

DATE: September 27, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-05396

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Ray T. Blank, Jr., Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In 1998, Applicant stole golf clubs from a base golf course while employed as a civilian aboard a military installation. He failed to disclose being fired from that job in a security clearance application he submitted in 2005, and provided false information about the theft in a statement he provided in 2005. Applicant also has unpaid delinquent debts that have remained unsatisfied for a number of years. Clearance is denied.

STATEMENT OF THE CASE

On November 3, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline J, criminal conduct, Guideline F, financial considerations, and Guideline E, personal conduct. Applicant submitted an undated answer to the SOR that was notarized on December 15, 2005, admitted all SOR allegations except the one contained in subparagraph 3.c, provided explanations to the allegations contained in 3.b and 3.d that effectively amounted to denials of those allegations, and requested a hearing.

The case was assigned to me on March 29, 2006. A notice of hearing was issued on May 30, 2006, scheduling the hearing for June 13, 2006. ⁽²⁾ The hearing was conducted as scheduled. The government submitted five documentary exhibits that were marked as Government Exhibits (GE) 1-5, and admitted into the record without objection. Applicant testified and submitted seven documentary exhibits that were marked as Applicant's Exhibits (AE) 1-7, and admitted into the record without objection. The transcript was received on June 26, 2006.

PROCEDURAL MATTERS

Department Counsel moved to amend the SOR before the presentation of evidence by striking the word "in" in the first sentence of subparagraph 1.a, and substituting therefore the phrase "serving with." That amendment was allowed

without objection.

Following the presentation of all evidence, Department Counsel moved to amend the SOR by adding a subparagraph 1.e to read as follows:

That information set forth in subparagraphs 3.a, 3.b, 3.c, and 3.d below, which constitutes a violation of Federal law, Title 18, United States Code, Section 1001, a felony. (Appellate Exhibit I)

The amendment was allowed as authorized by DoD Directive 5220.6, Enclosure 3, paragraph E3.1.17. Applicant denied the added allegation, stated he did not need additional time to prepare to respond to the allegation, and requested the record be reopened to allow him to present additional testimony in response to the allegation. Following the presentation of additional evidence, the record was again closed.

FINDINGS OF FACT

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

Applicant is a 37-year-old man who has been employed as a security police officer by a defense contractor since January 2004. He was promoted to a supervisory position in December 2005. Applicant submitted letters from several of his supervisors who attest to his reputation as a dependable, loyal, truthful, reliable and trustworthy individual who is considered to be an excellent employee and dedicated professional.

Applicant executed a security clearance application (SF 86) on June 22, 2004, and listed his employment history dating back to June 1995. Included in that history was employment as a sales representative from July 1998 until November 2000. Missing from that history was employment by a moral, welfare, and recreation (MWR) department aboard a military base from about late 1997 to November 1998. Applicant was fired from the omitted employment. He also failed to disclose he was fired from that job in the SF 86 as required in response to the applicable question. In a statement he provided to a special investigator from the Office of Personnel Management (OPM) in February 2005, Applicant claimed the omission was an oversight.

Applicant graduated from high school in 1988. He served on active duty in the U. S. Marine Corps from September 1989 until June 1992 when he was awarded an Other Than Honorable (OTH) Discharge based upon a pattern of misconduct. In August 1990, Applicant received non-judicial punishment (NJP) for the offense of going from his place of duty with the intent to abandon the same. He was ordered to perform 14 days extra duty, placed on restriction for 14 days, and forfeited \$188.00 pay as a result of this NJP. He received a second NJP in November 1990 for failing to go to a formation. He was ordered to perform 14 days extra duty, placed on restriction for 14 days, and forfeited \$180.00 pay as a result of this NJP. On October 31, 1991, he was convicted at a special court-martial of a three-month unauthorized absence. He was sentenced to 60 days confinement, ordered to forfeit \$502.00 pay per month for two months, and reduced to paygrade E-2.

In November 1998, Applicant provided a military golf course a \$10.00 rental fee and a false name and social security number in order to obtain a set of golf clubs valued at approximately \$1,400.00. Applicant failed to return the clubs at the end of the day as required and base police were notified. An investigation led the police to Applicant a few days later. When confronted by the police, Applicant returned the clubs and provided a statement in which he stated he intended to retain the clubs for an unspecified period of time to use on golf courses other than the one from which he had rented them. Applicant was married to an active duty service member at the time. The offense occurred at an overseas installation, and was thus disposed of by an administrative hearing at which Applicant's military I.D. card privileges were suspended and he was barred from access to military facilities. No criminal action was instituted against him.

Applicant was also questioned about the golf club incident by the OPM investigator in February 2005. He falsely told the investigator he had rented the clubs by using a recreation card issued to him by his MWR employer, placed them in the trunk of his car while awaiting the arrival of a friend who never showed up, and merely forgot they were there. He also falsely asserted he never intended to steal the clubs and insinuated he intended to immediately return them after

using them that day. He did not attempt to explain why he provided a false name and social security number when acquiring the clubs.

Applicant has three delinquent credit card accounts, totaling \$7,779 as alleged in the SOR, that have remained unpaid since at least 2004. He submitted a form prepared by a consumer credit counseling service about 12 days before the hearing that showed the amount owing on those three accounts had risen to \$8,954. Although Applicant testified he had entered into a repayment plan through the service, he admitted he had not made any payments as of the date of the hearing. He did submit proof he had fully satisfied the \$75.00 collection account alleged in SOR subparagraph 1.d. Applicant did not list the delinquent accounts in response to the applicable question posed in the SF 86 he executed in June 2004. In his response to the SOR, Applicant explained this omission was because he had not checked his credit report in the midst of his then pending divorce.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. 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. Considering the evidence as a whole, Guideline J, criminal conduct, Guideline F, financial considerations, and Guideline E, personal conduct with their respective DC and MC, are most relevant in this case.

BURDEN OF PROOF

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽³⁾ The government has the burden of proving controverted facts.⁽⁴⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁽⁵⁾ although the government is required to present substantial evidence to meet its burden of proof.⁽⁶⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁷⁾ 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.⁽⁸⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁹⁾

No one has a right to a security clearance⁽¹⁰⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹¹⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹²⁾

CONCLUSIONS

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the Nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

Applicant committed three minor offenses while in the military and a much more serious offense while he was married to a service member and employed by an MWR department. Additionally, he deliberately provided false answers in the SF 86 he submitted and executed in June 2004, subject to the criminal penalties imposed 18 U.S.C. § 1001.

Disqualifying Condition (DC) 1: *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*; and DC 2: *A single serious crime or multiple lesser offenses* apply.

Applicant's last offense, the falsification of the SF 86, occurred a mere two years ago. His criminal conduct began with

the relatively minor military offenses he was punished for in the early-1990s, was followed by the serious theft offense he committed in 1998, and continued until the perjurious offense he committed in 2004. Accordingly, he is not entitled to application of Mitigating Condition (MC) 1: *The criminal behavior was not recent*; MC 4: . . . *the factors leading to the violation are not likely to recur*; and MC 6: *There is clear evidence of successful rehabilitation*. The remaining mitigating conditions clearly have no applicability to the facts of this case. Guideline J is decided against Applicant.

Under Guideline F, a security concern exists when a person has significant unpaid debts. An individual who is financially overextended is at risk of having to engage in illegal or unethical acts to generate funds to meet financial obligations. Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, or careless in their obligation to protect classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

Applicant has allowed three debts, now totaling \$8,954.00, to become severely delinquent and charged off as bad debts. Those accounts have remained delinquent for several years. While he has satisfied one \$75.00 debt alleged in the SOR and a second \$150.00 account that was not alleged, he has not made any payments on the three large debts. He submitted a form indicating he consulted with a credit counseling service, but admitted he had not made any payments through the service as of the date of the hearing. DC 1: *A history of not meeting financial obligations*; and DC 3: *Inability or unwillingness to satisfy debts* apply in this case. No mitigating condition applies. Guideline F is decided against Applicant.

Under Guideline E personal conduct is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information.

There is no evidence Applicant was arrested, charged, or convicted of an offense in connection with the theft of the golf clubs. SOR subparagraph 3.c is decided for Applicant.

Applicant deliberately failed to disclose his employment with the MWR department and that he was fired from that job. Further, he deliberately provided false and/or misleading information to the OPM investigator about the theft of the golf clubs in the statement he provided in February 2005. Considering Applicant's appearance, demeanor, manner of testifying, and the totality of information he has provided or withheld during the course of the investigation and hearing in this case, his explanation for not listing his financial delinquencies in the SF 86 he submitted is not credible. Finally, the three military offenses he committed over the course of 15 months that led up to his receipt of an OTH discharge, coupled with his recent falsifications in the SF 86 and statement, demonstrate his continuing pattern of dishonesty and/or rule violations.

DC 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*; DC 3: *Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other representative in connection with a personnel security or trustworthiness determination*; and DC 5: *A pattern of dishonesty or rules violation, including violation of any written or recorded agreement between the individual and the agency* all apply. I have considered all mitigating conditions and none apply. Guideline E is decided against Applicant.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, Applicant has failed to mitigate the security concern caused by his criminal and personal conduct and financial considerations. He has failed to overcome the case against him or satisfy his ultimate burden of persuasion. It is not clearly consistent with the national interest to grant Applicant a security clearance.

FORMAL FINDINGS

SOR ¶ 1-Guideline J: Against Applicant

Subparagraphs a-e: Against Applicant

SOR ¶ 2-Guideline F: Against Applicant

Subparagraphs a-c: Against Applicant

Subparagraph d: For Applicant

SOR ¶ 3-Guideline E: Against Applicant

Subparagraphs a-b: Against Applicant

Subparagraph c: For Applicant

Subparagraphs d-f: Against 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.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Applicant was telephonically contacted by Department Counsel sometime before the issuance of the Notice of Hearing and agreed to the scheduled date of the hearing.
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
5. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
10. *Egan*, 484 U.S. at 528, 531.
11. *Id* at 531.
12. *Egan*, Executive Order 10865, and the Directive.