

KEYWORD: Criminal Conduct; Drugs; Financial; Personal Conduct

DIGEST: Applicant is 50 years old, married, and is a truck driver. He was arrested and convicted of several offenses between 1972 and 1987, serving nearly five years in jail for these offenses. He used marijuana from 1972 to 1987 regularly, and his last use was in 1994. Applicant has four delinquent debts remaining unpaid. Applicant only disclosed one felony drug arrest and conviction on his 2003 security clearance application, none of his delinquent debts, nor his 1997 Chapter 7 bankruptcy. Applicant mitigated the Drug Involvement security concern. He did not mitigate the Criminal Conduct, Financial Considerations, and Personal Conduct security concerns. Absent a waiver, the Department of Defense is statutorily prohibited from granting him a clearance because he was incarcerated for more than one year (10 U.S.C. § 986). Clearance is denied.

CASENO: 03-26797.h1

DATE: 04/28/2006

DATE: April 28, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-26797

**DECISION OF ADMINISTRATIVE JUDGE**

**PHILIP S. HOWE**

**APPEARANCES**

## **FOR GOVERNMENT**

Braden M. Murphy, Esq., Department Counsel

## **FOR APPLICANT**

*Pro Se*

## **SYNOPSIS**

Applicant is 50 years old, married, and is a truck driver. He was arrested and convicted of several offenses between 1972 and 1987, serving nearly five years in jail for these offenses. He used marijuana from 1972 to 1987 regularly, and his last use was in 1994. Applicant has four delinquent debts remaining unpaid. Applicant only disclosed one felony drug arrest and conviction on his 2003 security clearance application, none of his delinquent debts, nor his 1997 Chapter 7 bankruptcy. Applicant mitigated the Drug Involvement security concern. He did not mitigate the Criminal Conduct, Financial Considerations, and Personal Conduct security concerns. Absent a waiver, the Department of Defense is statutorily prohibited from granting him a clearance because he was incarcerated for more than one year (10 U.S.C. § 986). Clearance is denied.

## **STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On November 4, 2004, DOHA issued a Statement of Reasons<sup>(1)</sup> (SOR) detailing the basis for its decision-security concerns raised under Guideline J (Criminal Conduct), Guideline H (Drug Involvement), Guideline F (Financial Considerations), and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing in an undated document, and elected to have a hearing before an administrative judge. The case was assigned to me on October 4, 2005. On November 30, 2005, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government and the Applicant submitted exhibits that were admitted into evidence. The Government amended the SOR to add additional allegations under Guidelines J and E. Applicant had no objection to the amendments, and I granted the motion. DOHA received the hearing transcript (Tr.) on December 12, 2005.

## **FINDINGS OF FACT**

Applicant's admissions to the SOR allegations are incorporated here as findings of fact. After a complete and thorough review of the evidence in the record, and full consideration of that evidence, I make the following additional findings of fact:

Applicant is 50 years old, married, and is a truck driver for a company transporting oversized and unique loads for the government. He has been a truck driver since 1978, and worked for his present employer for the past ten years. His employer trusts him and finds Applicant to be an excellent and safe driver. His customers wrote his employer about Applicant's excellent performance. He also thinks he is truthful regarding any incident on the road transporting a special load. Applicant has a 10<sup>th</sup> grade education. (Tr. 21-31, 102-110; Exhibits 1, 3, A-F)

Applicant was 17 years old when he first was arrested for drug related offenses. Applicant surrendered to state authorities on February 2, 1972, and was formally charged on February 12, 1972, with the sale of narcotics and dangerous drugs. He pled guilty to the charges. The state court sentenced him to three years in the state penitentiary, but this sentence was suspended while Applicant was to serve three years of probation. On December 28, 1972, the police arrested Applicant on a charge of illegal possession of marijuana with the intent to distribute it. He received a 30 day jail sentence. On March 28, 1973, Applicant's parole was revoked and he went to the state penitentiary to serve the original three year sentence. After serving one year, Applicant got out of the state penitentiary on parole in February 1974. On September 20, 1974, Applicant was arrested on a charge of grand larceny for buying stolen tires. He pled guilty to the lesser charge of trespassing with larceny and received a 90 day jail sentence. On August 20, 1975, the police arrested Applicant for marijuana possession. This charge was dismissed. On January 20, 1976, Applicant's parole was revoked for the marijuana possession arrest in 1975, and he went to the state penitentiary to serve the remaining two years on his original sentence. After his release from the penitentiary in 1977, Applicant was again arrested for marijuana possession with intent to distribute on July 1, 1977. The local prosecutor nolle prosequi this charge. Applicant was arrested next on September 8, 1978, for marijuana possession with intent to distribute, was convicted in September 1978 of the charge and sentenced to three years in the state penitentiary. He served 18 months. Applicant's last arrest was on January 2, 1987, on a charge of methaqualone distribution. This charge was dismissed. Since 1987 Applicant has not been arrested on any charge. Applicant served about five years in prison. (Tr. 34-45, 74-81; Exhibits 2-5)

Applicant used marijuana a couple of times each week from 1972 to 1987. Then he stopped using it until a one time use in 1994. After that incident, he voluntarily attended a drug rehabilitation program. As part of his work requirements, he takes random drug tests. His last random drug test was three months before the hearing, in August 2005. His results are negative for drug use. The 1972, 1977, and 1978 marijuana possession with intent to distribute charges arose from his actions in transporting marijuana in his car from distributors for later sale by dealers. He did it about once a month, and was given marijuana in payment. (Tr. 44- 47, 81, 82; Exhibits 2-5)

Applicant filed Chapter 13 bankruptcy in August 1996 for his trucking business debts. He tried to repay these debts under the bankruptcy plan, but finally had to convert the Chapter 13 plan to a Chapter 7 bankruptcy. His bankruptcy discharge occurred in May 1997. Applicant did not disclose this bankruptcy in answer to Question 33 on his security clearance application (SCA) completed in July 2003. Applicant claims the bankruptcy was beyond the seven year period referred to in the SCA. (Tr. 47, 53, 63, 66, 87; Exhibits 1 and 2)

Applicant paid the satellite television debt of \$140 on February 28, 2005, in a settlement of \$70.31. The traffic ticket for speeding in 1998 for \$230 remains unpaid. Applicant contacted that jurisdiction on December 1, 2005, and the government allegedly does not have a current record of the debt. The credit card debts of \$400 and \$7,132 remain unpaid. The gasoline bill for Applicant's truck for \$1,383 remains unpaid. Applicant paid the remaining debt of \$427 for a gasoline credit card on January 28, 2005, in the amount of \$434.70. (Tr. 48-53, 82-86; Exhibits 2, 6-8, H)

Applicant completed a security clearance application (SCA) in July 2003. In it, he failed to disclose debts that were delinquent more than 180 days past due in the past 7 years (Question 38), which were the debts listed in Paragraph 3 of the SOR and discussed in the previous paragraph. He also deliberately did not disclose his felony offenses from 1972 to 1987 requested by Question 21 other than the 1973 arrest. Applicant did not disclose the total drug related arrests and convictions he had between 1972 to 1987 other than the 1973 drug conviction. He claimed his former wife handled the family finances as does his current wife so he did not know what was due and owing. His explanation for failing to disclose his lengthy list of arrest and convictions for drug related offenses was their frequency caused him to forget all of them except the 1973 conviction. (Tr. 42-44, 62-74, 83-88, 96-100; Exhibits 1, 2)

## 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. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information with Industry*

§ 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline that must be carefully considered in making the overall common sense

determination required.

In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. Those assessments include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (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 pertinent 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 (See Directive, Section E2.2.1. of Enclosure 2). Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. 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.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. ay 2, 1996). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at \*\*6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance. ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "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* Exec. Or. 12968 § 3.1(b).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

Guideline J: Criminal Conduct: *The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.* E2.A10.1.1

Guideline H: Drug Involvement: *The Concern. Improper or illegal involvement with drugs, raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information.* E2.A8.1.1

Guideline F: Financial Considerations: *The Concern: An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.* E2.A6.1.1

Guideline E: Personal Conduct: *The Concern: 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.* E2.A5.1.1

## CONCLUSIONS

The Government established by substantial evidence and Applicant's admissions each of the allegations in the SOR. To these facts the Disqualifying Conditions (DC) and Mitigating Conditions (MC) are considered and applied so that the following conclusions are drawn on each security concern.

The evidence under Guideline J shows DC 1 (Allegations or admissions of criminal conduct, regardless of whether the person is formally charged. E2.A10.1.2.1) and DC 2 (A single serious crime or multiple lesser offenses. E2.A10.1.2.2) apply. Between 1972 and 1987 Applicant had eight arrests, four convictions, and spent about five years in the state penitentiary or local jails for these offenses. His deliberate falsification of answers on his SCA regarding his criminal background is a violation of 18 U.S.C. § 1001 and is current criminal conduct.

MC 1 (The criminal behavior was not recent. E2.A10.1.3.1 might have applied except for Applicant's falsification actions. His drug offenses last occurred in 1987, and the passage of time without repeat offenses could have mitigated them. But because he deliberately failed to disclose them on his SCA, I conclude there are no mitigating conditions. I conclude this security concern against Applicant.

Regardless of the analysis under the Guideline J, 10 U.S.C. § 986 precludes the granting or renewal of a security clearance to those applicants who have been convicted in any Federal or State court, sentenced to more than one year in jail, and have actually served at least 12 months in jail (see 2004 amendment to the statute). Applicant falls within the

strictures of the statute and is ineligible for a clearance without a waiver.

In June 2001, the Deputy Secretary of Defense issued implementing guidance for processing cases under the statute. In response, the Director, DOHA, declared in cases in which the decision to deny or revoke a security clearance is based solely on 10 U.S.C. § 986, the administrative judge "shall include without explanation" a statement recommending or not recommending further consideration of the case for a waiver of the prohibition. (DOHA Operating Instruction (OI) No. 64 ¶ 3.e of July 10, 2001). With the enactment of the 2004 amendments, the waiver provision was also amended. It now provides that an exception to the prohibition on granting a waiver may be authorized "[i]n a meritorious case, . . . if there are mitigating factors. Any such waiver may be authorized only in accordance with standards and procedures prescribed by, or under the authority of, an Executive order or other guidance issued by the President." 10 U.S.C. § 986(d) (2004). No such executive order or other guidance has been issued by, or under the authority of, the President.

Notwithstanding the Director's direction in DOHA OI 64 that the administrative judge make a recommendation whether the statute's prohibitions should be waived, the Appeal Board has concluded that the 2004 amendments do not give the administrative judge authority to make a waiver recommendation without an executive order or other guidance issued by the President. ISCR Case No. 03-05804 at 4 (App.Bd. Sept. 9, 2005). It seems to me that the Appeal Board conflated making a recommendation to waive with making a decision to waive, so I do not agree with their construction of the 2004 amendments to 10 U.S.C. § 986. But I cannot disregard their decision. Nevertheless, to avoid the possibility of a remand if guidance is later issued by or under the authority of the President, I believe it is appropriate to note what my recommendation would be had I the authority to make one. Recognizing my recommendation is not binding on the waiver authority, I would not recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

Regarding Applicant's drug involvement under Guideline H, DC 1 (Any drug abuse. E2.A8.1.2.1) and DC 2 (Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution. E2.A8.1.2.2) apply. Applicant used marijuana from 1972 to 1987 regularly, and his last use was in 1994. Applicant transported marijuana in his car from 1972 into the 1980s between distributors and dealers in return for marijuana as payment for his services.

MC 1 (The drug involvement was not recent. E2.A8.1.3.1) applies. The last use of marijuana was in 1994. I conclude this security concern for Applicant.

Applicant has unpaid delinquent bills. DC 1 (A history of not meeting financial obligations. E2.A6.1.2.1) and DC 3 (Inability or unwillingness to satisfy debts. E2.A6.1.2.3) apply. The Chapter 7 bankruptcy in 1996 and 1997 resolved his business debts. Yet several personal debts remain unpaid, some of which are delinquent for five years or more. Applicant has taken little action until recently to resolve them, and four debts remain unpaid at present.

There are no MC applicable on these facts. The unpaid debts remain a security concern. Therefore, I conclude the financial considerations guideline against Applicant.

The Personal Conduct Guideline DC applicable is DC 2 (The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, or similar form used to determine security clearance eligibility or trustworthiness. E2.A5.1.2.2). Applicant failed to disclose requested information on his SCA in response to Questions 21, 24, 33, and 38. Reviewing Applicant's testimony, I am persuaded he did not deliberately fail to disclose his 1997 bankruptcy because he was confused whether his filing fell inside or outside the seven year period set forth in Question 33. I also am persuaded he did not deliberately falsify his answer on his delinquent debts because his wives handled the finances, he has been a long-distance truck driver for many years and did not focus on his bill payments, thinking they were paid as required. But I am not persuaded by his explanations on failing to disclose his many felony and drug arrests and convictions. He committed the offenses, served the time, and he knew them best. He deliberately failed to disclose them to the Government.

I find no MC apply. Therefore, I conclude the Personal Conduct security concern against Applicant.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: Against Applicant

Subparagraph 1.f: Against Applicant

Subparagraph 1.g: Against Applicant

Subparagraph 1.h: Against Applicant



Subparagraph 1.i: Against Applicant

Subparagraph 1.j: Against Applicant

Subparagraph 1.k: Against Applicant

Subparagraph 1.l: Against Applicant

Subparagraph 1.m: Against Applicant

Paragraph 2. Guideline H: FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: For Applicant

Paragraph 3. Guideline F: AGAINST APPLICANT

Subparagraph 3.a: For Applicant

Subparagraph 3.b: Against Applicant

Subparagraph 3.c: Against Applicant

Subparagraph 3.d: Against Applicant

Subparagraph 3.e: Against Applicant

Subparagraph 3.f: For Applicant

Subparagraph 3.g: For Applicant

Paragraph 4. Guideline E: AGAINST APPLICANT

Subparagraph 4.a: For Applicant

Subparagraph 4.b: For Applicant

Subparagraph 4.c: Against Applicant

Subparagraph 4.d: Against Applicant

**DECISION**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant or continue a security clearance for Applicant. Clearance is denied.

Philip S. Howe

Administrative Judge

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).