

DATE: July 12, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-01839

DECISION OF ADMINISTRATIVE JUDGE

ROBERT J. TUIDER

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has a history of adverse criminal and personal conduct concerns. He was charged with 21 moving violations from 1994 to 2002. Additionally, he was charged with unlawfully carrying a weapon in 1992, later dismissed, arrested and convicted for failure to pay a moving traffic violation in 1995, arrested with fleeing - eluding the police in 1996, dismissed upon completion of probation, arrested and convicted for failure to pay five moving traffic violations in 1998, charged with and convicted of seven counts of failure to appear in 1998, and arrested and convicted of driving while intoxicated in 2002. He failed to mitigate both concerns. Clearance is denied.

STATEMENT OF THE CASE

On October 6, 2003, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked.

Applicant submitted a signed and sworn statement, dated October 23, 2003. He admitted to Paragraph 1, 1.a, 1.c, 1.d, 1.e, 1.f and Paragraph 2.a and 2.b of the SOR. He denied Paragraph 1.b and Paragraph 2 of the SOR.

On November 25, 2003, Department Counsel submitted the Department's written case. A complete copy of the file of relevant material (FORM) was provided to the Applicant. He was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant filed a timely response to the FORM and the case was assigned to me on February 5, 2004.

FINDINGS OF FACT

Applicant's admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following additional findings of fact:

Applicant is 29 years old. He has never been married and has two children, ages 12 and 6 years old. He graduated from high school in June 1993. He attended a vocational school from January 1997 to January 1998, attended college from September 2001 to December 2001, and attended another vocational school from February 2002 to May 2002. (Item 5 at 2, 3, 4, 6 and 7). I am unable to determine from record evidence how many total credit hours Applicant has earned.

Applicant began his current position with a defense contractor in May 2002. (Item 5 at 3). Applicant's supervisor submitted a character reference attesting to his good character, reliability, and work ethic. (Item 2 at 9, 10). Applicant also submitted a performance appraisal ending in July 2003 reflecting above average performance. (Item 2 at 11).

Applicant has a history of criminal conduct beginning at age 17. In February 1992, he was arrested for unlawfully carrying a weapon. Applicant explained that he was in a vehicle with acquaintances from school. The driver, who Applicant did not know, was pulled over and arrested for an outstanding warrant. All passengers were required to leave the vehicle while it was searched. The police discovered a handgun under the seat and none of the occupants, including the driver, would admit to possessing the weapon. Applicant denies the weapon belonged to him. The charge was later dismissed. (Item 2 at 2, 4, Item 6).

Applicant's subsequent criminal conduct is as follows:

- Arrested at age 20 in February 1995 for an unpaid moving traffic violation and fined \$327.00;
- Arrested at age 21 in February 1996 for fleeing - eluding police and pled nolo contendere, was granted a deferred adjudication and adult probation for six months. He was ordered to pay a \$75.00 fine and court costs;
- Arrested at age 23 in October 1998 for five unpaid moving traffic violations and fined approximately \$493.00;
- Charged at age 24 in December 1998 with seven counts of failure to appear and fined approximately \$300.00; and
- Arrested at age 27 in January 2002 with driving while intoxicated and pled no contest and was sentenced to six months in jail, ordered to pay \$556.00 in fines and court costs and placed on six months probation in lieu of confinement.

From 1994 to 2002, Applicant was also charged with approximately 21 different moving violations, apart from those discussed above, to include disregard of a red light, speeding in other than 30 mile zone - interstate, speeding over 30 miles, speeding in school zone, disregard of a stop sign, failure to display valid license plates, operating a motor vehicle without a valid license, operating a motor vehicle without valid liability insurance, no valid certificate of inspection, and failure to appear. (Item 2 at 1, 2, Item 6 at 1, 2, 3, 4, 5, 6, 10, Item 7 at 1, 2, Item 8 at 1, 2, 3, Item 9 at 1, 2, 3, 4, Item 10 at 1, 2, 3, 4, 5).

Applicant stated in his response to SOR that "As an adolescent, I clearly proved my lack of judgment, reliability and trustworthiness. I felt rules and regulations established by authority figures did not apply to me. I was immature and very irresponsible. Ignorance played a key role on my decision-making. I assumed as long as I didn't commit any felonies I would not get into any serious trouble, and it would not cause a major impact on my life. This (sic) wasn't until my arrest in 1998 when I came to realize the seriousness of the offenses due to their accumulation." (Item 2 at 4).

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 judgement, 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* Section 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicted upon the applicant meeting the security guidelines contained in the Directive.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines that must be carefully considered according to the pertinent Guideline in making the overall common sense determination required.

Each adjudicative decision must also include an assessment of:

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation;
- (3) how recent and frequent the behavior was;
- (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 (See Directive, Section E2.2.1. of Enclosure 2).

Because each case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

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. All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. See Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. See Exec. Or. 12968 Section 3.1(b).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guideline most pertinent to an evaluation of the facts of this case:

Guideline J: Criminal Conduct

(A) The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. Directive, ¶ E2.A10.1.1.

(B) Conditions that could raise a security concern and may be disqualifying include:

- (1) Allegations or admission of criminal conduct, regardless of whether the person was formally charged; E2.A10.1.2.1
- (2) A single serious crime or multiple lesser offenses. E2.A10.1.2.2.

(C) Conditions that could mitigate security concerns include:

- (1) The criminal behavior was not recent. E2.A10.1.3.1.
- (6) There is clear evidence of successful rehabilitation. E2.A10.1.3.6.

Guideline E - Personal Conduct:

(A) The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. Directive, ¶ E2.A5.1.1.

(B) Conditions that could raise a security concern and may be disqualifying also include:

(5) *A pattern of dishonesty or rule violations, including the violation of any written or recorded agreement made between the individual and the agency applies.* E2.A5.1.2.5.

Conditions that could mitigate security concerns include:

- (1) The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress. E2.A5.1.3.5.

CONCLUSIONS

I conclude under Guideline J (Criminal Conduct) the Government proved its case. Therefore, the Disqualifying Conditions (DC) 1 (*Allegations or admissions or criminal conduct, regardless of whether the person was formally charged*), and 2 (*A single serious crime or multiple lesser offenses*) apply. Applicant consistently showed his contempt and disregard of traffic laws by accumulating 21 different moving violations from 1994 to 2002. Many of the violations involved safety-related violations, which put the people traveling the highways with him at risk. His suggestion that "it wasn't until [his] arrest in 1998 when [he] came to realize the seriousness of the offenses due to their accumulation" is unpersuasive. Less than four years later, he was convicted of driving while intoxicated. His conduct began as a teenager and continued until he was 27. Two years without a violation does not mitigate his past conduct over a 12-year period.

No Mitigating Conditions apply. Therefore, I find against Applicant under this guideline.

I conclude under Guideline E (Personal Conduct) the Government proved its case. Therefore DC 5 (*A pattern of . . . rule violations . . . applies*). As indicated above, Applicant's consistent disregard of traffic-related offenses to the point of accumulating 21 offenses over a 12-year period establishes a pattern of rule violations. Despite Applicant's assertions to the contrary, not enough time has elapsed to reflect a change in Applicant's behavior.

No Mitigating Conditions apply. Therefore, I find against Applicant under this guideline.

FORMAL FINDINGS

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

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

Subparagraph 1.f.: Against Applicant

Paragraph 2 Guideline E: Against Applicant

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

DECISION

In light of all the circumstances and facts presented by the record in this case, it is not clearly consistent with the interest of national security to grant a security clearance to Applicant. Clearance is denied.

Robert J. Tuider

Administrative Judge