Guideline E, Personal Conduct and one allegation relates to conduct alleged under Guideline J, Criminal Conduct. In his answer to the SOR, Applicant admitted one allegation and denied three allegations. He admitted in part and denied in part two allegations. His admissions are incorporated as findings of fact.

Applicant is a 41-year-old audio visual facilitator employed by a federal contractor. He has been married twice and is the father of two children, born in 1987 and 1990. He is also the stepfather to his second wife's child from a previous marriage. His background was investigated by the Defense Department for the purpose of determining his security worthiness.

From 1983 until 1988, Applicant served on active duty in the U.S. Marine Corps. From 1989 to 1997, he served in the Marine Corps Reserve. He received a permanent promotion to Staff Sergeant on May 11, 1995. (Item 3, Exhibit 9) Applicant submitted numerous letters of recommendation from Marine Corps superiors praising his intelligence, maturity, leadership, and ability to carry out assignments successfully with little or no supervision (Item 3, Exhibit 5) Five of the letters of recommendation were written in June 1988.

In November 1987, Applicant received a severe head injury in a motor vehicle accident. He received a speech, language, and cognitive evaluation in January 1989, which concluded his short term memory had been impaired by the accident but he had, nevertheless, made "remarkable improvement in cognitive functioning." (Item 3, Exhibit A) In January 2004, the Department of Veterans Affairs determined he was 80 percent disabled and awarded him monthly disability compensation of \$1474. (Item 3, Exhibit B.)

Applicant was fired from a job as a correctional officer in 1993. (Item 4.) He and his wife separated and there was animosity between them. In July 1994, Applicant was arrested for domestic assault and threatening to kill his wife. The wife requested and was granted an emergency restraining order. Applicant was ordered to surrender all firearms and the licenses he had to carry firearms. The police removed a shotgun, revolver, and ammunition from Applicant's apartment. The wife took custody of their two children. (Item 8.)

During the period from late 1993 to 1996, while he was at times collecting unemployment insurance, Applicant worked as an installer for his brother's flooring business. He was paid in cash and did not report these earnings to state or federal tax authorities. He presented tax records from 1993 and 1994 showing salaries from other employers. (Item 3, Exhibits C and D.) In 1994 he received \$6,230 in unemployment compensation. (Item 3, Exhibit D.) In his answer to the SOR, Applicant said it was his brother's responsibility, as his employer, to report his income to the proper taxing authorities. (Item 3, page 3.) He attributed his failure to admit making a verbal threat to kill his first wife to his memory loss problems. (Item 3, at page 3.)

Applicant executed a security clearance application (SF-86) in April 2002. In response to Question 20 on the SF-86, he admitted being fired from a job as a prison guard in 1993 for allegedly filing a false report. In response to Question 26 on the SF-86, he denied being arrested or charged with offenses in the seven years prior to April 2002.

Applicant was interviewed by a special agent of the Defense Security Service on June 7, 2002. In a signed, sworn statement, he admitted being fired from another job in 1992. He denied ever threatening to kill his wife. (Item 5, at 2.)

Applicant was interviewed again by the special agent on July 31, 2002. In a signed, sworn statement, he admitted receiving unemployment compensation after being fired as a prison guard and while working for his brother's business. He said he was not considered a full time employee and worked only as needed. (Item 6, at 1.)

Applicant was interviewed a third time by a special agent of the Defense Security Service on October 11, 2002. In a signed, sworn statement, he admitted that his wife had petitioned for a restraining order against him because he had threatened to kill her and her boyfriend. He acknowledged allegations of child physical abuse relating to his son and stepson. He admitted being employed by his brother from December 1993 to September 1996. Some of the employment was full time and some was part time. He admitted his brother paid him in cash and he did not report the income to Federal or State taxing authorities. He admitted he collected the unemployment compensation while working for his brother, and he admitted he did not report his income from employment by his brother as he knew he was required to do. He said he was not truthful about this conduct in his signed sworn statements of June 7, 2002 and July 31, 2002 because he was afraid he would not get a security clearance if he told the truth. (Item 7, at 2.)

On each of the three occasions when he made a statement, reduced to writing, to a special agent of the Defense Security Service, Applicant signed and dated an acknowledgment which read, in pertinent part, as follows:

I certify that the following statement is true, complete and accurate to the best of my knowledge and belief and is made in good faith. I understand that a knowing and willful false statement can be punished by fine or imprisonment or both. (See U.S. Code, Title 18, Section 1001).

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). 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 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.

CONCLUSIONS

Guideline E, Personal Conduct

In the SOR, DOHA alleged Applicant raised concerns under Guideline E, Personal Conduct, when he failed to report income earned during a period between 1993 and 1996 when he was also at times collecting State unemployment compensation benefits (¶ 1.a.); when he failed to report all income earned between 1993 and 1996 to federal and state tax authorities (¶ 1.b.); when he denied making a verbal threat to kill his former spouse, thereby falsifying material facts in a signed, sworn statement dated June 7, 2002 and presented to an authorized investigator of the Department of Defense (¶ 1.c.); when he stated in his signed sworn statement of June 7, 2002 that he did not recall his State tax authorities telling him he had collected compensation illegally, when in fact he deliberately failed to disclose he had unreported earned income while receiving unemployment compensation benefits (¶ 1.d.); and when he falsified material facts by stating, in a signed sworn statement dated July 31, 2002, to an authorized investigator of the Department of Defense, that he had never collected unemployment benefits fraudulently when he had in fact received unemployment benefits while earning income from working for his brother and not reporting that income (¶ 1.e.). Guideline E conduct, which involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, could indicate an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

With respect to the Guideline E conduct alleged in the SOR, the Government has established its case. Applicant refused to provide full, frank and truthful answers to lawful questions of investigators in connection with a personnel security or trustworthiness determination. ¶ E2.A5.1.1.2. Additionally, Applicant's deliberate false statements to an investigator in connection with a personal security or trustworthiness determination raises a concern under ¶ E2. A5.1.2.3. In a signed sworn statement to a special agent of the Defense Security Service, dated June 7, 2002, Applicant denied ever threatening the life of his former wife. In his signed sworn statement of July 31, 2002, he denied ever collecting unemployment compensation fraudulently by not claiming income earned. In a signed sworn statement dated October 11, 2002, he admitted threatening to kill his former wife, receiving cash payments from employment by his brother from December 1993 to September 1996, which he did not report to state and federal taxing authorities, and collecting unemployment compensation while receiving income from employment by his brother. Applicant admitted these deliberate falsifications and said he provided false information to the investigators because he was concerned that telling the truth about his conduct would prevent him from being granted a security clearance. (Item 7, at 2.) His concealment

of information he considered embarrassing or professionally damaging could make him vulnerable to coercion and blackmail. ¶E2.A5.1.2.4. His conduct raises additional concerns under E2.A5.1.2.5. because it suggests a pattern of dishonesty or rule violation. Applicant's reticence to reveal the truth about his conduct suggests that, under some circumstances, he may put his interests before those of the Government. It is well established that embarrassment is not a mitigating condition under the Directive. ISCR Case No. 99-0557 at 3 (App. Bd. Jul.10, 2000).

Mitigating condition E2.A5.1.3.1 does not apply to the facts of this case: The information Applicant withheld is pertinent to a determination of his judgment, trustworthiness, and reliability. Only one other mitigating condition under Guideline E might be applicable to the instant case. The security concern raised by Applicant's disqualifying conduct could be mitigated if the falsification was an isolated incident, was not recent, and if the Applicant subsequently provided the correct information voluntarily. ¶E.2.A.5.1.3.2. Applicant supplied the correct information when questioned a third time by a special agent of the Defense Security Service in October 2002. His falsifications are recent, and they are not isolated incidents. Accordingly, allegations in subparagraphs 1.a. through 1.e. of the SOR are concluded against the Applicant.

Guideline J, Criminal Conduct

In the SOR, DOHA alleged the deliberate falsifications Applicant provided to authorized investigators of the Defense Security Service in the signed sworn statements identified in allegations 1.c., 1.d., and 1.e. constituted felonious criminal conduct under section 1001 of Title 18 of the United States Code. (¶2.a.)

Applicant provided three sworn written statements to special agents of the Defense Security Service and each time signed his name below the following statement, which reads, in pertinent part, as follows:

I make this statement without any threats having been made against me or any promise extended to me. I certify that the following statement is true, complete and accurate to the best of my knowledge and belief and is made in good faith. I understand that a knowing and willful false statement can be punished by fine or imprisonment or both. (See U.S. Code, Title 18, Section 1001.)

Under section 1001 of title 18 of the United States Code, it is a felony to make a writing or document, knowing it contains a materially false, fictitious, or fraudulent statement. Applicant admitted preparing and signing written statements in which he lied about personal and criminal conduct.

The security concern under Guideline J is that an individual's history or pattern of criminal activity raises doubts about his judgment, reliability and trustworthiness. A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. Where the facts proven by the Government or admitted by the applicant raise doubts about the applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nevertheless security worthy.

Applicant's falsifications of his signed, sworn statements occurred in 2002. These criminal acts were recent, and they were not isolated events. They demonstrate a pattern of criminal conduct. Thus, the mitigating conditions at ¶¶ E2.A10.1.3.1. and E2.A10.1.3.2 of Guideline J do not apply in this case.

Applicant admits the criminal conduct alleged by the Government in subparagraph 2.a. of the SOR., a security concern under ¶ E2.A10.1.2.1.of Guideline J. He also admits knowingly preparing and signing deliberately false written statements denying personal and criminal conduct alleged in the SOR. Applicant's acts constitute disqualifying conduct under ¶ E2.A10.1.2.2. of Guideline J. None of the Guideline J mitigating factors apply. Thus, the Guideline J allegation in the SOR is concluded against the Applicant.

FORMAL FINDINGS

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

Paragraph 1. Guideline E: 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 J: 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.

Joan Caton Anthony

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.