

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant is a 56-year-old truck driver who has worked for a federal contractor since 2002. Applicant has a 20-year history of criminal offenses. Applicant failed to provide his criminal history on his security clearance application as required. Applicant failed to mitigate the security concerns regarding Guidelines J and E. Clearance is denied.

CASENO: 04-03754.h1

DATE: 11/25/2005

DATE: November 25, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-03754

DECISION OF ADMINISTRATIVE JUDGE

CAROL G. RICCIARDELLO

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 56-year-old truck driver who has worked for a federal contractor since 2002. Applicant has a 20-year history of criminal offenses. Applicant failed to provide his criminal history on his security clearance application as required. Applicant failed to mitigate the security concerns regarding Guidelines J and E. Clearance is denied.

STATEMENT OF CASE

On April 1, 2005, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline J for criminal conduct and Guideline E for personal conduct. In a sworn statement dated April 27, 2005, Applicant admitted allegations 1.b., 1.c., 1.d., 1.e., 1.f., 1.g., and 1.i. of the SOR. He denied allegations 1.a., 1.h., 1.j., 1.k., 2.a., and 2.b. He did not provide a response to allegations 2.c. and 2.d. Applicant requested a hearing.

The case was assigned to me on September 22, 2005. A notice of hearing was issued on September 28, 2005, scheduling the hearing for October 20, 2005. The hearing was conducted as scheduled. The government submitted six exhibits that were marked as Government Exhibits (GE) 1-6, and admitted without objections. Applicant testified, had a witness testify, and submitted five exhibits that were marked as Applicant's Exhibits (AE) A through E, and admitted without objections. The transcript was received on November 1, 2005.

FINDINGS OF FACT

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

Applicant is a 56-year-old truck driver who has worked for a federal contractor since approximately 2002. Applicant has been married and divorced twice. He has six children, three from each marriage. All the children are grown and only one lives with Applicant. Applicant was married to his first wife from approximately 1966 to 1977. He was married to his second wife from approximately 1980 to approximately 1991. From 1994 to 1996 Applicant and his second wife lived together off-and-on in an attempt at reconciliation.

Applicant was arrested on July 17, 1978, and charged with sexual assault, a felony. Applicant was accused of molesting his first wife's daughter. She was approximately eleven years old. The charges were later dismissed. Applicant adamantly denied the charge and claimed he was falsely accused. He claims his then in-laws were involved in the accusations because they did not like him. Applicant and his first wife divorced after this allegation.

On September 11, 1994, Applicant returned home from driving his truck on an extended road trip, and discovered his ex-wife (who he had been living with) and another man together. Applicant had an altercation with both his ex-wife and the man. Applicant was arrested and charged with (1) Battery-Domestic Abuse, (2) Disorderly Conduct, and (3) Contact After Domestic Abuse Arrest. Applicant was found guilty of Count (1) that was amended to Disorderly Conduct and fined \$286.00. Counts (2) and (3) were dismissed.

Applicant was arrested on June 16, 1995, and charged with disorderly conduct. He was found guilty and fined.

Applicant was arrested on April 14, 1996, and charged with disorderly conduct-domestic abuse related. He was fined.

Applicant was arrested on May 11, 1996, and charged with disorderly conduct-domestic abuse related. The charge was not prosecuted.

Applicant was arrested on May 16, 1996, and charged with disorderly conduct-domestic abuse related. He entered a no contest plea, was found guilty, and fined \$203.00 to include court costs.

Applicant was arrested on July 15, 1996, and charged with (1) Disorderly Conduct-Domestic Abuse Related, and (2) Domestic Abuse Restraining Order Violation. Applicant was found guilty of Count (1) and fined \$203.00. Count (2) was not prosecuted.

Applicant was arrested on October 30, 1996, and charged with shoplifting. Applicant denies he shoplifted. He claimed he brought an item into the restroom with him and leaned it against the wall. He was then retained. Applicant claimed he did not intend to steal the item, but because it was the only item left of its kind, he wanted to make sure no one bought it while he was in the restroom, so he took it with him. Applicant was fined and sentenced to six months probation.

Applicant was arrested on May 29, 1998, and charged with disorderly conduct. Applicant had an altercation with his then girlfriend. Applicant was found guilty and fined \$209.00.

Applicant was cited on September 26, 1998, and charged with hit and run. Applicant denied he was involved in this incident. The charge was dismissed.

A civil suit was filed against Applicant on January 10, 2000 for Child Abuse Restraining Order. Another civil suit was filed against Applicant on January 13, 2000 for a Harassment Restraining Order. Both cases were dismissed. These cases stemmed from an allegation that Applicant hit the child of the woman he was then living with.

Applicant filled out a security clearance application (SCA) and sworn to it on April 15, 2001. Applicant had his girlfriend assist him in filling out the application because his handwriting is illegible. However, he provided the answers to her to write for him and he reviewed its contents

before signing it. Applicant answered "No" to Question 23 (a), (2) which was false. Applicant had been arrested and charged with a felony on July 17, 1978, that was later dismissed. Applicant stated he thought because the charge was eventually dropped he did not have to put it on his SCA.

Applicant also answered "No" to Question 23 (f), (3) which was false in that Applicant had numerous arrests during the past seven years from the date of the application. Applicant admitted to being arrested for all the incidents alleged, but disputed that he committed the allegations in 1.a., 1.h., and 1.j. Applicant stated, "I wasn't going to admit to something I didn't do. But I did, I did get arrested and the charges were dropped. And they told me that they would not show on my record, so I didn't think no more about it. And when I filled this out, I figured, you know, it's not on my record, I don't need to put it on there." (4) Applicant claimed he misunderstood this question and should have stated "yes" because his offenses did occur within the past seven years.

Applicant was characterized by a person who knows him as honest and forthcoming.⁽⁵⁾ He is seen as a hard working and timely employee who followed his employer's administrative policies.⁽⁶⁾ He is considered a dependable and courteous driver,⁽⁷⁾ who has demonstrated a high level of responsibility and performed well.⁽⁸⁾

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Considering the evidence as a whole, Guideline J, criminal conduct, and Guideline E, personal conduct considerations, with their respective DC and MC, apply in this case. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. 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.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽⁹⁾ The government has the burden of proving controverted facts.⁽¹⁰⁾ The burden of proof is something less than a preponderance of evidence.⁽¹¹⁾ 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.⁽¹²⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹³⁾

No one has a right to a security clearance⁽¹⁴⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁵⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽¹⁶⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽¹⁷⁾ 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.

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

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.

Guideline E-Personal Conduct is a security concern when an individual's conduct involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, pertaining to the adjudicative guideline are set forth and discussed in the conclusions below.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a *prima facie* case for disqualification under Guideline J and Guideline E.

Based on all the evidence Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*Allegations or admissions of criminal conduct, regardless of whether the person was formally charged*), and CC DC E2.A10.1.2.2 (*A single serious crime or multiple lesser charges*) apply. Applicant was arrested nine times from 1978 through 1998. Applicant was found guilty seven times for criminal offenses. I find Applicant deliberately failed to tell the truth when filling out his SCA, a criminal offense. [\(18\)](#)

I have considered all the mitigating conditions and especially considered Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.2.1 (*The conduct was not recent*), CC MC E2.A10.1.2.2 (*The crime was an isolated incident*), CC MC E2.A10.1.2.4 (*The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*), and CC MC E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*). Most of Applicant's offenses occurred from 1998 and earlier. Because I have found that Applicant intentionally failed to provide accurate information

on his SCA, a federal crime, I can not apply CC MC E2.A10.1.2. 1. due to the recency of his criminal actions. The frequency of Applicant's criminal conduct, seven convictions , precludes applying CC MC E2.A10.1.2.2, that his actions were isolated. Applicant has a history of domestic abuse, with at least two women and allegations of child abuse. Under those circumstances, I can not find that such violations are not likely to recur. Finally, there was no evidence presented to convince me that Applicant is successfully rehabilitated.

Based on all the evidence, Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.2 (*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*), and PC DC E2.A5.1.2.5 (*A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency*) apply in this case. Applicant did not list his felony charge and any of his arrests on his SCA. He did not voluntarily disclose this information before he was interviewed. Applicant has a 20-year history of violating the law and continued to do so when he deliberately omitted relevant information on his SCA.

Allegations 2.c. and 2.d. of the SOR allege two civil suits were filed against Applicant and later dismissed. Applicant denied the charges in the suits, and no other information was provided. Therefore, I find for the Applicant with regards to these allegations, because there is not enough evidence to make any type of meaningful determination about these allegations, other than a document stating a suit had been filed and dismissed.

I have considered all the mitigating conditions and especially considered Personal Conduct Mitigating Condition (PC MC) E2.A5.1.3.2 (*The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*), PC MC E2.A5.1.3.3 (*The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*), and PC MC E2.A5.1.3.5 (*The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*). I conclude none of the mitigating conditions apply. Applicant's failed to provide vital information that was part of his

SCA. Applicant made an intentional decision that he was not going to put down offenses that he believed were not on his record, despite the plain language of the questions asking him to do so. Even when the plain language specifically asked him about his arrests in the past seven years, many that he was convicted of, he chose to state he had none. Applicant's lack of candor and willingness to interpret the questions that most favored what responses he chose to provide is a serious security concern.

Applicant was interviewed for his SCA three years later. ⁽¹⁹⁾ During those intervening years Applicant did not correct the false answers on his SCA, but rather admitted them only after he was interviewed. Applicant at first claimed he did not understand the security questions, but later he admitted he did not know why he did not list his arrests. Applicant's testimony was not credible. I find PC MC E2.A5.1.3.2 and PC MC E2.A5.1.3.5 do not apply because his actions were not isolated, and he lied on two questions. I also find Applicant did not subsequently voluntarily provide the correct information nor did he correct the falsification before being confronted with the facts. Applicant has provided no evidence to show he has taken any steps to reduce his vulnerability. Applicant's lack of candor and dishonesty reflects directly on his trustworthiness. Applicant failed to mitigate the security concern regarding his personal conduct.

In all adjudications, the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I have considered all the evidence in the record and the whole person concept. Applicant's criminal history, lack of candor, and dishonesty, demonstrate questionable judgment and raise serious security concerns. Applicant has failed to mitigate the security concerns regarding his criminal conduct and personal conduct. Therefore, I am persuaded by the totality of the evidence in this case, that it is not clearly consistent with the national interest to grant Applicant a security clearance. Accordingly, Guidelines J and Guideline E are decided against Applicant.

FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1: Criminal Conduct (Guideline J) AGAINST THE APPLICANT

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. Against the Applicant

Subparagraph 1.e. Against the Applicant

Subparagraph 1.f. Against the Applicant

Subparagraph 1.g. Against the Applicant

Subparagraph 1.h. Against the Applicant

Subparagraph 1.i. Against the Applicant

Subparagraph 1.j. Against the Applicant

Subparagraph 1.k. Against the Applicant

Paragraph 2: Personal Conduct (Guideline E) AGAINST THE APPLICANT

Subparagraph 2.a. Against the Applicant

Subparagraph 2.b. Against the Applicant

Subparagraph 2.c. For the Applicant

Subparagraph 2.d. For the 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.

Carol G. Ricciardello

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. GE 1 at 7. That question reads: YOUR POLICE RECORD, For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607. (a). Have you ever been charged with or convicted of any felony offense? (Include those under Uniform Code of Military Justice).
3. *Id.* Question 23 (f) In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in response to a, b, c, d, or e above? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.)
4. Transcript (TR.) at 45.
5. AE A.
6. AE B.
7. AE C.
8. AE D.
9. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
10. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, ¶ E3.1.14.
11. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
12. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, ¶ E3.1.15.
13. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, ¶ E3.1.15.
14. *Egan*, 484 U.S. at 531.
15. *Id.*
16. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
17. Executive Order 10865 § 7.
18. Title 18 U.S.C. § 1001.
19. GE 2.