

DATE: December 9, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-07839

ECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Chief Department Counsel

Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is vice-president and director of operations for a family-owned defense contractor. In 1988 he was convicted of fraud by switching price tags on a compact disc. In 1992 he was arrested and charged with grand larceny and felony burglary for stealing computer equipment from a real estate office. In 2002 he was convicted of reckless driving. He falsified his security clearance application by not disclosing his felony arrest. The 1988 and 1992 offenses are mitigated as "not recent." The reckless driving and falsification are not mitigated. Clearance is denied.

STATEMENT OF THE CASE

On October 14, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to not grant a security clearance to Applicant. This action was taken under Executive Order 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 (Directive). The SOR alleges security concerns under Guidelines J (Criminal Conduct) and E (Personal Conduct) of the Directive. It alleges that Applicant was convicted of fraud in April 1988 (SOR ¶ 1.a.), arrested for grand larceny and burglary and convicted of lesser offenses in December 1992 (SOR ¶ 1.b.), convicted of speeding in July 2002 (SOR ¶ 1.c.), and falsified material facts on his security clearance application (SOR ¶ 1.d., 2.a., and 2.b.).

Applicant answered the SOR in writing on October 31, 2003. He admitted all the allegations except intentional falsification of his security clearance application, offered explanations, and requested a hearing. The case was assigned to me on August 18, 2004. On August 25, 2004, DOHA issued a notice of hearing setting the case for September 21, 2004. Applicant appeared as scheduled. At the hearing, I granted Department Counsel's motion to amend the SOR ¶ 1.c. to allege reckless driving instead of speeding. DOHA received the transcript (Tr.) on October 5, 2004.

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I also make the following findings:

Applicant is a 37-year-old vice-president and director of operations for a family-owned defense contractor. He has occupied his present position since March 1996. His father is the president of the company, and Applicant expects to succeed his father as president. Applicant is married and has one child. He previously held an interim clearance, but he does not now have a security clearance.

On April 28, 1988, Applicant was arrested for switching the price tag on a compact disc in a department store. He was convicted of fraud, fined \$200.00, and placed on probation for 12 months.

In December 1992, Applicant and a friend used the friend's keys to unlawfully enter a real estate office and steal computer equipment. Applicant was arrested for grand larceny and felony burglary. He pleaded guilty to petit larceny and unlawful entry, and was sentenced to confinement for 180 days, with 90 days suspended, and ordered to pay restitution. He served his confinement in a work-release program, working during the day and spending nights in a confinement facility.

On July 4, 2002, Applicant was cited for reckless driving by driving 92 miles per hour in a 55-mile-per-hour zone. He pleaded guilty and was fined \$750.00. He was required to complete a driver improvement course within one month and perform 150 hours of community service within one year. He failed to complete the driver improvement course on time. Upon being notified that he was required to appear in court for this failure, he requested a two-week extension, received it, and completed the course.

On December 19, 2000, Applicant submitted a security clearance application (SF 86). In response to question 5 regarding his education beyond junior high school, Applicant responded that he attended college from January 1, 1993 to January 1, 1995, and received a bachelor's degree on January 1, 1995. These dates were incorrect. In fact, he attended college from August 1988 to July 1990, receiving his bachelor's degree on August 18, 1990.

On the same SF 86, Applicant gave a negative answer to question 21 regarding felony offenses. He did not disclose his arrest for grand larceny and felony burglary.

In October 2001, a Defense Security Service (DSS) investigator interviewed Applicant about his SF 86. The investigator reviewed each question and asked Applicant to verify each answer. He specifically asked Applicant about question 21 and received a negative answer. He also asked about question 24, pertaining to drug use, and he received a negative answer.

After this interview, the DSS investigator discovered evidence of Applicant's felony arrest. He scheduled a second interview and again asked Applicant if he had any additional information pertaining to his application. Applicant responded in the negative. The investigator then confronted Applicant with the evidence of his felony arrest. Applicant first responded that he had no involvement in the crime. After considerable questioning and various responses regarding his degree of involvement, Applicant finally admitted his full participation in the crime.

After the first interview, the DSS investigator also discovered evidence that Applicant had used ecstasy, an illegal drug, in 1992 or 1993. Applicant's negative answer to question 24 was not incorrect, because the question asks about drug use within the last seven years preceding the application. Nevertheless, at the second interview, the investigator asked Applicant if he had ever used drugs. Applicant gave a negative response. After the investigator confronted Applicant with evidence of his drug use, Applicant admitted it.

Applicant offered the DSS investigator alternate explanations for his negative answer to question 21. He first asserted that he had blocked the information from his memory. He then asserted that he thought the information was outside the scope of the question because it was more than seven years old and did not result in a felony conviction. At the hearing, Applicant offered the same explanation regarding his understanding of the scope of question 21.

When Applicant prepared the SF 86 that he submitted in December 2000, he copied information from a previous SF 86 that he had partly completed in July 1999 but never submitted. On the 1999 draft, the same incorrect information was entered for question 5 as was entered on the December 2000 application. The answer to question 21 was negative on the 1999 draft. No answers were entered to questions 6 (employment record), 18 (Selective Service record), 24 (alcohol and drug offenses), 26 (police record), 33 (bankruptcy), and 34 (wage garnishments).

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.

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through ¶¶ 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant'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. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

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

Falsification of Security Clearance Application (SOR ¶¶ 1.d., 2.a., 2.b.)

Applicant denies falsifying his security application, which is alleged under both Guidelines E and J. He asserts that his misstatement of the dates of his attendance at college was an inadvertent typographical error.

Under Guideline E (Personal Conduct), "Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, [or] dishonesty . . . could indicate that the person may not properly safeguard classified information." Directive ¶ E2.A5.1.1. A "deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire" can raise a security concern and may be a disqualifying condition (DC 2). Directive ¶ E2.A5.1.2.2. Information is material if it would affect a final agency decision or if incorrect information would impede a thorough and complete investigation of an applicant's background. *See* ISCR Case No. 01-06870, 2002 WL 32114535 at 6 (App. Bd. Sep. 13, 2002).

Under Guideline J, a single serious offense can raise a security concern (DC 2). It is a felony, punishable by a fine or imprisonment for not more than 5 years, or both, to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the executive branch of the Government of the United States. 18 U.S.C. § 1001. Security clearances are within the jurisdiction of the executive branch of the Government of the United States. *See Egan*, 484 U.S. at 527. A deliberately false answer on a security clearance application is a serious crime within the meaning of Guideline J.

To establish a falsification under both Guidelines E and J, there must be "a showing that the applicant acted with intent to mislead or deceive the government by not disclosing the information." ISCR Case No. 00-0302, 2001 DOHA LEXIS 337 at *5 (App. Bd. Apr. 23, 2001). The answer to question 5 was patently incorrect, because the dates listed for Applicant's college attendance overlapped the dates he was employed overseas. There was no reason for Applicant to fabricate the answer because the correct answer was not derogatory. I find Applicant's explanation for this error plausible and credible.

On the other hand, Applicant's answer to question 21 concealed his felony arrest, a material derogatory fact. He asserted that his failure to disclose his arrest was an honest mistake based on his belief that it was not required to be disclosed because it was more than seven years old and did not result in a felony conviction. I find Applicant's explanation for his negative answer to this question implausible and not credible. Applicant is a mature, college-educated adult. His presentation of his own case at the hearing demonstrated that he is intelligent and very articulate. The question contains no seven-year limitation. It asks whether an applicant has "ever" been "charged or convicted" of a felony offense. Before submitting his security clearance application, Applicant contacted his lawyer regarding the details of his arrest and conviction, but he did not

claim his negative answer was based on advice of counsel. The word "felony" appears in bold print at the top of each arrest warrant. Applicant was present in court when he was arraigned on felony charges and pleaded guilty to lesser offenses. He was evasive during the DSS interview and attempted to minimize his culpability. Based on this record, I conclude that Applicant intentionally failed to disclose his felony arrest.

In falsification cases, a mitigating condition (MC 3) under Guideline E may apply if "[t]he individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts." Directive ¶ E2.A5.1.3.3. MC 3 is not established, because Applicant did not disclose the felony arrest until 11 months after submitting his application, after being confronted with the evidence. Later, he voluntarily disclosed his traffic offense, but he minimized it, describing it only as "speeding" instead of the more serious offense of reckless driving. Although Applicant's drug use was outside the scope of question 24 on the SF 86, his blanket denial of drug use during the first DSS interview is relevant on the issue of Applicant's candor. *See* Directive ¶ E2.2.5.2. ("Adjudicator should consider whether the person . . . was truthful and complete in responding to questions.").

A mitigating condition (MC 2) under Guideline J may apply if the crime was "an isolated incident." Directive ¶ E2.A10.1.3.2. While Applicant's false answer on his security clearance application is his only crime involving falsification, it was not an isolated incident of criminal conduct when considered in the context of other criminal offenses. He attempted to conceal his felony arrest by falsifying his security clearance application. It is one of three offenses in his criminal history involving dishonesty. Under these circumstances, I conclude that MC 2 is not established.

Fraud, larceny, unlawful entry, speeding (SOR ¶¶ 1.a., 1.b., 1.c.)

Under Guideline J, "[a] history or pattern of criminal activity creates doubt about an applicant's judgment, reliability,

and trustworthiness." Directive ¶ E2.A10.1.1. Under DC 2, a single serious crime or multiple lesser offenses can raise a security concern and be disqualifying. Directive ¶ E2.A10.1.2.2. Applicant admitted his fraud, larceny, unlawful entry, and driving 92 miles per hour in a 55-mile-per-hour zone. As discussed above, I have concluded that he committed a serious offense by falsifying his security clearance application. I conclude that DC 2 is established.

Security concerns based on criminal conduct can be mitigated by showing "[t]he criminal behavior was not recent [MC 1]," (MC 1) or "[t]here is clear evidence of successful rehabilitation [MC 6]." Directive ¶¶ E2.A10.1.3.1., E2.A10.1.3.6. Applicant's conviction of fraud is 16 years old and occurred when he was 22 years old. His conviction of unlawful entry and larceny is 12 years old and occurred when he was 26 years old. Almost ten years elapsed between the larceny from the real estate office and Applicant's reckless driving. I conclude that MC 1 is established for these two offenses, and the security concerns raised by these two offenses (SOR ¶¶ 1.a. and 1.b.) are mitigated.

MC 6 applies in Guideline J cases when "[t]here is clear evidence of successful rehabilitation." Applicant has the burden of producing such evidence. Directive ¶ E3.1.15. Applicant's reckless driving and falsification on his security clearance application are relatively recent. In determining whether Applicant has been rehabilitated, these more recent offenses must be considered in the context of his earlier criminal offenses, including those in the SOR ¶¶ 1.a., and 1.b. that were otherwise mitigated.

In an effort to show his rehabilitation, Applicant presented testimony from his father, the president of the company; a longtime family friend who works for the company; and the company's deputy facility security officer. Applicant's father described him as "the engine that has driven the company from a small family business to a hundred million dollar company." He described Applicant as very talented, hard-working, reliable, trustworthy, and well respected by the agencies and organizations with whom they do business. Applicant's father testified that he remembered very little about the details of Applicant's arrests and convictions in 1988 and 1992.

A family friend who has known Applicant since he was a teenager testified that Applicant has matured into a "fine executive" who is not a security risk. He did not know the details of Applicant's criminal record. Applicant told him "he had some dates wrong and that he had put down something regarding a previous felony misdemeanor [sic] charge." A program manager and deputy facility security officer testified that Applicant was extremely conscientious and "overly protective" when working with classified material.

Applicant also presented a letter from his sister, the company facility security officer. She stated that she was "aware of many of the issues resulting in the adjudication of [Applicant's] clearance request." She opined that Applicant is capable of making good personal and business decisions, is sensitive to the need to protect national security information, and is "without a doubt a loyal American."

Applicant's conviction of reckless driving is slightly more than two years old, and it was committed when he was a mature, 35-year-old adult. He committed the offense after he falsified his security clearance application and while action on the application was pending. Notwithstanding the high esteem he enjoys among his family members and colleagues, his reckless driving and falsification of his application demonstrate a recurrence of the same social irresponsibility as his earlier conduct during his younger years. I conclude that insufficient time has elapsed to mitigate these more recent offenses. "Only with the passage of time will there be a track record that shows whether a person, through actions and conduct, is willing and able to adhere to a stated intention to refrain from acting in a way that the person has acted in the past." ISCR Case No. 97-0727, 1998 DOHA LEXIS 302 at *7 (App. Bd. Aug. 3, 1998). I conclude that MC 1 and MC 6 are not established with respect to Applicant's reckless driving and his falsification of the answer to question 21 on the SF 86.

FORMAL FINDINGS

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

Paragraph 1. Guideline J (Criminal Conduct): AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Paragraph 1. Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: Against Applicant

DECISION

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

LeRoy F. Foreman

Administrative Judge