

DATE: March 20, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-16167

REMAND DECISION OF ADMINISTRATIVE JUDGE

CAROL G. RICCIARDELLO

APPEARANCES

FOR GOVERNMENT

Jason R. Perry, Esq., Department Counsel

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

James R. Klimaski, Esq.

SYNOPSIS

Applicant is a 38-year-old security guard who has been employed by a defense contractor since 2001. Applicant answered "No" to Question 20 on his security clearance application questioning if he had ever been terminated from employment under unfavorable circumstances. Applicant had been terminated for threatening a supervisor. He later admitted this termination, but then proceeded to contradict himself in his statements and answer to the SOR. Applicant has failed to mitigate the security concerns regarding his personal conduct. Clearance is denied.

STATEMENT OF CASE

On June 30, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance. [\(U\)](#) The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline E, Personal Conduct considerations.

In a sworn statement, dated August 4, 2004, Applicant responded to the SOR allegations, admitting all of them and providing an explanation in extenuation and mitigation. Applicant also elected to have his case decided on the written record. Department Counsel submitted the government's case on August 13, 2004. A file of relevant material (FORM) was received by Applicant on August 30, 2004. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. The case file was forwarded to me with a letter indicating Applicant had not responded to the FORM. The case was originally assigned to another administrative judge on November 1, 2004. Due to case load considerations it was reassigned to me on May 5, 2005.

On July 15, 2005, I issued a decision denying Applicant a clearance because he had failed to mitigate the security concerns regarding his personal conduct. Applicant appealed the decision, claiming he had submitted a response to the

FORM that I had not considered. On January 17, 2006, the Appeal Board issued a Remand Order directing I take the following actions:

1. Allow the parties a reasonable opportunity to make submissions concerning Applicant's claim about the letter referred to as an attachment to his answer to the SOR and Applicant's claim about submitting a response to the FORM.
2. Decide whether there is good cause to reopen the record to accept the letter (or alternate proof) and Applicants claimed response to the FORM.
3. Issue a new decision, consistent with the requirements of Directive Additional Procedural Guidance, Items E3.1.35 and E3.1.25.

On January 26, 2006, I issued an order directing the appealing party to provide documentary support of their position and an explanation as to the relevance of the documents within 15 days.⁽²⁾ I also ordered the Government to provide their response within 15 days of receipt of the appealing parties documents.⁽³⁾ Both submissions were timely.

I have thoroughly reviewed the briefs provided by both parties. I find there is good cause to reopen the record for the limited purpose of considering the affidavit provided. No other new documentary evidence was provided.

FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, exhibits, statements, and new evidence provided, I make the following findings of fact:

Applicant is a 38-year-old single man who has been employed as a security guard by a federal contractor since 2001. His prior jobs included, messenger, staff assistant, and mail clerk. Applicant has a high school education. Applicant completed and signed his security clearance application (SF 86) on January 17, 2001.

Applicant worked for Company A from 1991 to 1996. Applicant stated "I was terminated from this job, I guess from (sic) poor performance. I can't tell you why."⁽⁴⁾ Applicant's supervisor at the time from Company A provided an affidavit stating that Applicant had left Company A after a reorganization eliminated his position and was not related to his work performance or any character related issue. He was considered an excellent employee and was admired by his peers and others at the management level.⁽⁵⁾

Applicant worked as a messenger for Company B from 1996 to 2001. Applicant had an argument with his supervisor because Applicant was not wearing a tie.⁽⁶⁾ Applicant threatened his supervisor.⁽⁷⁾ Applicant was placed on leave without pay and a month later received a letter terminating his employment.⁽⁸⁾

Applicant answered "No" to Question 20 on his SF 86 (*Has any of the following happened to you in the last 10 years? Fired from a job; Quit a job after being told you'd be fired; Left a job by mutual agreement following allegations of misconduct; Left a job by mutual agreement following allegations of unsatisfactory performance; Left a job for other reason under unfavorable circumstances.*)

Applicant was interviewed on February 27, 2001, by a Defense Security Service (DSS) special agent and provided information about his adverse termination from employment with Company B. He did not provide information about his loss of employment from Company A at that time. On June 18, 2001, Applicant provided a sworn statement to the DSS special agent and did not provide information about his loss of employment from Company A.⁽⁹⁾ Applicant was again interviewed on October 1, 2001, and admitted he did not reveal information regarding his loss of employment from Company A at the time he filled out his SF 86, because he may have been terminated from employment due to poor performance. Regarding his failure to provide the information Applicant stated "I did not list this on my security paperwork, because I thought it would stop me from getting a job."⁽¹⁰⁾ When asked why he answered "No" to Question 20 of the SF 86, Applicant stated "because I thought it was going to stop me from getting a job with [Company C]"⁽¹¹⁾ (his present employer). Applicant admitted he was not being truthful on his SF 86 regarding his employment history.

Applicant was not required to list his loss of employment from Company A because his termination was not adverse, however he was required to list his termination from Company B.

In Applicant's answer to the SOR with regards to ¶1.b. he admits he was terminated from Company B, but states "I encountered a verbal disagreement with my supervisor about a route dispute, which upon this time I was placed on non-pay leave status."⁽¹²⁾ This contradicts the previous sworn statement where he stated "I was terminated for threatening a supervisor," and "[a]bout a month later I was terminated by letter."⁽¹³⁾ Applicant goes on to say in his answer "I was also never notified to turn in my uniforms, or work gear, i.e. gunbelt and ammunition, after being placed on non-pay leave status. In the interim of this dispute, since I was never contacted on my status of this position, I proceeded to find other employment opportunities."⁽¹⁴⁾ (This is redundant with the second sentence in this paragraph) He further states in his answer "I was unaware of these specific reasons that were stated in the Statement of Reasons for my termination from these previous employers. I was never contacted nor notified formally in writing of these specific reasons for my termination as stated in the Statement of Reasons from these employers." Although he may not have been notified about the reasons for termination from Company A, he was aware of his termination circumstances with regard to Company B.

Applicant provided a note from a doctor relating that he may need time off from work on an irregular basis due to a chronic illness. Applicant stated he had to take time off from work in the past due to a medical condition.⁽¹⁵⁾

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Considering the evidence as a whole, Guideline E, personal conduct considerations, with its respective DC and MC, applies in this case. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽¹⁶⁾ The government has the burden of proving controverted facts.⁽¹⁷⁾ The burden of proof is something less than a preponderance of evidence.⁽¹⁸⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against

him.⁽¹⁹⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽²⁰⁾

No one has a right to a security clearance⁽²¹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽²²⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽²³⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽²⁴⁾ 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.

Based upon consideration of the evidence, I find the following adjudicative guideline most pertinent to the evaluation of the facts in this case:

Guideline E-Personal Conduct is a security concern when an individual's conduct involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, pertaining to the adjudicative guideline are set forth and discussed in the conclusions below.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a *prima facie* case for disqualification under Guideline E.

Based on all the evidence Personal Conduct Disqualifying Condition (PE DC) E2.A5.1.2. (*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*) and PE DC E2.A5.1.2.5. (*A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency*) apply in this case. With regard to Applicant's termination from Company B, he admitted he deliberately falsified his SF 86. His reason for the falsification was he thought it would hamper him getting a job if he were truthful. (25) He stated he had been terminated for threatening a supervisor and went on to say "about a month later I was terminated by letter." (26) In Applicant's sworn statement of October 1, 2001, he admitted he deliberately lied on his SF 86. In his answer to the SOR he contradicts his previous sworn statement concerning Company B.

With regard to Applicant's assertions on his termination from Company A, I find that the reason he was terminated was not for an adverse cause, and therefore he did not have a duty to list it as so on Question 20 of his SF 86. In reconsidering my decision, I specifically have not considered Applicant's loss of employment from Company A adversely, and specifically find he has mitigated the concern regarding termination from Company A. However, when considering the "whole person," I have considered the facts and circumstances surrounding Applicant's submission of the SF 86 and sworn statements as part of the "whole person." Applicant admits he thought he was terminated from Company A for poor performance and admits that he did not list his termination because he "thought it was going to stop me from getting a job. . ." (27) Applicant was motivated to lie because he thought if he told what he believed was true, he would not get the job. Although the objective facts show he did not lie on the SF 86, he was willing to do so if necessary to get the job.

I have considered all the mitigating conditions and specifically considered Personal Conduct Mitigating Condition (PC MC) E2.A5.1.3.2. (*The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*), PC MC E2.A5.1.3.3. (*The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*). I conclude none of the mitigating conditions apply. Applicant falsified his SF 86 and did not subsequently provide the correct information voluntarily. To the contrary Applicant continued to contradict himself in other statements. These incidents are not isolated and he did not show a good-faith effort to correct the falsifications.

In all adjudications, the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I have considered the whole person and I find Applicant has failed to mitigate the security concerns regarding his personal conduct. Applicant's disregard for the truth is a grave and serious concern that reflects poorly on his character and judgment. Therefore, I am persuaded by the totality of the evidence in this case, that it is not clearly consistent with the national interest to grant Applicant a security clearance. Accordingly, Guideline E is decided against Applicant.

FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1: Personal Conduct (Guideline E) AGAINST THE APPLICANT

Subparagraph 1.a: For the Applicant

Subparagraph 1.b: Against the Applicant

Subparagraph 1.c: 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 Applicant. Clearance is denied.

Carol. G. Ricciardello

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

2. Order of Administrative Judge.

3. *Id.*

4. Item 6, Sworn Statement dated October 1, 2001 at 2.

5. Applicant's Appeal Brief dated February 10, 2006, Attachment 2.

6. *Id.* at 1.

7. *Id.* at 2.

8. *Id.*

9. Item 5.

10. *Id.* at 1.

11. *Id.*

12. Item 3 at 2.

13. *Id.*

14. Item 3 at 2.

15. Item 3.

16. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

17. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, ¶ E3.1.14.

18. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
19. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, ¶ E3.1.15.
20. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, ¶ E3.1.15.
21. *Egan*, 484 U.S. at 531.
22. *Id.*
23. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
24. Executive Order 10865 § 7.
25. Item 6 at 1.
26. *Id.*
27. *Id.* at 2.