

DATE: July 14, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-14782

ECISION OF ADMINISTRATIVE JUDGE

CHARLES D. ABLARD

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esq. , Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a 52-year-old employee of a defense contractor, mitigated sexual behavior and criminal conduct allegations since all occurred between 25 and 35 years ago. The oldest was an arrest while a juvenile. He has shown rehabilitation since the latest arrest and conviction in 1980. He failed to mitigate personal conduct security concerns by failing to report the two earliest arrests which were felonies at Question 21 on his SF 86. Clearance is denied.

STATEMENT OF CASE

On May 31, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On June 21, 2005, Applicant, in a sworn written statement, responded to the allegations set forth in the SOR, and requested a hearing. The case was assigned to me on March 14, 2006. A notice of hearing was issued on April 26, 2006. A hearing was held on May 3, 2006. The Government introduced four exhibits and Applicant introduced six, and all were admitted into evidence. Applicant and a security investigator testified. The transcript was received May 11, 2006.

FINDINGS OF FACT

Applicant is a 52-year-old employee since 1979 of a major defense contractor. He has been employed there since 1979 and works as a materials handler. He has held a security clearance for the past twelve years. The SOR alleged sexual behavior, criminal conduct, and personal conduct security concerns. After a complete review of the evidence in the record and upon due consideration of the record, the following findings of fact are made:

A review of the allegations in the SOR and the testimony thereon leads to the following findings as to each:

1. Sexual Conduct

- a. When Applicant was 16 years old he engaged in a sexual act with a four-year-old boy who was in the care of Applicant's mother. He was arrested November 10, 1971, and charged with felony child molestation but was not prosecuted. He received counseling under court supervision and such conduct has not recurred. He denied the date of the offense but not the substance of the charge. The SOR was amended to reflect the correct date.
- b. On December 24, 1975, Applicant was arrested and charged with felony abduction based on transporting minor females across state lines for the purpose of having sexual relations. He and a friend picked up two minor females in his friend's car in one state and drove into another state. He was not driving, fell asleep, and when he awakened he was in another state. They all slept awhile in the car and returned to the point of origin. He was not prosecuted and did not have sexual relations with the females.

When Applicant was questioned in his interview as to whether he had ever had sexual relations with minor females he answered that he had done so several times. This was based on the fact that he has been married three times and the first two marriages were with females who were under 18 at the time of the marriage and not on the basis of the 1975 incident and arrest. He denied the allegation insofar as the sexual relations part of the allegation which may have been a standard Mann Act charge.

2. Criminal Conduct

- a. On August 23, 1980, Applicant was arrested for stealing and sentenced to pay restitution and court costs totaling \$7,420.00 and serve five years probation. The case arose because Applicant owned an automobile for which he owed payments on an auto loan. He believed the car was defective and asked a friend to get rid of it for him. The friend destroyed the car by burning it. This matter was reported to the authorities and resulted in Applicant's arrest and the payment of restitution to the creditor. He served his probation without incident.
- b. The SOR alleged he was arrested on August 9, 1976, and charged as a fugitive. Applicant denied the allegation and there was no evidence offered of the offense.
- c. The SOR alleged he was arrested for disturbing the peace on July 21, 1976, after an argument with his father. He admitted the incident and the arrest but no charges were filed.
- d. The SOR alleged he was arrested for DUI on March 1, 1976. He denied it and no evidence was introduced to establish the allegation.
- e. This allegation is dated the same as SOR 1.b. and includes several of the above allegations but includes only one new one, an arrest for a robbery in his neighborhood, but not on the date alleged. He admitted the arrest, offered explanation for the police mistake in arresting him, and was never prosecuted.

3. Personal Conduct

- a. Applicant answered in the negative on Question 21 of his SF 86 relating to ever having been charged with or convicted of a felony. Only the two offenses under SOR 1 were alleged to have been omitted. In his statement to the investigator he stated that he omitted reference to them for fear that to do so would jeopardize his security clearance.
- b. Applicant stated in his signed statement to the security investigator that he could be blackmailed if anyone found out about the arrest as a juvenile for the sexual incident alleged in 1.a.

At the hearing he denied having said that he could be blackmailed and only included it in the statement because the investigator suggested it.

c. Applicant admitted in his security interview and statement that he withheld information about 1.a. and b. in his application for employment. No other evidence was offered.

Applicant married his third wife in 1988 but has been separated since 1996. They have two sons aged 13 and 15 for whom they have shared custody. She has custody during the school year but he has custody for weekends and in the summer months.

Applicant is well regarded in his employment and has received numerous commendation and awards during his employment (Exhs. A, D-F, and I). For the past 26 years he has worked as a volunteer fireman in his community receiving numerous recognition awards (Exh. B, C, and H).

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.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (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 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. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Executive Order No. 10865 § 2. *See* Executive Order No. 12968 § 3.1(b).

Initially, the Government must establish, by something less than a preponderance of the 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. The applicant then bears the burden of demonstrating that it is clearly consistent with the national interest to grant or continue the applicant's clearance. "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* Executive Order No. 12968 § 3.1(b).

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions above, I conclude the following with respect to all allegations set forth in the SOR.

Under Guideline D of the Directive sexual behavior is a security concern if it involves a criminal offense, and may subject the individual to coercion, exploitation, or duress (E2.A4.1.1.). Conditions that could raise a security concern and may be disqualifying include engaging in sexual behavior of a criminal nature, whether or not the individual has been prosecuted (E2.A4.1.2.1). Based on the evidence of record, including Applicant's admissions, the Government has established reasons to deny him a security clearance based on sexual behavior. Having established such reasons, the Applicant has the burden to establish security suitability through evidence that refutes, mitigates, or extenuates the disqualifying conditions and demonstrates that it is clearly consistent with the national interest to grant a security clearance. ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

Mitigating conditions might include that the behavior occurred during or prior to adolescence and there is no evidence of subsequent conduct of a similar nature (E2.A4.1.3.1.), the behavior was not recent and there is no evidence of subsequent conduct of a similar nature (E2.A4.1.3.2.). The two allegations relating to sexual behavior occurred respectively 35 and 31 years ago. The most egregious and oldest offense was when Applicant was a juvenile. He received counseling and there have been no further similar incidents involving minors. The mitigating conditions are applicable.

Under Guideline J, Criminal Conduct, a security concern arises when there is a history of pattern of criminal activity that creates doubt about a person's judgment, reliability, and trustworthiness (E2.A10.1.1.). Conditions that could raise a security concern and may be disqualifying include allegations or admission of criminal conduct, regardless of whether the person was formally charged (E2.A10.1.2.1.), or a single serious offense (molesting a child) or multiple lesser offenses (E2.A10.1.2.2.).

The allegations could be mitigated if the criminal behavior was not recent (E2.A10.1.3.1), or there is clear evidence of successful rehabilitation (E2.A10.1.3.6.). Applicant attended counseling for the first sexual behavior allegation. The most recent criminal conduct was causing the destruction of his automobile to defraud a creditor. It resulted in probation for five years and restitution of the value of the automobile. All of the other incidents either did not happen or were 30 years ago. Mitigating conditions are applicable because of the age of the incidents and that no criminal conduct has occurred in over 25 years showing rehabilitation through passage of time, his work record, and public service.

Under Guideline E, Personal Conduct actions involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information (E2.A5.1.1.). The Government has established by evidence and Applicant's admissions that he has been involved in a pattern of rule violations (E2.A5.1.2.5.). The deliberate failure to give complete and accurate information on his SF 86 (E2.A5.1.2.2.) is sufficient to establish reasons to deny a security clearance based on personal conduct. As the policy prescribes, the burden shifted to the Applicant to show that Mitigating Conditions (MC) are applicable to him.

Applicant's statement to the investigator that he feared loss of his security clearance and that he could be blackmailed indicates a motive for the falsification. In view of the nature of the allegation and the outcome, the 1975 offense likely would not have led to either loss of his clearance or blackmail. The 1971 offense during Applicant's minority years would not, as the investigator testified at the hearing, have been available to the public and was available to him only because he is a law enforcement agent and the waiver to obtain records that all security clearance to which applicants for security clearances must agree. Thus, while his fear likely was misplaced, he apparently had such concerns thus showing a deliberate attempt to withhold information to which the government had a right to receive. His changed views on both matters at the hearing deserves little credibility. As to his application for company employment, no evidence was offered to show that his company required him to report either a juvenile offense or an arrest without conviction.

The objective of the security clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. The "whole person" concept recognizes that we should view a person by the totality of their acts and omissions. Each case must be judged on its own merits taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

While Applicant has had a good record for the past 25 years and shows support for his children and dedication to his employment and volunteer work, his admitted effort to deceive by the omission of his felony arrests does not speak well for application of the whole person doctrine to this matter.

After considering all the evidence in its totality and as an integrated whole to focus on the whole person of Applicant, I conclude that he is not eligible for access to classified information. Thus, I find against the Applicant.

FORMAL FINDINGS

Formal findings as required by the Directive (Par. E3.1.25) are as follows:

Paragraph 1. Guideline D: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Paragraph 2. Guideline J FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: For Applicant

Subparagraph 2.d.: For Applicant

Subparagraph 2.e.: For Applicant

Paragraph 3. Guideline E: AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

Subparagraph 3.b.: Against Applicant

Subparagraph 3.c.: For 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 renew a security clearance for Applicant. Clearance is denied.

Charles D. Ablard

Administrative Judge