

DATE: December 8, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-11112

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Nichole Noel, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

As a result of a general court-martial, Applicant was dismissed from the U.S. Air Force after being convicted of four specifications of conduct unbecoming an officer by making false official statements. Applicant failed to mitigate criminal 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 30 August 2004, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision ⁽¹⁾-security concerns raised under Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on 15 September 2004 and elected to have a hearing before an administrative judge. The case was assigned to me on 5 November 2004. A hearing was scheduled on 21 December 2004, but was continued due to the decision of the Director, DOHA, to issue a moratorium on cases affected by amendments to 10 U.S.C. § 986. The moratorium was lifted in August 2005. On 26 October 2005, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on 9 November 2005.

FINDINGS OF FACT

Applicant is a 51-year-old network engineer for a defense contractor. Applicant held a top secret clearance while he was on active duty with the U.S. Air Force from August 1980 until January 1991. He was granted an interim clearance in April 2003 by his current employer. In July 2004, the interim clearance was suspended. Tr. 28.

In December 1986, with the intent to deceive, Applicant signed a Federal Aviation Administration form certifying that he had flown 10 hours as a pilot in command of a T-43A aircraft in the previous 12 months, when he knew he had not done so. On the same day, Applicant also signed an Air Force form, a Certificate of Aircrew Qualification, which he

knew was false. In August 1988, with intent to deceive, Applicant made an official statement that he had obtained a flight rating for a Boeing 737 type jet aircraft by taking a flight test. Applicant knew the statement was false. In October 1988, with intent to deceive, Applicant made an official statement to an administrative law judge for the National Transportation Safety Board that he had logged time as a command pilot on a B-52 aircraft, which he then knew was false. Ex. 5.

As a result of these false statements and writings, criminal charges were referred to a general court-martial. On 30 March 1989, Applicant pled guilty to four specifications of conduct unbecoming an officer by making the false writings and statements. The military judge accepted Applicant's pleas and sentenced him to a dismissal, confinement for 15 months, and forfeiture of all pay and allowances. The convening authority approved only so much of the sentence as provided for a dismissal, confinement for 12 months, and forfeiture of all pay and allowances. Applicant was confined from 2 April until 12 December 1989. After completion of his sentence to confinement, Applicant was placed on appellate leave. After his sentence was affirmed on appeal, Applicant was dismissed from the service effective 31 January 1991. Ex. 3.

Upon his separation from the Air Force, Applicant was provided a DD Form 214, Certificate of Release or Discharge From Active Duty. It lists his type of separation as "Dismissal" and his character of service as "uncharacterized."

In 1990, Applicant requalified as a private pilot and received his instrument and commercial ratings in both single and multi-engine aircraft. He was certified as a flight instructor and an instrument flight instructor in both single and multi-engine aircraft. Ex. D. In 2004, Applicant received the FAA's Aviation Safety Award for exemplary service as a voluntary aviation safety counselor.

Before his current employment, Applicant worked as an aviation insurance underwriter. He was given authority to underwrite policies up to \$300 million. Tr. 24. When the company downsized, Applicant went to work for one of the company's clients to manage its airline portfolio. He became interested in computer networking and earned certified network engineering credentials along with network instructor certification to train and mentor others. Tr. 25. He provided contract training to FBI agents and computer staff. He then worked with several other federal agencies, where he obtained approval to accept ADP-related positions, and he held an interim secret clearance. Tr. 26.

He recently was awarded master's degrees in business and technology management and received a faculty appointment as an instructor.

Applicant considers his criminal conduct "an isolated one-time act of personal stupidity" (Tr. 32), "a mistake and [he] look[s] at it as being an internal logic processing decision on [his] part because [he] was blinded by an overriding zeal and passion for flying" (Tr. 35).

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 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). 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.

Enclosure 2 of the Directive sets forth personnel 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 the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

In the SOR, DOHA alleged Applicant was dismissed from the U.S. Air Force after being convicted of conduct unbecoming an officer by making false official statements and signing false statements (¶ 1.a); and he is disqualified from being granted a clearance by 10 U.S.C. § 986 (¶ 1.b). Applicant admitted the allegation in ¶ 1.a, but denied the allegation in ¶ 1.b. A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1.

Applicant was convicted of four specifications of conduct unbecoming an officer, was sentenced to be dismissed from the service, and the sentence was executed. The Government's evidence and Applicant's admission established potentially disqualifying conditions under Guideline J. Applicant engaged in criminal conduct (DC E2.A10.1.2.1) consisting of multiple serious offenses. ⁽²⁾

But the criminal conduct was not recent (MC E2.A10.1.3.1)-he committed the offenses some 17 years ago. Applicant insists he has been rehabilitated (MC E2.A10.1.3.6) and presented evidence of his multiple graduate degrees and work with the FAA as an aviation safety counselor in support of that claim. Since his release from confinement, Applicant has resumed flying, regained his flight ratings, and been a law abiding citizen and productive member of society.

After considering all of the evidence, I am unable to find there is clear evidence of rehabilitation. Applicant made four false official statements, two of which occurred on the same date when he deliberately falsified both an FAA form and an Air Force form. Almost two years later, in August 1988, he lied to an investigator about how he obtained his Boeing 737 type flight rating. Two months later, in October 1988, he lied to an administrative law judge about flying a B-52 aircraft. Contrary to Applicant's contention, this was not one incident. It was four incidents spanning two years that demonstrated a shocking lack of personal integrity. Although he pled guilty to the offenses, I am not convinced Applicant fully recognizes or accepts the breadth of his misconduct. He is still trying to minimize his personal failings. I find against Applicant on ¶ 1.a.

In 2000, a federal statute was enacted that prohibited the Department of Defense from granting or continuing a security clearance, absent a waiver, for any applicant who was "discharged or dismissed from the Armed Forces under dishonorable conditions." 10 U.S.C. § 986 (c)(4) (2000). Although he admits he was dismissed from the service, Applicant asserts 10 U.S.C. § 986 does not apply to him because he was not dismissed under dishonorable conditions. Applicant bases this assertion on his DD-214 which lists his character of service as "uncharacterized." See Ex. 3. He claims the DoD Directive 5220.6 extends to other federal agencies including the Department of Labor, the Department of Labor has established guidelines for unemployment compensation for ex-servicemen, and his home state has determined that uncharacterized is the same as honorable. Tr. 16-17. I disagree.

The dismissal of an officer from the service is the equivalent of a dishonorable discharge. It is a separation from the service under dishonorable conditions. William Winthrop, *Military Law and Precedents* 405-406 (2d. ed. reprinted 1920); George B. Davis, *A Treatise on the Military Law of the United States* 166 (2d. ed. rev. 1909). Applicant's reliance on the characterization of his service in Item 24 of his DD-214 is misplaced. The regulation governing the preparation of the DD-214 required Item 24 to read "NOT APPLICABLE" in cases in which an officer was dismissed by court-martial. Air Force Regulation 35-6, *Separation Documents*, Table 4, Rule 51 (Jan. 1, 1990). The "uncharacterized" on Applicant's DD-214 was an administrative error. Therefore, I conclude Applicant was dismissed under dishonorable conditions and the Department of Defense is prohibited from granting Applicant a clearance absent a waiver of 10 U.S.C. § 986. I find against Applicant on ¶ 1.b.

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

Subparagraph 1.b: Against Applicant

DECISION

In light of all of the circumstances 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. As required by Exec. Or. 10865 (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended and modified (Directive).

2. Although charged as violations of Article 133, UCMJ, conduct unbecoming an officer, the gravamen of the offenses was making false official statements. See Article 107, UCMJ. Each of the specifications was a "serious crime" for purposes of Guideline J. Each offense carried a maximum punishment of a dismissal and confinement for five years. *Manual for Courts-Martial, United States* ¶31.e (1984).