

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: In 1981, when he was 18 years old, Applicant deliberately violated federal law by failing to register for the draft with the U.S. Selective Service System because he found such registration morally repugnant and against his conscience. Applicant defends his decision and would undoubtedly refuse to register if ordered to do so today. Applicant failed to mitigate the criminal conduct and personal conduct security concerns raised by his conduct. Clearance is denied.

CASENO: 03-02799.h1

DATE: 07/26/2004

DATE: July 26, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-02799

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Jason Perry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In 1981, when he was 18 years old, Applicant deliberately violated federal law by failing to register for the draft with the U.S. Selective Service System because he found such registration morally repugnant and against his conscience. Applicant defends his decision and would undoubtedly refuse to register if ordered to do so today. Applicant failed to mitigate the criminal conduct and personal conduct security concerns raised by his 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 15 September 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 writing on 13 August 2003 and elected to have the case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's written case on 11 May 2004. A complete copy of the file of relevant material (FORM) was provided to Applicant, and he was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant received the FORM on 20 May 2004, but failed to respond. The case was assigned to me on 9 July 2004.

FINDINGS OF FACT

Applicant is a systems administrator for a defense contractor. He was born on 7 April 1963. He is married and has two children. Applicant turned 18 years of age in 1981. Applicant received a secret clearance in 1992. Item 4 at 10. He turned 26 years of age in 1994.

Applicant never registered for the draft under the Selective Service Act (50 U.S.C. § 453) because the idea of registering for a military draft is morally repugnant to him. *Id.* at 8. He made the decision not to register after serious consideration. He believes registering for the draft would be giving up his freedom. *Id.*

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, 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

Every male U.S. citizen between the ages of 18 and 26 is required to register for the draft under the Selective Service Act in the manner determined by proclamation of the President. 50 U.S.C. § 453(a). The President determined that persons required to register under 50 U.S.C. § 453, born after 1 January 1963, are required to present themselves for registration within 60 days of their 18th birthday. Exec. Procl. 4771, 45 F.R. 45247, 94 Stat. 3775 (1980). Any person required to register who knowingly fails or neglects to register who is convicted of such offense may be punished upon conviction in federal court by imprisonment for not more than five years, a fine, or both. 50 U.S.C. § 462(a). No person shall be prosecuted for failing to register unless the indictment is found within five years next after the last day before such person attains the age of twenty-six. 50 U.S.C. § 462(d).

Guideline J-Criminal Conduct

In the SOR, DOHA alleged Applicant failed to register with the U.S. Selective Service System as required by 50 U.S.C. § 453 (¶ 1.a). 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 the allegation by Applicant's admissions. Applicant committed a serious criminal offense by failing to register for the draft. DC E2.A10.1.2.1., E2.A10.1.2.2. The fact that he was never charged or convicted of the offense is not dispositive. *See* ISCR Case No. 01-12452 at 3 (App. Bd. Jan. 27, 2003). Although the running of the statute of limitations prevented prosecution of this offense after 1994, that does not prevent a finding adverse to Applicant. ISCR Case No. 01-09691 at 3 (App. Bd. Mar. 27, 2003). Applicant's offense was not recent (MC E2.A10.1.3.1.)-it occurred 23 years ago when Applicant failed to register within 60 days of his 18th birthday. (2) It was an isolated incident. MC E2.A10.1.3.2. There is no evidence Applicant has committed any additional crimes.

Although Applicant's refusal to register for the draft was an isolated event and occurred over 23 years ago, Applicant has not met his burden to mitigate his conduct and establish it is clearly in the national interest to grant him a security clearance. Applicant's criminal conduct and his continued defense of that criminal conduct as the reasoned and conscientious decision of an individual who is unwilling to violate his conscience creates doubt about his judgment, reliability, and trustworthiness. Applicant is not rehabilitated. He has no remorse for his actions and would undoubtedly again refuse to register if called upon to do so. The Government recognizes that some individuals are conscientiously opposed to fighting wars and has made specific provision for those persons to avoid combat by acquiring conscientious objector status. Applicant did not register and apply for conscientious objector status. He simply refused to follow the law because it conflicts with his conscience. Applicant believes the only law he has to obey is his own conscience. An applicant who is unwilling to follow the law when it does not conveniently fit within his own personal notions of what is right is not a good security risk. After considering all of the evidence, including the adjudicative factors in ¶ 6.3 of the directive, I find against Applicant.

Guideline E-Personal Conduct

In the SOR, DOHA alleged Applicant failed to register with the U.S. Selective Service System as required by 50 U.S.C. § 453 (¶ 2). 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 established the allegation by Applicant's admissions. Applicant's refusal to register for the draft is unfavorable information that raises a security concern regarding Applicant's judgment, trustworthiness, reliability, and willingness to comply with rules and regulations. DC E2.A5.1.2.1. None of the mitigating conditions apply.

Security clearance decisions are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances. *Egan*, 484 U.S. at 528-29. Applicant has the burden of establishing that it is in the national interest to grant or continue his security clearance. He failed to do so. Before granting a security clearance, I must be convinced Applicant will protect classified information. But Applicant agrees to follow only those rules and regulations that do not violate his conscience. He substitutes his personal beliefs for the reasoned judgments of the Government. Applicant is not suitable for a clearance. I find against Applicant on ¶ 2.

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

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. 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.
2. Although Applicant still has not registered, the offense was complete when he failed to register within 60 days of his birthday. Men over the age of 26 years are not permitted to register. Item 5 at 1.