

DATE: October 21, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-08346

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Stephanie E. Hess, Esq., Department Counsel

FOR APPLICANT

Scott M. Badami, Esq.

SYNOPSIS

Applicant committed numerous rule violations during a 18-year period when he was employed as a correctional officer. They were resolved variously by letters of counseling, reprimands, suspensions from duty, demotion, and termination of employment. The security concern based on personal conduct is not mitigated. Clearance is denied.

STATEMENT OF THE CASE

On March 26, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to deny Applicant a security clearance. 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 Guideline E (Personal Conduct). It alleges numerous rules violations by Applicant while he was employed as a correctional officer.

Applicant answered the SOR on May 19, 2004, and his answer was forwarded by his lawyer on May 21, 2004. ⁽¹⁾ The answer was mixed, admitting some allegations, denying others, and offering explanations. Applicant requested a hearing, and the case was assigned to me on June 20, 2005. The case was heard on August 23, 2005, and DOHA received the transcript (Tr.) on September 6, 2005.

PROCEDURAL RULINGS

Department Counsel offered several documents reflecting substandard duty performance. When Applicant's counsel objected on the ground that they did not pertain to any allegations in the SOR, Department Counsel moved to amend the SOR. I excluded the documents and did not grant the motion to amend. ⁽²⁾

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 56-year-old fiscal administrator for a defense contractor. He has worked for his present employer since May 2002. His employer's facility security officer, who was his supervisor for about one year, regards him as a person of integrity, character, and reliability. The supervisor was aware of Applicant's employment record as a correctional officer "in general terms," but he considers it "apples and oranges" because Applicant's current employer is not a correctional facility and his job is to manage a budget, not prison inmates. [\(3\)](#)

Applicant served in the U.S. Marine Corps from 1967 to 1971. After he left the Marine Corps, he joined the U.S. Army Reserve and has served until the present, currently holding the grade of sergeant first class (E-7).

After completing his active duty in the Marine Corps, Applicant began a career as a correctional officer. In February 1982, he was dismissed from his position as a county correctional officer for fraternizing with an inmate, using the public address system to intimidate an inmate, illegally depositing funds in an inmate's canteen fund, and attempting to conceal the deposit by altering records. [\(4\)](#) Applicant denied the allegations. In the original investigation of the incident, he stated a visitor to the detention center gave him \$10.00 to deposit in the inmate's account, would not identify himself, and said he did not have time to wait for a receipt. [\(5\)](#) In his answer to the SOR and in his testimony at the hearing, Applicant abandoned his story about the unidentified visitor and admitted he gave the money to the inmate out of compassion, because she was an old friend he had not seen for several years. He denied altering any records to cover up his conduct. [\(6\)](#)

Applicant began working as a state correctional officer in 1986. [\(7\)](#) In January 1990, Applicant received a "letter of counseling" for bumping an inmate. According to Applicant, an inmate made physical contact with him in a doorway, Applicant pushed the inmate away, and an altercation ensued. Applicant explained he thought it was necessary to push the inmate away, lest he be perceived as a weak correctional officer who could be taken advantage of by inmates. [\(8\)](#)

In November 1990, Applicant received a letter of counseling for a breach of security. Applicant claims he has no memory of this event. [\(9\)](#)

In May 1991, Applicant was suspended for seven days for sleeping on duty. In his answer to the SOR, he denied being asleep and blamed his supervisor for not following the correct procedure to determine if he was asleep, but the investigative record of the incident contains a handwritten statement from Applicant admitting he "dozed off while on duty." [\(10\)](#) At the hearing, Applicant admitted he "was nodding off and dozed off asleep." [\(11\)](#) The supervisor who reported him for sleeping on duty, now an assistant warden, supported his application for a security clearance, stating Applicant "had a very successful career" as a correctional officer. He testified he regards Applicant as trustworthy and reliable. [\(12\)](#)

In January 1992, Applicant was suspended for three days for harsh treatment of an inmate. He admitted pushing a recalcitrant inmate against a wall in an effort to convince the inmate "he needed to straighten up his attitude." [\(13\)](#)

In November 1993, Applicant received a letter of counseling for unnecessary physical contact with an inmate. Applicant stated he has no recollection of this incident. [\(14\)](#)

In March 1994, Applicant was suspended for one day for sexual harassment of a fellow employee by brushing against her as he attempted to pass her while carrying a uniform and a duffle bag. When the physical contact occurred, a loud argument between Applicant and the employee ensued. It ended when Applicant left the gate house, slamming the door in anger. Applicant appealed, and an administrative law judge found no sexual harassment but instead found a breach of peace reflecting discredit on the correctional institution. The administrative law judge determined the one-day suspension was an appropriate disciplinary response for Applicant's loud and inappropriate behavior. [\(15\)](#) At the hearing, Applicant testified the administrative law judge found him guilty of "improper conduct for not shutting the gate," [\(16\)](#) which is inconsistent with the judge's written findings. The same incident appears to be the basis for the allegations in

SOR ¶ 1.g. and 1.h.

In September 1994, Applicant was reprimanded for using unnecessary force on an inmate and failing to report the incident. Applicant denied the accusation and explained he did not report it because nothing happened. [\(17\)](#)

In November 1996, Applicant was again reprimanded for using unnecessary force against an inmate. [\(18\)](#) An unruly inmate spit on Applicant, who responded with physical force. Applicant explained: "Correctional officers must respond to these types of physical altercations to ensure that discipline and management is maintained. If a correctional officer is perceived as weak by inmates, his authority will not be respected and he will not be able to do his job properly." [\(19\)](#)

In January 1999, Applicant was reprimanded for using profanity or racial epithets. Applicant appealed to an administrative law judge, who found Applicant not guilty. [\(20\)](#) In his answer to the SOR, he stated he had no recollection of the incident. [\(21\)](#)

In April 2000, Applicant was promoted from sergeant to lieutenant. In September 2000, while Applicant was in the six-month probationary period as a new lieutenant, he ordered an inmate into administrative segregation for being in an "out of bounds" area. Applicant signed his supervisor's name to the notice of inmate rule violation, without notifying the supervisor. In his answer to the SOR, Applicant stated he was disciplined for not notifying the supervisor, but the evidence shows Applicant admitted signing his supervisor's name to the form, thereby indicating the supervisor reviewed and approved Applicant's action. In October 2000, Applicant was demoted from lieutenant to sergeant. [\(22\)](#) Applicant retired from the state correctional system in May 2002 and received a "Governor's Citation" attesting to his "high integrity and ability." [\(23\)](#)

The staff director of the correctional law enforcement union, who assisted Applicant in some of the disciplinary proceedings, regards him as an honest, trustworthy, hard-working person. The staff director pointed out that Applicant worked in an environment where frivolous and unsubstantiated complaints by inmates were common. [\(24\)](#)

In the state correctional system, letters of counseling were not regarded as disciplinary actions. Instead, they were used as learning and training tools to correct unacceptable conduct or performance. [\(25\)](#) Applicant received letters of counseling in four of the ten incidents established by the evidence.

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), as amended and modified. 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.

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 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, conditions 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

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1. Three disqualifying conditions are relevant to Applicant's case. DC 1 applies where there is "[r]eliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances." Directive ¶ E2.A5.1.2.1. The information concerning Applicant's record of disciplinary and corrective measures obtained from former employers establishes DC 1.

The allegation of sexual harassment in SOR ¶ 1.g. was resolved in Applicant's favor by an administrative law judge and reduced to a finding of unbecoming conduct alleged separately in SOR ¶ 1.h. I conclude SOR ¶ 1.g. is not established by the evidence.

The allegation of using profanity or racial epithets in SOR ¶ 1k. was determined by an administrative law judge to be unfounded. I conclude this allegation is not established by the evidence.

The allegation of failure to perform assigned duties in SOR ¶ 1.l. was one of the bases for Applicant's demotion alleged in SOR ¶ 1.m. Where the same conduct is alleged twice in the SOR, one of the duplicative allegations should be resolved in Applicant's favor. *See* ISCR Case No. 03-04704 (App. Bd. Sep. 21, 2005) at 3 (same debt alleged twice). Accordingly, I will resolve SOR ¶ 1.l. in Applicant's favor.

DC 4 applies when there is evidence of "[p]ersonal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress." DC 4 is not established because Applicant's current employer is aware of his record of infractions, at least in general terms, and does not consider it relevant to his current position.

DC 5 applies where there is a pattern of dishonesty or rule violations. I conclude this disqualifying condition is established, because Applicant's employment record as a county and state correctional officer demonstrates a pattern of rule violations beginning in 1982 and ending in September 2000, less than two years before Applicant was hired by his current employer and applied for a security clearance.

One mitigating condition specifically enumerated in the Directive is relevant. MC 5 applies when an Applicant "has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress." Directive ¶ E2.A5.1.3.5. This mitigating condition is partially established, because Applicant has disclosed his past record to his current employer in general terms and his supervisor regards his previous difficulties as a correctional officer irrelevant to his current job of managing a budget. The level of detail in Applicant's disclosure is not clear from the record.

Several additional considerations are relevant under the "whole person" concept. Most of the allegations against

Applicant involved minor infractions, but they are numerous and span a period of eighteen years. Directive ¶ E2.2.1.1. The infractions occurred in a difficult environment, among unruly and aggressive inmates who would not hesitate to retaliate against a correctional officer by making false accusations. Directive ¶ E2.2.1.2. They were relatively frequent, and the most recent was less than two years before Applicant began his current employment. Directive ¶ E2.2.1.3. Applicant's first violation occurred when he was a young, inexperienced correctional officer, but it is not mitigated by the passage of time because it was the beginning of a pattern of conduct and the latest violation occurred recently when he was a seasoned officer. Directive ¶ E2.2.1.4.

The issues of rehabilitation and likelihood of recurrence are related. Directive ¶¶ E2.2.1.6., E2.2.1.9. The thrust of Applicant's case was not focused on changed behavior, but rather on changed circumstances, i.e., Applicant is no longer dealing with inmates in a correctional setting. Nevertheless, it is relevant that Applicant has attempted to minimize his culpability rather than demonstrate a change of attitude or behavior. In the 1982 incident, he initially claimed an unidentified visitor gave the \$10.00 to an inmate, but he later admitted he gave the inmate money. In the May 1991 incident involving sleeping on duty, Applicant asserted in his answer to the SOR that he was not sleeping and the fault was with the supervisor who failed to take proper steps to determine if he was sleeping. However, at the hearing, Applicant admitted he was sleeping. In the March 1994 sexual harassment incident, Applicant testified at the hearing that he was eventually found guilty of "improper conduct for not shutting the gate"; but the administrative law judge's determination was that Applicant had engaged in loud and inappropriate conduct that ended when Applicant angrily slammed the gate house door. In the September 2000 incident resulting in Applicant's demotion, he asserted in his answer to the SOR and in his testimony at the hearing that he was disciplined for failing to obtain his supervisor's approval of his decision to place the inmate in administrative segregation, but the evidence shows he not only failed to obtain his supervisor's approval, he also forged the supervisor's signature on the approval form in an effort to give the appearance of the supervisor's approval.

The SOR does not charge Applicant with making false statements, and it would be improper to base an adverse security determination on uncharged misconduct. However, it is proper to consider Applicant's lack of candor and refusal to accept responsibility for his actions in determining his rehabilitation and the likelihood of future rule violations. *See* ISCR Case No. 03-08625 (App. Bd. Sept. 29, 2005) at 5 (Jaksetic concurring).

Just as I denied Department Counsel's requests to amend the SOR to allege incidents of substandard performance of duty, I have not considered Applicant's inconsistent justifications of his behavior as an independent basis for determining whether to grant or deny a clearance. However, I have considered Applicant's lack of candor and refusal to accept responsibility for his conduct on the issues of rehabilitation and likelihood of recurrence. His most recent lack of candor occurred when he denied sleeping on duty in his answer to the SOR (dated May 19, 2004) and then admitted the infraction at the hearing. Applicant's pattern of minimizing his culpability causes me to doubt whether his attitude toward following the rules has changed, and it raises a concern whether he will violate security rules and attempt to minimize his culpability and justify his behavior in the future. After considering the disqualifying and mitigation conditions and evaluating the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concern based on personal conduct.

FORMAL FINDINGS

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

Paragraph 1. Guideline E (Personal Conduct): 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

Subparagraph 1.g.: For Applicant

Subparagraph 1.h.: Against Applicant

Subparagraph 1.i.: Against Applicant

Subparagraph 1.j.: Against Applicant

Subparagraph 1.k.: For Applicant

Subparagraph 1.l.: For Applicant

Subparagraph 1.m.: 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 Applicant a security clearance. Clearance is denied.

LeRoy F. Foreman

Administrative Judge

1. The heading of the forwarding letter contains a typographical error, indicating the year 2003 instead of 2004.
2. Tr. 41-47; Government Exhibits 4, 16, 24, 25, 26, 29, and 30 for identification were not admitted. Government Exhibit 20 for identification was not admitted because it duplicated Government Exhibit 19.
3. Applicant's Exhibit A; Tr. 51-59.
4. Government Exhibits 7, 8, 9, and 27.
5. Government Exhibit 27, p. 2.
6. Answer to SOR, p. 3; Tr. 108.
7. Applicant's Exhibit F; Tr. 93.
8. Answer to SOR, p. 4.
9. Government Exhibit 19; Answer to SOR, pp. 4-5.
10. Answer to SOR, p. 5; Government Exhibit 28, p. 5
11. Tr. 116.
12. Applicant's Exhibit D, p. 2; Tr. 71.
13. Answer to SOR, p. 5-6; Government Exhibit 21.
14. Answer to SOR, p. 6; Government Exhibits 3 and 19..
15. Government Exhibits 12, 13, and 19.

16. Tr. 120.

17. Answer to SOR, p. 7-8; Government Exhibits 5 and 6.

18. Government Exhibit 15.

19. Answer to SOR, p. 8.

20. Government Exhibit 32, p. 9.

21. Government Exhibit 31; Answer to SOR, p. 8.

22. Government Exhibits 17 and 18.

23. Applicant's Exhibit E.

24. Applicant's Exhibits B and C.

25. Applicant's Exhibits B and C; Tr. 68-69, 78-81.