

DATE: July 31, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-00949

DECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In April 2001, Applicant was arrested and charged with three counts of felony Child Abuse Parent and pled guilty to three counts of misdemeanor Assault 2nd Degree. When Applicant completed his security clearance application in January 2002, he denied he had ever been charged with or convicted of any felony offense, and he failed to disclose his April 2001 arrest. He also failed to disclose he had received treatment from a mental health professional for anxiety and anger management. Applicant failed to mitigate Guideline J and E security concerns. 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 October 18, 2005, under the applicable Executive Order⁽¹⁾ and Department of Defense Directive,⁽²⁾ DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision-security concerns raised under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on November 8, 2005, and elected to have a hearing before an administrative judge. On March 2, 2006, the case was assigned to me. On May 5, 2006, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. At the hearing, the Government called no witnesses and submitted six exhibits (Ex.), which were identified as Ex. 1 through 6. The Government's exhibits were admitted without objection. The Government also submitted a document, identified as Government Document for Administrative Notice I, which was admitted to the record without objection. Applicant testified on his own behalf and called one witness. He submitted sixteen exhibits, identified as Ex. A through P, which were admitted to the record without objection. On May 12, 2006, DOHA received the transcript (Tr.) of the hearing.

FINDINGS OF FACT

The SOR contains four allegations of disqualifying conduct. Two allegations relate to conduct alleged under Guideline E, Personal Conduct, and two allegations relate to conduct alleged under Guideline J, Criminal Conduct. In his answer

to the SOR, Applicant admitted the Guideline E allegations and offered mitigating circumstances. He denied the two Guideline J allegations. His admissions are incorporated as findings of fact.

Applicant is a 39-year-old data link systems engineer employed by a federal contractor. He holds a bachelor of science degree in professional aeronautics, cum laude, and a bachelor of science degree in technical management, cum laude. He has held a security clearance since approximately 1992. (Exs. 1, 2; Ex. J; Ex. K; Tr. 55.)

Applicant was married in 1987 and divorced in 1995. He is the father of three children, a daughter and two sons, from his marriage. Additionally, he has a step-daughter from his first marriage and a son from a current relationship. All five children were living in his household in April 2001, and their ages at that time were 17, 13, 9, 8, and 2. (Ex. 1; Tr. 56-57.)

Applicant and the mother of his youngest child both had jobs outside the home. The 17-year-old stepdaughter and Applicant's 13-year-old daughter were responsible for looking after the younger children after school until the parents returned. The children were not allowed to have visits from other children when their parents were not in the house. When Applicant returned home from work on April 3, 2001, he found the two-year-old was unattended. The 17-year-old stepdaughter was not home, and the 13-year-old daughter was entertaining a visiting boy in Applicant's computer room. (Tr. 42-46.)

Applicant escorted the visiting boy from his home. He questioned the 13-year-old daughter about her conduct with the boy for approximately 40 minutes. He told her to call the boy's parents. Applicant admitted slapping his daughter and telling her to stop lying to him. The boy's parents came to Applicant's home and he spoke with them. While Applicant was speaking with the boy's parents, the daughter called the police. (Tr. 58-60.)

When police arrived at the scene, they found the 13-year-old daughter standing in the middle of the street in front of the family home. The police report recited that the daughter said her father grabbed her by her hair and pulled her down the stairs, from the second level of the house to the first level, and hit her on the head four or five times with a telephone. The police report also recited that Applicant's sons, ages 8 and 9, had been hit in the face by Applicant. The police report stated the daughter had a chipped front tooth, red marks on her forehead, several small red marks on her left forearm, several lumps on the top of her head, and a bruised and slightly swollen finger. One of the sons had red marks and swelling under his right eye and a minor contusion beside his left eye. The other son had a lump on the top of his head. Applicant was detained and taken into custody by the police. (Ex. 5 at 9-10.)

Applicant was charged with four counts of felony Child Abuse Parent and four counts of misdemeanor Second Degree Assault. Charges against Applicant for Child Abuse Parent and Second Degree Assault against the two-year old child were dropped. Applicant pled guilty to three Counts of misdemeanor Second Degree Assault, and the three felony Child Abuse Parent counts were *nolle prosequi*. On November 9, 2001, Applicant was sentenced to 18 months in jail, suspended, and was awarded 18 months supervised probation. Applicant was ordered to pay court costs of \$125. As a special condition of his probation, Applicant was ordered to continue with the psychiatric counseling he had begun in August 2001. (Ex. 5 at 11-20; Ex. 6 at 1; Tr. 65-68.)

The four oldest children were removed from Applicant's home, and went to live with Applicant's ex-wife. Applicant was responsible for paying child support. He was not permitted visitation rights. (Tr. 67-68.)

Applicant sought psychiatric counseling because he felt betrayed by his children, especially his 13-year-old daughter, and his ex-wife. He was diagnosed by a licensed clinical professional counselor⁽³⁾ as suffering from "Anxiety D.O., NOS 300.00" [Anxiety Disorder, Not Otherwise Specified] under the Diagnostic and Statistical Manual of Mental Disorders. He received treatment for anger management and anxiety in November 2001. He continued in therapy until December 2001. While in therapy, he expressed concern with his counselor that the events of April 3, 2001, would jeopardize his job. (Ex. 6 at 1; 5; 7; Tr. 68-70; 74; Government Document for Administrative Notice I.)

The day after he was arrested, Applicant told his security officer about his arrest. He discussed with the security officer that he had been charged with felony child abuse and second degree assault. He did not recall telling the security officer he had pled guilty to the second degree assault charges, and he was not sure whether he told the security officer about

his 18 month suspended sentence and supervised probation. Applicant provided his program manager with general information about his arrest. He did not inform his immediate supervisor of his arrest, guilty plea, and sentence. (Ex. B; Tr. 81-82; 86-90.)

On January 16, 2002, Applicant completed a security clearance application (SF-86) and submitted it electronically. Question 19 on the SF-86 asks an applicant if, in the last 7 years, he has consulted a mental health professional or another health care provider about a mental health related condition. The question defines mental health professional as "psychiatrist, psychologist, counselor, etc." Applicant answered "no" to Question 19.

Question 21 on the SF-86 asks if an applicant has ever been charged with or convicted of any felony offenses. Applicant answered "no" to Question 21. Question 26 on the SF-86 asks if, in the last 7 years, an applicant has been arrested for, charged with, or convicted of any offenses not listed in Questions 21, 22, 23, 24, or 25, questions which ask about pending criminal charges, felony charges and convictions, firearms/explosives offenses, alcohol/drug offenses, and military court or other military disciplinary proceedings. Applicant answered "no" to Question 26.

On January 16, 2002, Applicant signed the following certification at the end of his completed SF-86:

CERTIFICATION BY PERSON COMPLETING FORM

My statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both. (See section 1001 of title 18, United States Code.)

Applicant was interviewed by a special agent of the Defense Security Service (DSS) on April 29, 2003, and asked about his arrest in April 2001. Applicant said the only physical contact he had with his daughter was that he slapped her open hand and accused her of lying. He denied he hit his sons. (Ex. 3 at 2.) Applicant was interviewed again by a DSS special agent on July 15, 2003. He was shown a copy of the police report of the events that precipitated his arrest in April 2001. He denied falsifying his earlier answers in response to the DSS agent's questions. (Ex. 4 at 1-2.)

At his hearing, Applicant acknowledged he had held a security clearance in the past and was familiar with the process of answering questions on an SF-86. (Tr. 75-76.) Applicant testified he was confused by the use of the word "counselor" in Question 19 and thought that if he answered "yes," he was admitting to having mental health problems. (Tr. 77.) He said he answered "no" to Question 21 because he didn't understand the meaning of the word "charge" in the question. (Tr. 79.) He also said he was not aware that his misdemeanor convictions would remain a part of his record. (Tr. 79.)

Applicant provided letters of recommendation, awards, and commendations from program managers and supervisors attesting to his hard work, attention to detail, and value to the organizations that employed him. (Exs. C, D, E, F, G, H, I, and L.)

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 judgment, 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.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. 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. 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. *See Egan*, 484 U.S. at 531. 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. May 2, 1996).

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.

CONCLUSIONS

Guideline E, Personal Conduct

In the SOR, DOHA alleged Applicant raised concerns under Guideline E, Personal Conduct, when he falsified material facts in his answers to Question 21 and 26 on the SF-86 he electronically submitted on or about January 16, 2002, by denying he had been charged with felony offenses and convicted of misdemeanor offenses and deliberately failing to disclose he had been arrested on April 3, 2001, and charged with four counts of felony Child Abuse Parent and four counts of misdemeanor Second Degree Assault, that he had pled guilty to three counts of misdemeanor assault second degree, was sentenced to 18 months in jail, suspended, 18 months probation, ordered to pay court costs of \$125, and ordered to have no further contact with the victims and to continue to receive counseling (¶ 1.a(1)). DOHA further alleged Applicant falsified material facts in his answer to Question 19 on his SF-86 by deliberately failing to disclose he had received treatment for a condition diagnosed as Anxiety D.O., NOS 300.00. and was also treated for anger management and anxiety (¶ 1.b(1)).

Guideline E conduct, which involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, could indicate an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

With respect to the Guideline E conduct alleged in the SOR, the Government has established its case. Applicant's failure to answer Questions 19, 21, and 26 completely, truthfully, and correctly on his security clearance application raises a security concern under ¶ E2.A5.1.2.2. of Guideline E. Applicant's assertions that he answered "no" to the three questions because he did not understand the wording or the terms used in the questions lacked credibility. Applicant is a highly educated man and has held a security clearance for several years. He had answered questions on security clearance applications in the past. Applicant knew the information he withheld in his answers could be damaging to his career and livelihood. His concealment of information he considered embarrassing or professionally damaging could make him vulnerable to coercion and blackmail. ¶ E2.A5.1.2.4. His conduct raises additional concerns under E2.A5.1.2.5. because it suggests a pattern of dishonesty or rule violations. Applicant's reticence to reveal the truth about his conduct suggests that, under some circumstances, he may put his interests before those of the Government. The ability to be truthful goes to the essence of an individual's security worthiness.

Mitigating condition E2.A5.1.3.1. does not apply to the facts of this case: the information Applicant withheld is pertinent to a determination of his judgment, trustworthiness, and reliability. Only one other mitigating condition under Guideline E might be applicable to the instant case. The security concern raised by Applicant's disqualifying conduct could be mitigated if the falsification was an isolated incident, was not recent, and if the Applicant subsequently provided the correct information voluntarily. ¶ E2.A5.1.3.2. Applicant supplied the correct information only when repeatedly questioned by special agents of the Defense Investigative Service. His falsifications were multiple and occurred recently. Accordingly, ¶ E2.A5.1.3.2. does not apply to the facts of Applicant's case. The Guideline E allegations in the SOR are concluded against Applicant.

Guideline J, Criminal Conduct

In the SOR, DOHA alleged Applicant's deliberate material falsifications of his criminal record and mental health treatment on the security clearance application he certified and signed on or about January 16, 2002, constituted criminal conduct and a violation of Federal law under section 1001 of Title 18, United States Code. (¶¶ 2.a. and 2.b.)

When he completed his security clearance application, Applicant signed his name and certified that his statement was true, complete and correct to the best of his knowledge and belief. Further, he acknowledged his understanding that a false statement on the SF-86 could be punished as a felony crime by fine or imprisonment under the provisions of section 1001 of title 18, United States Code.

Applicant's criminal conduct raises security concerns under ¶¶ E2.A10.1.2.1. and E2.A10.1.2.2. of Guideline J. His history or pattern of criminal activity raises doubts about his judgment, reliability and trustworthiness. ¶ E2.A10.1.1. A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. Where the facts proven by the Government or admitted by the applicant raise doubts about the applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nevertheless security worthy.

Applicant's multiple falsifications on his security clearance application occurred in 2002. These criminal acts were recent. They were not isolated events, but, instead, reflected a conscious intent to deceive the Government and demonstrated a pattern of criminal conduct. Thus, neither ¶ E2.A10.1.3.1. nor ¶ E2.A10.1.3.2. of Guideline J applies in mitigation to Applicant's Guideline J conduct. Additionally, no other mitigating conditions under Guideline J are applicable to the facts of Applicant's case. Accordingly, the Guideline J allegations in the SOR are concluded against the Applicant.

FORMAL FINDINGS

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

Paragraph 1.: Guideline E: AGAINST APPLICANT

Subparagraph 1.a.(1): Against Applicant

Subparagraph 1.b.(1): Against Applicant

Paragraph 2.: Guideline J: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: 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 continue a security clearance for Applicant. Clearance is denied.

Joan Caton Anthony

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
3. Applicants for licensure in Applicant's state of residence as Licensed Clinical Professional Counselors are required to

hold a master's or doctoral degree in a professional counseling field from an accredited educational institution. *See* Government Document for Administrative Notice I.