

KEYWORD: Foreign Influence

DIGEST: Applicant failed to mitigate criminal conduct allegations relating to an insurance fraud charge in 1993 and solicitation of prostitution in 2001 to which he pled guilty. He did successfully mitigate a charge of misuse of telephone relating to collection of a debt in 1991 for which he was granted judgment and the telephone charge was dismissed. Clearance is denied.

CASENO: 03-17708.h1

DATE: 12/22/2005

DATE: December 22, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-17708

DECISION OF ADMINISTRATIVE JUDGE

CHARLES D. ABLARD

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Kathleen E. Voelker, Esq.

SYNOPSIS

Applicant failed to mitigate criminal conduct allegations relating to an insurance fraud charge in 1993 and solicitation of prostitution in 2001 to which he pled guilty. He did successfully mitigate a charge of misuse of telephone relating to collection of a debt in 1991 for which he was granted judgment and the telephone charge was dismissed. Clearance is denied.

STATEMENT OF CASE

On November 16, 2004, 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 December 3, 2004, Applicant responded to the SOR allegations, and requested a hearing. The matter was assigned another judge on April 25, 2005, and re-assigned to me on June 20, 2005. A notice of hearing was issued on August 30, 2005, and a hearing was held on September 16, 2005. Six government exhibits and 21 Applicant exhibits were admitted into evidence. Three witnesses and the Applicant testified. The transcript was received on October 5, 2005.

FINDINGS OF FACT

Applicant admitted the specifics of the allegations with explanation. After a complete review of the record, I make the following additional findings of fact:

Applicant is 43 years old and has been employed by several defense contractors over the past four years. He now works as a software integrator with his own company as a subcontractor for a major defense contractor, traveling frequently both in the U.S. and to military bases abroad. Applicant and his parents immigrated to the U.S. from India in 1972 when he was a child. He attended school and college in the U.S. and became a citizen in 1990. He was married in 2002 and has two children. Applicant and his parents owned a motel in a southern U.S. city for several years until 1990 when his parents returned to India to retire and Applicant then ran the motel with his wife.

In 1991 when he was 29-years-old, a controversy arose with the local chief of police. Applicant had loaned the chief \$750.00 in three installments in 1990 (Exhs. A). When he attempted to collect the debt the chief declined to talk with him and Applicant phoned him several times. He wrote to the chief on September 18, 1991 and gave him a deadline of September 30, 1991, to pay the debt (Exh. B). When he was not paid, he filed a civil suit to recover the funds. At some point that year Applicant was charged with Unlawful Use of Telephone by making harassing telephone calls to the chief. Applicant received a judgment for the debt in the amount of \$550.00 on July 24, 1992 (Exh. C). The telephone charge was nolle prossed on September 16, 1992 (Exh. D). Applicant was unable to collect on the judgment.

On June 21, 1991, while Applicant was in the northeast meeting his wife and children who were returning from a vacation in India, a fire occurred in the motel. Applicant returned home with his family to check the damage and discovered it had not done major damage to the motel. On June 24, 1991, another fire occurred severely damaging the motel. An insurance claim was filed by Applicant on behalf of his parents who were the legal owners of the motel. The insurance company declined to pay the claim. Applicant and his family then moved to another city where he was privately employed. In 1993 Applicant was charged with insurance fraud and returned to his former home to defend the charges at a 1994 trial. Midway in the trial the government offered a plea arrangement whereby Applicant pled guilty to the charge and was given a five year sentence reduced to three years probation, court costs of \$90.00 and allowed to return to his new home (Exh. E). He successfully completed his probation.

Applicant filed his security clearance application in December 2000 (Exh. 1 and 3). On March 8, 2001, Applicant was arrested and charged with criminal attempt (Prostitution) in a city away from his home while he was on a business trip. Applicant has explained his conduct stating that he often obtained services of a masseuse after work when traveling. These usually occurred at spas but on this occasion it was after hours and he called a masseuse from a number in the yellow pages and she agreed to come to his room. When the masseuse and a man arrived at his door he assumed she was

accompanied by a chaperone, paid \$80.00 for a massage and was immediately arrested by the man who was a plainclothes policeman. He was allowed to leave the city, hired a lawyer who entered a plea of nolo contendere resulting in a fine of \$500.00 and \$169.00 costs for a class C misdemeanor (Exh. F). His wife is aware of the charge and the fine. This information was first revealed to the government in Applicant's security clearance interview with a defense investigator on May 29, 2003.

Applicant has a good record with his government supervisors and is valued for his dedicated professionalism. His supervisors in the military and industry colleagues speak highly of him in their letters of support and through a number of awards and evaluations he has received (Exhs.G-X). These include such as statements as "A job truly well done", "your knowledge and technical expertise", "team spirit" by an Army Major General, and ".dedication and personal expertise you provided will make our nation stronger" by an Army General.

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 it is clearly consistent with the national interest to grant or continue a security 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 adjudicative factors, I conclude the following with respect to all allegations set forth in the SOR:

Guideline J (Criminal Conduct) is alleged. The Government has established a sufficient basis that Disqualifying Condition E2.A10.1.1. might be applicable to Applicant in that he was charged and pled guilty to two unrelated criminal offenses. He was charged a third in 1991 that was dismissed. It could be mitigated by the facts that the criminal behavior was not recent (E2.A10.1.3.1), and the crime was an isolated incident (E2.A10.1.3.2.). The offenses all occurred between four and fourteen years ago, the application of the mitigating condition might be justified for all three but for certain other circumstances. The charge of telephone misuse was dropped probably as a result of the favorable verdict on the debt owed by the complainant in the telephone allegation. That allegation is mitigated. The other charge in 1993 arising from the fire resulted in a plea of guilty and a lengthy but suspended sentence.

The most recent arrest was four years ago under strange circumstances that were questionable. However, he did plead guilty to the charge. Since it was a misdemeanor, applicant is not bound by collateral estoppel. ISCR Case No. 01-08410 (May 8, 2002) However, I cannot ignore the fact that he pled guilty to the charge. Likewise, he pled guilty to the insurance fraud charge arising from the motel fire even though he may have done so to be able to leave and go to his new home with only a suspended sentence and probation and \$90.00 costs. On that charge he is bound by collateral estoppel since the charge is for a felony. While the criminal behavior was not recent it was serious and of a type, financial fraud, that is central to the security clearance process that, even after this many years, cannot be ignored. While there is evidence of rehabilitation (E2.A10.1.3.6.) the charge and second plea four years ago compound the problem and make application of the mitigating factor difficult to apply. Thus, those mitigating conditions are not applicable for the two offenses to which he pled guilty.

Applicant is a talented person who has worked diligently in the private defense sector both as an employee and an entrepreneur doing creditable work for which he has been applauded and recognized by several officials. However, he has pled guilty to two offenses which are sufficiently serious as to raise fair questions as to his judgment even though he has raised some appealing questions as to his guilt on both.

The "whole person" concept recognizes 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. Applicant has a good record with his government customers and his former employers and shows promise for the future. Unfortunately, at this time it is premature to grant a clearance.

After considering all the evidence in its totality, and as an integrated whole to focus on the whole person of Applicant, I conclude that it is not clearly consistent with the national interest to grant a security clearance to him.

FORMAL FINDINGS

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

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: 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 renew a security clearance for Applicant. Clearance is denied.

Charles D. Ablard

Administrative Judge