

DATE: December 14, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-11167

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Richard A. Stevens, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant failed to mitigate security concerns about his multiple instances of criminal conduct from 1977 through 2002. He also deliberately falsified his SF 86, which is itself criminal conduct, by omitting four arrests from a 2002 security clearance questionnaire, and he has failed to mitigate the related personal conduct concerns. Clearance is denied.

STATEMENT OF THE CASE

After reviewing the results of Applicant's background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding⁽¹⁾ it is clearly consistent with the national interest to give Applicant a security clearance. On October 8, 2004, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed in the Directive under Guideline E (personal conduct), and Guideline J (criminal conduct). Applicant timely responded to the SOR, admitted with explanation all but four of the ten allegations therein, and requested a hearing.

The case was assigned to me on August 23, 2005, and I convened a hearing on September 13, 2005. The parties appeared as scheduled and the government presented six exhibits (GE 1 through GE 6), which were admitted without objection. Applicant testified in his own behalf and presented one exhibit (AE A), which was admitted without objection. I also left the record open to receive an additional submission from Applicant, which he timely submitted. It has been admitted, without objection, as AE B. DOHA received the transcript (Tr) on September 29, 2005.

FINDINGS OF FACT

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant is 49 years old and has worked for his current employer as a field service technician since March 2000. His company supports State Department facilities programs in a variety of overseas locations. The president of his company,

his immediate supervisor, and his facility security officer all support Applicant's request for a security clearance.

Applicant is a high school graduate with two years of technical school to his credit. He served from 1973 to 1976 as an enlisted member of the U.S. Coast Guard. The only known blemish on his service record, as alleged in SOR ¶ 1.g, was a 1973 charge of fighting with another enlisted man. Applicant and the other combatant were each awarded non-judicial punishment in the form of extra duty. In 1977, as alleged in SOR ¶ 1.f, Applicant was charged with possession of marijuana; however, the charge was later dismissed. Applicant asserts he has never smoked marijuana and that there was never any marijuana on his person when he was arrested.

In May 1994, Applicant was charged with obtaining property worth more than \$150 by issuing a worthless check (SOR ¶ 1.e). The charge is a third degree felony in the state where it occurred. Applicant cashed a check for \$170 at a company that specialized in check cashing. However, he did not have sufficient funds in his account to cover the check. Applicant asserts he made good on the check as soon as the company notified him of the problem and thought the matter was resolved. He subsequently moved to another state. In 1996, Applicant was arrested after a traffic stop when police learned he had an outstanding arrest warrant on the aforementioned felony charge. Applicant claims he appeared in court several times to show he had already paid the check, but that faulty record keeping by the court caused him to finally settle the matter by pleading guilty and paying restitution and court costs.

In September 1994, Applicant was arrested and charged with attempted fraud. (SOR ¶ 1.d) He had tried to return a radio to a store for a cash refund, but the radio had been stolen and the receipt was invalid. Applicant claims he was innocent of this offense as he was simply trying to do a favor for a friend. He pleaded guilty and paid a fine, because, even though he "was not guilty, it was more convenient and less expensive than missing time from work."⁽²⁾

In March 1998, Applicant was charged with three felonies - strong armed robbery, residential burglary, and criminal mischief. (SOR ¶ 1.c) All three charges were dismissed because the charges were brought by an irate former girlfriend as reprisal from a domestic dispute; Applicant had been doing improvements on her residence, left them unfinished, then went out with another woman. In September 1998, Applicant was charged with grand larceny, a third degree felony, by the same girlfriend; this time over a dispute about her belongings when she moved out. That charge was also dismissed. (SOR ¶ 1.b)

In January 1999, Applicant was involved in a dispute with a different girlfriend. In March 1999, the girlfriend filed a criminal complaint of battery against the Applicant, who received a summons in the mail. Pending a trial date, Applicant moved again to another state. As alleged in SOR ¶ 1.a, on October 27, 1999, he pleaded guilty in absentia to disorderly conduct. He was assessed a fine and court costs totaling \$300, and was allowed 129 days to pay, but did not do so until March 2003,⁽³⁾ when a Defense Security Service (DSS) agent brought to his attention the fact he had an outstanding warrant against him for non-compliance with the terms of his sentence. Applicant has insisted, during his background investigation and at hearing, that he did not touch his girlfriend, who he also claims was intoxicated the day of their dispute. He further asserts he pleaded guilty to the lesser charge solely as a matter of convenience.

Applicant signed and submitted a security clearance application (SF 86) on August 19, 2002. As alleged in SOR ¶ 2.a, in response to question 21, which asks if the respondent has "ever been charged with or convicted of any felony offense(s)," Applicant answered "no," despite the fact he had been charged with felonies on at least three different occasions. As alleged in SOR ¶ 2.b, in response to question 26, which asks if, in the preceding seven years, he had been arrested for, charged with, or convicted of any offenses (other than minor traffic offenses) not addressed by other questions about criminal conduct. He answered "no," notwithstanding the fact he had pleaded guilty in 1999 to disorderly conduct after being initially charged with battery. In response, Applicant has denied knowingly falsifying his answers to these questions, asserting either he thought he was only required to list offenses for which he was convicted, or he did not know the difference between a felony and a misdemeanor. However, Applicant also testified that, at the time he completed the SF 86, he may have been concerned about not getting his clearance.⁽⁴⁾

Applicant was married in 1983, but divorced in 1988. He re-married in October 2000 and lives with his wife and two stepchildren. He lives a quiet, productive life, spending his free time gardening, working on his home, and boating.

POLICIES AND BURDEN OF PROOF

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁽⁵⁾ for an Applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for the Applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it establishes that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden then shifts to the Applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, the Applicant bears a heavy burden of persuasion.⁽⁶⁾ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.⁽⁷⁾

To that end, the Directive sets forth adjudicative guidelines⁽⁸⁾ for consideration when evaluating an Applicant's suitability for access to classified information. Security clearance decisions must reflect consideration of disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having considered the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are Guideline E (personal conduct) and Guideline J (criminal conduct).

CONCLUSIONS

Under Guideline J, a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.⁽⁹⁾ A person who is willing to ignore the law, thereby risking criminal sanctions including fines and incarceration, may also be willing to disregard rules, regulations, and procedures intended to protect classified information. With the exception of SOR ¶¶ 1.b, 1.c, and 1.f, the government has presented sufficient information to support the allegations of criminal conduct alleged in SOR ¶ 1. Applicant pleaded guilty to charges outlined in SOR ¶¶ 1.a, 1.d, and 1.e. He has also admitted he fought with another enlisted man while in the service in 1973. Further, as discussed below regarding Guideline E, and as alleged in SOR ¶ 1.h, Applicant's criminal conduct extends to a violation of federal law⁽¹⁰⁾ against intentionally making false statements to the government. As alleged in SOR ¶ 2.a and 2.b, Applicant deliberately falsified facts about his criminal record when he signed and submitted his SF 86 in August 2002.

As to SOR ¶¶ 1.b, 1.c, and 1.f, it appears Applicant was charged with the crimes as stated, but the State chose to forego further prosecution, and there is no other evidence available to show Applicant actually engaged in criminal any conduct. I resolve these allegations for the Applicant. Nonetheless, based on the foregoing, Guideline J disqualifying condition (DC) 1⁽¹¹⁾ and DC 2⁽¹²⁾ apply. By contrast, a review of the listed mitigating conditions (MC) shows none apply. Had his conduct ended in 1999, after he pleaded guilty to disorderly conduct, MC 1⁽¹³⁾ and MC 6⁽¹⁴⁾ might apply, as he now lives a stable, productive life not otherwise conducive to criminal conduct. However, Applicant's deliberate falsifications of his SF 86 responses, discussed below, bring current the government's concerns about his judgment and willingness to protect the government's information. Also of concern is his apparent unwillingness to timely pay the \$300 fine and costs ordered by the court after his 1999 conviction. I conclude Guideline J against the Applicant.

The security concern stated under Guideline E is that 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.⁽¹⁵⁾ Applicant has insisted he did not knowingly omit the felony charges outlined in SOR ¶¶ 1.b, 1.c, and 1.e. His alternating explanations - that he thought he only had to disclose actual convictions, or that he did not know the difference between a felony and a misdemeanor - seem implausible; especially in light of his testimony at hearing that he may have withheld information about his arrests

because he was concerned about the adverse effect such information might have on his application for clearance. Further, Applicant was charged, not once, but three times with felonies, one of which he eventually pleaded guilty to. As to the allegation in SOR ¶ 2.b, regarding "other offenses," Applicant has adopted the same position. Again, if he felt he only had to disclose convictions, he should have disclosed his 1999 conviction (via guilty plea) to disorderly conduct.

Based on the totality of information available about the allegations in SOR ¶ 2, I conclude Applicant knowingly and wilfully falsified his responses to the SF 86. Accordingly, Guideline E DC 2-⁽¹⁶⁾ applies. Having reviewed the Guideline E mitigating conditions, I conclude none apply. On balance, I conclude Guideline E against the Applicant.

I have carefully weighed all of the available evidence, and I have applied the appropriate disqualifying and mitigating conditions. Further, I have tried to make a fair and commonsense assessment of the record before me as required by Directive Section E2.2.3. No single fact or adjudicative factor is dispositive of my decision in this case; rather, I have considered Applicant's suitability in light of the record evidence in its entirety. The government's compelling interest in maintaining the integrity of its personnel security program mandates a finding Applicant is not currently a suitable risk for access to classified information. Reasonable doubts persist about Applicant's criminal conduct and his lack of candor about that conduct. These doubts, in turn, undermine the government's confidence in Applicant's ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. Absent substantial information to mitigate these doubts, which Applicant has failed to provide, I cannot conclude he has overcome the government's case.

FORMAL FINDINGS

Formal findings regarding each SOR allegation are as follows:

Paragraph 1, Guideline J (Criminal Conduct): AGAINST THE APPLICANT

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: For the Applicant

Subparagraph 1.c: For the Applicant

Subparagraph 1.d: Against the Applicant

Subparagraph 1.e: Against the Applicant

Subparagraph 1.f: For the Applicant

Subparagraph 1.g: Against the Applicant

Subparagraph 1.h: Against the Applicant

Paragraph 2, Guideline E (Personal Conduct): AGAINST THE APPLICANT

Subparagraph 2.a: Against the Applicant

Subparagraph 2.b: Against the 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 or continue a security clearance for the Applicant. Clearance is denied.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. Answer to SOR.
3. AE B.
4. Tr., p. 38 - 39.
5. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
6. *See Egan*, 484 U.S. at 528, 531.
7. *See Egan*; Directive E2.2.2.
8. Directive, Enclosure 2.
9. Directive, E2.A10.1.1.
10. Title 18 U.S.C. § 1001.
11. Directive, E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
12. Directive, E2.A10.1.2.2. A single serious crime or multiple lesser offenses.
13. Directive, E2.A10.1.3.1. The criminal behavior was not recent;
14. Directive, E2.A10.1.3.6. There is clear evidence of successful rehabilitation.
15. Directive, E2.A5.1.1.
16. Directive, E2.A5.1.2.2. The deliberate omission, concealment, or falsification 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;