

DATE: April 6, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-08525

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Kathryn Antigone Trowbridge, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 26 years old. He is employed by a defense contractor as a computer software engineer. The Statement of Reasons alleged foreign preference, foreign influence, and personal conduct security concerns. Applicant's current girlfriend is an illegal immigrant from Mexico, to whom he gave \$1000 for smuggling more of her relatives into the U.S. He cheated on some of his college examinations and helped others do so. He deliberately failed to disclose on his 2002 security clearance application his illegal drug use and work suspension for providing alcohol to minors. Applicant mitigated the foreign preference security concern, but failed to mitigate the foreign influence and personal conduct security concerns. 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 May 27, 2004, DOHA issued a Statement of Reasons⁽¹⁾ (SOR) detailing the basis for its decision-security concerns raised under Guideline C (Foreign Preference), Guideline B (Foreign Influence), and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on June 16, 2004 and requested his case be decided on the written record in lieu of a hearing. On January 31, 2005, the Department Counsel submitted the Department's written case. A complete copy of the file of relevant material (FORM) including eight items in support of the SOR was provided to the Applicant, and he was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant received the FORM on February 15, 2005. Applicant filed a response to the FORM on arch 16, 2005. The case was assigned to me on March 22, 2005.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated here as findings of fact. After a complete and thorough review of the evidence in the record, and full consideration of that evidence, I make the following additional findings of fact:

Applicant is 26 years old, unmarried, and employed as a software engineer by a defense contractor. Applicant was born in the United States. Applicant has five uncles and four aunts who are citizens of Mexico and live in the U.S. Other relatives live in Mexico. Two uncles were, at one time, involved in the illegal drug trade importing illegal drugs from Mexico for sale in the U.S. Applicant's brother and father are dual U.S. and Mexican citizens. They voluntarily applied for exican citizenship while U.S. citizens in 2002. Applicant's father arrived in the U.S. in the 1970s illegally, but became a naturalized U.S. citizen in 1989. Applicant also applied for Mexican citizenship in December 2002, but withdrew his application when told it would affect his security clearance application. Applicant wanted Mexican citizenship so he could travel easily in Mexico, and because of his pride in his heritage. Applicant claims his "primary loyalty is to the U.S." Between 1999 and 2003, he traveled five times to Mexico. (Items 2-7)

Applicant's girlfriend, who now is 17 years old but whom he met when she was 13 years old in 2001, is an illegal immigrant to the U.S., being a citizen of exico. She lives near Applicant with her relatives. Applicant did not report this association or her illegal status to an appropriate official. Applicant gave \$3,000 to his girlfriend's family, in installments of \$1,000 and \$2,000, in 2002, ostensibly for them to buy housing, clothing, and various sundries while they lived illegally in the U.S. The \$1,000 was actually spent to pay human smugglers to get their relatives into the U.S. illegally. Applicant claims ignorance of the ultimate use of the money. (Items 2-7)

Applicant used marijuana in 1999 several times, and used psilocybin in 1997. He did not disclose this usage in answer to Question 27 on his security clearance application (SCA) he filed on May 20, 2002. Applicant admitted he did not disclose this information intentionally because he "felt it was unwise to include information regarding his immature experimentation." He also admitted in his January 7, 2003, statement he deliberately did not disclose his drug use because he did not want the government to find out about it. (Items 2-7)

Applicant failed to disclose he was suspended from his summer employment with the university he attended in June 2000 in answer to Question 20 on the SCA. Applicant provided alcoholic beverages to underage students while in a mentoring capacity to minority students, and when his supervisors discovered this action, he was suspended. Applicant should have disclosed these facts. (Items 2-5, 8)

Applicant cheated at least five times on his university examinations between 1997 and 2003. He wrote answers on his hands, entered equations he needed for examinations into a calculator he was allowed to bring into the examinations, and took other information into the examinations to provide himself with an unfair advantage during the examinations. Applicant also assisted other students to obtain better grades during examinations by allowing his friends to see his answers to questions. He claimed it was only the lower division courses in which he cheated, and everyone else cheated. (Items 2, 5, 7)

Applicant engaged in intimate personal relationships with three women during the period of February 2001 to December 2002. One woman was married. With that woman and a co-worker he had sexual relations during that time period. Simultaneously, Applicant was courting by telephone and trips to Mexico a then-14-year-old girl who subsequently illegally entered the U.S., and whom Applicant now considers his girlfriend. With that girlfriend he has engaged in fondling and other intimate physical activities, excusing his intimate contacts with a minor female as allowed and normal in Mexico, regardless of U.S. laws against such inappropriate sexual contacts. Applicant claimed he was waiting for his girlfriend to become 16, "the age of consent in New Mexico, for things to get serious." (Items 5 at 5, 6, 7)

Applicant submitted five character statements from co-workers. These statements show Applicant's work product is good and he is a competent employee. He also submitted a June 7, 2004, drug urinalysis testing he took showing a negative result for all drugs. (Item 2)

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 the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information with Industry*

§ 2 (Feb. 20, 1960). 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 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 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline that must be carefully considered in making the overall common sense determination required.

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. Those assessments include: (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.

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, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996). 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 C: Foreign Preference: *The Concern:* When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States. E2.A3.1.1

Guideline B: Foreign Influence: *The Concern:* A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries are relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

E2.A2.1.1

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. E2.A5.1.1

CONCLUSIONS

The Government established by substantial evidence and Applicant's admissions each of the allegations in the SOR under two of the guidelines. Applicant submitted sufficient mitigating evidence on one of the guidelines to ameliorate the security concerns. Applicant's conduct remains a security concern under the applicable guidelines.

Regarding the Foreign Preference guideline, Applicant went to the Mexican consulate in his home state to obtain an application for a Mexican internal passport. While he may have intended originally to submit the application, he did not do so, and none of the Disqualifying Conditions (DC) apply because Applicant did none of the overt acts in the guideline to trigger the security concern. Applicant does not have dual Mexican-U.S. citizenship. If he had obtained Mexican citizenship, and voted in a Mexican election as his father intended to do in 2002 when he went to Mexico to get a voter's card, then my conclusion would be the opposite. I conclude this guideline for Applicant.

The more serious security concerns lay with the foreign influence and personal conduct guidelines. DC E2.A2.1.2.1 (An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country), DC E2.A2.1.2.4 (Failing to report, where required, associations with foreign nationals), and DC E2.A2.1.2.6 (Conduct which may make the individual vulnerable to coercion, exploitation, or pressure by a foreign government) apply. Applicant's girlfriend is an illegal immigrant from Mexico and a citizen of Mexico. He has supported her by giving her \$3,000, which she or her family used to smuggle more relatives into the U.S. Some of his close relatives are Mexican citizens, but more significantly, two uncles were illegal drug importers. Applicant makes himself vulnerable to coercion and exploitation by any foreign government with these associations alone, particularly the illegal human smuggling across the Mexican-U.S. border.

On these facts, there are no Mitigating Conditions (MC) that apply here. Applicant's girlfriend and her family, and Applicant, are in position to be exploited by foreign governments that could force Applicant to choose between loyalty to the U.S. and his girlfriend, and his and her relatives. I conclude this guideline against Applicant.

Applicant's conduct alleged in the SOR individually or totally under the personal conduct guideline shows the concern expressed in that guideline is well based. Applicant deliberately failed to make full disclosure on his SCA about his illegal drug use in 1997 and 1999. He admitted he deliberately failed to make these disclosures because he feared an adverse effect on his security clearance application. He failed to disclose he was suspended, thereby leaving a job, because of misconduct on his part, providing minor-aged students alcohol. He provided money to his girlfriend for human smuggling of her relatives into the U.S. in violation of federal law. He cheated on his college exams over a six-year period, and helped his friends cheat on some of their examinations. Furthermore, Applicant committed adultery during 2001 and 2002 with a married woman, and is engaged in a relationship with a minor female. While she is under age, he could be considered to have molested a minor, and while she is an illegal immigrant. None of these actions are those which would make someone invulnerable to coercion and exploitation. Together they demonstrate an attitude of irresponsibility and lack of good judgment antithetical to someone who has good judgment and reliability and might have a security clearance.

DC E2.A5.1.2.1 (Reliable, unfavorable information provided by associates, employers, coworkers, neighbors and other acquaintances), DC E2.A5.1.2.2 (The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire or similar form used to conduct investigations, determine employment qualifications, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities), DC E2.A5.1.2.4 (Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail), DC E2.A5.1.2.5 (A pattern of dishonesty or rule violations), and DC E2.A5.1.2.6 (Association with persons involved in criminal activity) apply.

There are no MC applicable here. Applicant shows a pattern of misconduct and serious lack of good judgment in these matters. His cheating, adultery, donating money used for illegal human smuggling across the U.S. border, flaunting U.S. immigration laws, illegal drug use, supplying of minors with alcohol, and intimate physical contact with a minor female in violation of state law, all show a selfish, untrustworthy, unreliable, and dishonest person unwilling to comply with laws. If he cannot comply with these myriad of laws, it is not likely he will maintain safeguards on classified information. Therefore, I conclude this guideline against Applicant.

FORMAL FINDINGS

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

Paragraph 1. Guideline C: FOR APPLICANT

Subparagraph 1.a: For Applicant

Paragraph 2. Guideline B: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: Against Applicant

Subparagraph 2.d: Against Applicant

Paragraph 3. Guideline E: AGAINST APPLICANT

Subparagraph 3.a: Against Applicant

Subparagraph 3.b: Against Applicant

Subparagraph 3.c: Against Applicant

Subparagraph 3.d: 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.

Philip S. Howe

Administrative Judge

1. Pursuant to 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 (Directive).