KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant is 52 years old, married, and has three children. He is an employee of a defense contractor and has been for 26 years. Applicant was convicted in 1975 of grand larceny, sentenced to three years in jail and served four months of that sentence, and failed to disclose that conviction on his security clearance application. Applicant mitigated the criminal conduct security concern. He did not mitigate the personal conduct security concern. Clearance is denied.

CASENO: 03-06086.h1

DATE: 08/11/2004

DATE: August 11, 2004

In re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 03-06086

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Juan J. Rivera, Esq., Department Counsel

FOR APPLICANT

George W. Graham, Esq.

SYNOPSIS

Applicant is 52 years old, married, and has three children. He is an employee of a defense contractor and has been for 26 years. Applicant was convicted in 1975 of grand larceny, sentenced to three years in jail and served four months of that sentence, and failed to disclose that conviction on his security clearance application. Applicant mitigated the criminal conduct security concern. He did not mitigate the personal conduct security concern. Clearance is denied.

STATEMENT OF THE CASE

On October 22, 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 the 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. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked.

In a signed and sworn statement, dated November 18, 2003, Applicant responded to the SOR allegations. He requested a hearing. This case was assigned to me on January 30, 2004.

A Notice of Hearing was issued on February 19, 2004 setting the hearing for March 2, 2004. At the request of the Applicant, that hearing date was continued, and on March 23, 2004, a Notice of Hearing was issued setting the hearing date for April 13, 2004. On that date, I convened the hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government presented three exhibits, all of which were admitted

into evidence. Applicant appeared and testified, and offered one exhibit. I also took administrative notice of 10 U.S. C. §986. I received the transcript (Tr.) of the hearing on April 23, 2004.

FINDINGS OF FACT

Applicant admitted the allegations contained in subparagraph 1.a. of the SOR, and denied subparagraphs 1.b. and 2.a. Those 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 the same, I make the following additional findings of fact:

Applicant is 52 years old. He is married and has three children. He works for a defense contractor and has done so for the past 26 years. (Exhibit 1; Tr. 13, 26, 32)

Applicant was convicted on June 18, 1975, of grand larceny and sentenced to three years in jail. The court's sentence also allowed any jail time beyond six months to be suspended, and required three years' probation. Applicant, with two other men, stole stereo equipment from another man, as the indictment alleged. Applicant was convicted after a jury trial, and was represented by an attorney. Applicant was convicted of a felony under the laws of that state. Applicant was on active duty with the U.S. Marines at that time. After his conviction, Applicant appealed his conviction to the state Supreme Court. On March 29, 1976, that Supreme Court upheld the conviction. Applicant was represented by the local public defender on the appeal, because his civilian attorney withdrew from further representation of Applicant when Applicant could not pay his fees. Applicant was 23 years old at this time. Applicant testified he only had one attorney, but the record evidence shows he hired a civilian attorney, and after he withdrew with Applicant's knowledge and consent, a public defender represented Applicant on his appeal. Applicant also testified he thought his conviction was null and void, and that the case was being worked on by his attorney. But the record evidence shows the state Supreme Court decided Applicant's appeal a month before Applicant was discharged, and the Marines knew the appeal was denied in April 1976, so they could proceed with the administrative discharge. (Exhibits 2 and 3, Exhibit A at 19, 24, 25, 32 and 33; Tr. 15, 18)

Applicant was discharged from the U. S. Marines for misconduct as a result of his civilian conviction. That discharge occurred on May 14, 1976. Applicant received a General Under Honorable Conditions Discharge. Applicant served six years in the U.S. Marines, and had received an Honorable Discharge in October 1973 when he was discharged so he could reenlist. Applicant testified he chose to get out of the Marines in 1976, but the record evidence shows his commander administratively discharged him for misconduct. Applicant acknowledged on April 7, 1976 he was being administratively discharged and was being recommended for a General Discharge (Exhibit A at 2, 19, 30-32; Tr. 23, 30)

Applicant testified he was court-martialed by the Marines after his civilian conviction, but there is no record evidence of

any such court-martial. Applicant was in confinement or on barracks details from June 18, 1975 until May 14, 1976. (Exhibit A at 13; Tr. 17)

Applicant did not disclose his 1975 felony conviction on his 2002 security clearance application (SCA) in answer to Question 21 (have you ever been charged with or convicted of a felony offense) because he answered "no". Applicant testified he thought his conviction had been rendered "null and void" based on what he said his attorney told him, but he had no record of any such advice. Applicant obtained a local police record in August 1978 at the request of his prospective employer that showed no arrests or convictions regarding Applicant. Applicant did not have a copy of that report. Applicant signed his SCA on ay 29, 2002, acknowledging that a "knowing and willful false statement on this form" could be punished under 18 U.S.C. §1001. Applicant deliberately failed to disclose his 1975 conviction on his SCA, in violation of the certification he gave on his SCA when he signed it. Applicant has had a security clearance since 1980. (Tr. 13, 26, 27; Exhibit 1 at 8)

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 he 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 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 security 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 § 3.1(b).

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

Guideline J - Criminal Conduct

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

Conditions that could raise a security concern and may be disqualifying include: E2.A10.1.2.

(1.) Allegations or admissions of criminal conduct, regardless of whether the person the person was formally charged; E2.A10.1.2.1.

(2.) A single serious crime or multiple lesser offenses. E2.A10.1.2.2.

Conditions which could mitigate security concerns include: E2.A10.1.3.

(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:

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. The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility: E2.A5.1.1

Conditions that could raise a security concern and may be disqualifying include: E2.A5.1.2.

(2) The deliberate omission, concealment, falsification or misrepresentation of relevant and material facts from any personnel security questionnaire, personal history statement or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; E2.A5.1.2.2.

Conditions that could mitigate security concerns include:

(2) The falsification was an isolated incident, was not recent, and the individual has

subsequently provided correct information voluntarily. E2.A5.1.3.2

Smith Amendment

Absent a waiver from the Secretary of Defense, the Department of Defense may not grant or continue a security clearance for any applicant who has been sentenced by a U.S. court to confinement for more than a year, according to the terms of 10 U.S.C. § 986.

Under Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, I drew those inferences and conclusions which have a reasonable and logical basis in the evidence of record.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions above, I conclude the following with respect to each allegation set forth in the SOR:

Concerning Paragraph 1 and Guideline J, two Disqualifying Conditions (DC) in the Guideline J apply: DC 1 (*Allegations or admissions of criminal conduct, regardless of whether the person was formally charged*) and DC 2 (*a single serious crime or multiple lesser offenses*). Applicant was arrested and convicted in 1975 of grand larceny, a serious offense. The conviction and sentence was affirmed on appeal to the state Supreme Court. The Government

proved its case.

I considered two Mitigating Conditions (MC) might have applied here, but Applicant's deliberate falsification of his SCA does not allow me to apply them. C 1 (*the criminal behavior is not recent*) would have applied because the offenses took place in 1975, 29 years ago. MC 6 (*there is clear evidence of successful rehabilitation*) would have applied, but Applicant violated . 18 U.S.C. § 1001 by deliberately falsifying his SCA and I consider that action on the issue of rehabilitation, and I cannot apply that MC. Therefore, I conclude Guideline J against Applicant.

Under Guideline E, I conclude Applicant did not disclose the 1975 conviction in response to Question 21 on the SCA. Applicant attempts to portray himself as ignorant of the true history of this conviction. My review of the evidence leads me to conclude otherwise, based on the following summary of the sequence of events and their effects.

First, Applicant spent four months in jail, hired two attorneys to represent him (the first at the trial and the second on the appeal), was not administratively discharged from the Marines until about two months after his appeal was decided by the state Supreme Court and the Marines knew about the appeal result. And he has no evidence to support his contention that his conviction was null and void, so I do not believe him.

Second, the local police records check in 1978 would only show arrests or convictions in that locale, and was not a national database search of Applicant's convictions in all states. Applicant would have had to go to the FBI for a check of that breadth even in 1978. So I think that records check in 1978 was worthless for this purpose.

Third, Applicant claimed he was court-martialed by the Marines in 1975 or 1976 for the same or some allied offense and cleared. Yet there is no record of such a court-martial or a result of such a court-martial.

Fourth, Applicant testified he had two Honorable Discharges. However, the DD 214 form Applicant submitted as an exhibit only shows one Honorable Discharge, and then a General Discharge due to his civilian court conviction for grand larceny. The records of his discharge, also submitted as an exhibit by Applicant, show he was administratively discharged for a civilian conviction and given a General Discharge Under Honorable Conditions, and Applicant signed paperwork acknowledging that discharge characterization while requesting an Honorable Discharge. Applicant knew what type of discharge he received when he got it, but tried to deceive me at the hearing into thinking he received two Honorable Discharges.

None of these occurrences happened as Applicant described them. None of his assertions about this part of his life are supported by the evidence. Applicant is covering up his past by putting a favorable light on it. Yet he knew he spent time in jail for an offense and he should have disclosed the information about his trial, conviction, incarceration, and appeal in response to Question 21, or put such information in an answer to Question 43, the general catch-all SCA question. He did neither. I do not find Applicant's explanations credible. Therefore, DC 2 applies here.

I cannot find any MC which apply to these facts. Therefore, I conclude Guideline E against Applicant.

The Smith Amendment, 10 U.S.C. § 986, precludes the granting or renewal of a security clearance to those applicants who have been convicted in any Federal or State court and sentenced to more than one year, regardless of the time actually served. Applicant was convicted in 1975 of grand larceny, a felony. He received three years confinement as a sentence, even though he was released after four months and put on probation. Therefore, Applicant falls within the purview of the Smith Amendment. Applicant is ineligible for a clearance without a waiver if I had granted a clearance under the allegations in the SOR. Because I conclude against Applicant on those allegations, I need not consider or make a recommendation for a waiver.

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

Paragraph 2 Guideline E: Against Applicant

Subparagraph 2.a.: 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 national interest to grant or continue a security clearance for Applicant. Clearance is denied.

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Philip S. Howe

Administrative Judge