

DATE: December 6, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-26962

ECISION OF ADMINISTRATIVE JUDGE

THOMAS M. CREAN

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is employed in shipyard work by a defense contractor. He was arrested and convicted of 2 counts of the felony of housebreaking in 1974 and 3 counts of the felony of grand larceny in 1976. He was imprisoned as a result of the grand larceny offenses for almost 4 years. He was arrested for stalking in 2001 but the charge was dismissed. He deliberately did not list the arrests and convictions for housebreaking and grand larceny in response to question 21 on his security clearance application. He did not deliberately omit the arrest for stalking in response to question 26 on his security clearance application. The provisions of 10 U.S.C. 986 apply. Waiver recommendation is not required. Clearance is denied.

STATEMENT OF THE CASE

On May 17, 2004, The Defense Office of Hearing and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to not grant a security clearance to Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb 20, 1990), 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). Applicant acknowledged receipt of the SOR on July 6, 2004. The SOR alleges security concerns under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of the Directive.

Applicant answered the SOR in writing on July 9, 2004. He admitted to the allegation under Guideline J. He admitted to the allegations under Guideline E but that his omissions on the security clearance application were not intentional. He elected to have the matter decided on the written record in lieu of a hearing.

Department Counsel submitted the Government's written case on September 23, 2004. Applicant received a complete file of relevant material (FORM) and was provided the opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. His response was received on October 27, 2004. The case was assigned to me on November 19, 2004.

FINDINGS OF FACT

Applicant is a 50-year-old welder working on ship repairs for a defense contractor. He submitted a security clearance application on December 11, 2002. He responded "no" to question 21 on the application which asked if he had ever been charged with or convicted of any felony offenses. He also responded "no" to question 26 which asked if, in the last 7 years, he had been arrested for, charged with, or convicted of any offenses not otherwise listed on his application.

Applicant admitted he was arrest and convicted of two counts of the felony offense of housebreaking in 1975 and sentenced to as a youthful offender. He also admitted he was convicted of three counts of the felony offense of grand larceny in 1976 and imprisoned for almost 4 years. Applicant states that the reason for not including the felonies on his security clearance application was a secretary told him he only had to go back ten years.

Applicant provided a car dealer the down payment for a car being purchased by a friend. She did not make payments on the car and the car dealer asked him to continue to make payments. Applicant tried to find the friend to have her continue to make the payments and when he could not, he put a note under the windshield wiper of the car. He was told the police wanted to see him and when he went to the police station, he was informed that the friend had charged him with stalking. He was released by the police but the charge was not prosecuted and was dismissed. Applicant admitted in his response to the SOR that he was arrested for stalking. He stated his failure to list the arrest on the his security clearance application was unintentional.

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 restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgement, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1 (b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be fair, impartial, and a commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶ 6.3.1 through ¶ 6.3.6

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." Directive ¶ E2.2.1. An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. *Id.* An administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant'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 of recurrence. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

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, 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. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. 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 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determination should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

Under the provisions of 10 United States Code, § 986, absent a waiver from the Secretary of Defense, the Department of Defense cannot grant or renew a security clearance to any person convicted and sentenced in any court of the United States for a crime and incarcerated as a result of that sentence for not less than one year. Applicant was convicted of and sentenced to imprisonment for three counts of grand larceny and was incarcerated for more than a year. The provisions of 10 U.S.C. § 986 apply.

CONCLUSIONS

I carefully considered all of the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR:

Applicant's arrests for and convictions of the felonies of grand larceny, housebreaking, and stalking brings his conduct under Guideline J of the Directive. Under Guideline J (Criminal Conduct), there is a security concern for a history or pattern of criminal activity which creates doubt about a person's reliability and trustworthiness. Directive ¶ E2.A10.1.1. Applicant's arrest and conviction in 1974 for housebreaking, his 1976 arrest and conviction of grand larceny, and his 2001 arrest for stalking raise a security concern under Criminal Conduct Disqualifying Conditions Directive ¶ E2.A10.1.2.1. (*allegation or admission of criminal conduct regardless of whether the person was formally charged*); and Directive ¶ E2.A10.1.2.2. (*A single serious crime...*). Applicant admitted to the arrests and convictions of grand larceny and housebreaking. He admitted to being arrested for stalking but that charge was later dismissed. I conclude the criminal conduct disqualifying conditions have been established.

The Criminal Conduct Mitigating Conditions that are relevant to Applicant's case are: Directive ¶ E2.A10.1.3.1. (*the criminal conduct was not recent*); Directive ¶ E2.A10.1.3.2. (*the crime was an isolated incident*); Directive ¶ E2.A10.1.3.5. (*acquittal*); and Directive ¶ E2.A10.1.3.6. (*there is clear evidence of successful rehabilitation*). The crimes are not recent since the housebreaking occurred in 1974 and the grand larceny in 1976. They are not isolated incidents since they occurred within a short period of time of each other. There is no clear evidence, except for the passage of time, of successful rehabilitation. Since the crime of stalking was not prosecuted, this is tantamount to an acquittal of that offense and the offense is mitigated. I conclude there is no mitigating condition established for the offenses of housebreaking and grand larceny but there is a mitigating condition established for the crime of stalking.

Under Guideline E (Personal Conduct), a security concern exists for conduct involving questionable judgment, untrustworthiness, *lack of candor*, *dishonesty*, or unwillingness to comply with rules and regulations. Any of these characteristics in a person could indicate that the person may not properly safeguard classified information. Directive ¶ E2.A5.1.1. Applicant's failure to note his felony arrests and convictions for housebreaking and grand larceny in response to question 21 on the security clearance application and his arrest for stalking under question 26 of the security clearance application brings his conduct within Personal Conduct Disqualifying Condition Directive ¶ E2.A5.1.2.2. (*the deliberate omission, concealment, or falsification of relevant and material facts from a personnel security questionnaire, personal history statement used to conduct investigations, determine security clearance eligibility or trustworthiness*). Question 21 on the security clearance application form is very clear in asking for any arrest for or conviction of a felony. There is no possibility of an applicant misunderstanding what information is being sought in response to these questions. I conclude that Applicant deliberately failed to list the felony arrests and conviction and the disqualifying condition has been established.

The directions for question 26 are clear to list any arrest in the last 7 years not otherwise listed in the security clearance application. Applicant's failure to list the stalking offense in response to this question was unintentional since the

charges were dismissed. I conclude Applicant did not deliberately conceal the stalking offense and the disqualifying condition was not established.

The Personal Conduct Mitigating Conditions that may apply in this case are: Directive ¶ E2.A5.1.3.2. (*the falsification was an isolated incident, was not recent, and the individual subsequently provided correct information voluntarily*); Directive ¶ E2.A5.1.3.3. (*the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*); and Directive ¶ E2.A5.1.3.4. (*omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided*). Applicant provided false information on the recent security clearance application by failing to list the arrests and conviction for housebreaking and grand larceny. Applicant did not correct the material until questioned about the omissions. While Applicant claimed he was told by a secretary to only go back 10 years on question 21, he provides no proof of such advice and the directions on the security clearance application are very clear. I conclude there were no mitigating conditions established for the deliberate failure to list the felony arrests and convictions for housebreaking and grand larceny in response to question 21.

I carefully considered all of the circumstances in light of the "whole person" concept. I conclude Applicant is not eligible for access to classified information. A recommendation for waiver under 10 U.S.C. 986 is not required since this statutory provision is not the sole reason for denying Applicant a security clearance.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.22 of Enclosure 3 of the Directive are:

Paragraph 1, Guideline J: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: For Applicant

Paragraph 2, Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: For Applicant

DECISION

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

Thomas M. Crean

Administrative Judge