

KEYWORD: Criminal Conduct

DIGEST: Applicant has a history of criminal conduct, including a conviction for carrying a concealed handgun in 1986, a conviction for petit larceny in 2002, and charges for assault and battery on a family member in 2003. Applicant failed to mitigate the security concerns arising from his history of criminal conduct. Clearance is denied.

CASE NO: 04-04354.h1

DATE: 04/28/2006

DATE: April 28, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-04354

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL J. BRESLIN

APPEARANCES

FOR GOVERNMENT

Richard Stevens, Esq., Department Counsel

FOR APPLICANT

Jennifer T. Stanton, Esq.

SYNOPSIS

Applicant has a history of criminal conduct, including a conviction for carrying a concealed handgun in 1986, a conviction for petit larceny in 2002, and charges for assault and battery on a family member in 2003. Applicant failed to mitigate the security concerns arising from his history of criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

On February 20, 2003, Applicant submitted a security clearance application. The Defense Office of Hearings and Appeals (DOHA) declined to grant a security clearance for Applicant under Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended (the "Directive"). On April 14, 2005, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. The SOR alleges security concerns raised under Guideline J, Criminal Conduct, of the Directive.

Applicant answered the SOR in writing on May 2, 2005. On May 25, 2005, he elected to have a hearing before an administrative judge.

I received the case assignment on January 3, 2006. With the concurrence of Applicant and Department Counsel, I convened the hearing on March 8, 2006. The government introduced Exhibits 1 through 4. Applicant's counsel presented Exhibits A and B, and the testimony of four witnesses. Applicant also testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on March 21, 2006.

FINDINGS OF FACT

Applicant admitted the factual allegations in the SOR. (Applicant's Answer to SOR, dated May 2, 2005.) Those

admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, I make the following additional findings of fact.

Applicant was born in August 1960. (Ex. 1 at 1.) In June 1980, when Applicant was 19 years old, he and a friend took some beer to the beach to celebrate the friend's enlistment in the Army. (Tr. at 64.) According to Applicant, just as they opened their first beers, two bicycle policemen stopped them and charged them both with drinking alcohol in public. (*Id.*) Applicant was found guilty of the offense and fined. (Answer to SOR, *supra*, at 1; Tr. at 64.)

In 1981, Applicant began working as an assistant truck foreman for a railroad. (Ex. 1 at 2.) He served in that position for about 18 years.

In 1986, Applicant owned a .25 caliber automatic handgun with a two-shot capacity. (Tr. at 64-65.) On December 26, 1986, Applicant and his friend went to the shooting range and practiced firing the handgun. According to Applicant, he didn't have a bag so he put the gun in his back pocket and forgot about it. (Tr. at 65.) He then went to his mother-in-law's house. While there, a man and a woman got into a fight; Applicant stepped in to break it up and eventually started fighting with the man. (Tr. at 65.) The police arrived, broke up the fight, searched Applicant, found the handgun, and charged Applicant with carrying a concealed weapon. (Tr. at 65.) The court found Applicant guilty of the charge and sentenced him to a \$110.00 fine, the payment of court costs, and five years probation. (Answer to SOR, *supra*, at 1-2; Tr. at 66.)

In March 1988, Applicant was married. (Ex. 1 at 3.) Two children were born of the marriage.

In 1999, Applicant worked briefly as a driver for a parcel delivery service. (Ex. 1 at 2.) From October 1999 to October 2001, he was an assembler for a federal contractor. (*Id.* at 1.) In October 2001, Applicant began working in his present job as an installation technician for a defense contractor. (*Id.*)

In August 2002, Applicant's wife took him to a department store in a nearby mall, and he waited while she brought merchandise to a sales register. (Ex. 2 at 3.) His wife and one of her friends who worked part-time at the department store contrived to steal merchandise by ringing up only small amounts for the purchases, including selling a \$300.00 purse for \$20.00. (*Id.*) According to Applicant, he was unaware of the plan to steal the property. Applicant's wife asked him to sign the charge slip and he did; Applicant claimed he did not look at the total amount shown on the sales slip. (Tr. at 77.) Security officers arrested Applicant and his wife as they were carrying the merchandise out of the store. The state charged Applicant with Grand Larceny, a felony, and Conspiracy to Commit Larceny. He pled guilty to the reduced charge of Petit Larceny, a misdemeanor, and the prosecutor dropped the conspiracy charge. (Tr. at 80; Ex. B.) He paid court costs and \$1,000.00 in restitution, and served unsupervised probation for one year. (Tr. at 67.) Applicant's wife was prosecuted on the felony larceny charge, convicted, and fined.

In about July 2003, Applicant took his (then) 13-year-old daughter with him when he went to take a golf lesson and left her in the car listening to the radio. (Ex. 2 at 2.) His daughter started the car, backed it out of the parking space, and struck a parked vehicle causing damage. Applicant's daughter repeatedly denied that she started the car. (Ex. 2 at 2.) Applicant took his daughter home and spanked her as punishment. (*Id.*) At school the next day, Applicant's daughter told her guidance counselor that Applicant "beat her." A representative from social services examined the child and observed bruising. Local authorities arrested Applicant for Assault and Battery on a family member. At the hearing in this case, Applicant's daughter testified that she reported her father in an attempt to get back at him, and that by taking a shower the following morning she exaggerated the appearance of the bruises. (Tr. at 53.) At trial, the court deferred ruling for two years (December 2005). (Ex. 2 at 3.) Applicant completed the required eight-week Anger Management Course and a six-week Teen Parenting Course. (Ex. 2 at 3; Ex. 3; Ex. 4; Ex. A.)

Presently, Applicant works as a senior installation technician for a defense contractor. (Ex. 2 at 1.) His supervisor praises his character and integrity. (Tr. at 19.) A witness indicated Applicant is a close friend of the family and a coach for youth sports. (Tr. at 31-32.) A co-worker expressed his opinion that Applicant was of good character and was not a security risk. (Tr. at 43, 46.)

POLICIES

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." (*Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).) In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch.

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. The adjudicative guideline at issue in this case is:

Guideline J, Criminal Conduct: A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. (Directive, ¶ E2.A10.1.1.)

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

"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 the following factors: (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 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. (*Id.*)

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. (Directive, ¶ E3.1.14.) Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. (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).) "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.)

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. (Exec. Ord. 10865, § 7.) It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

CONCLUSIONS

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

Paragraph E2.A10.1.2.1 of the Directive provides that "allegations or admission of criminal conduct" may be disqualifying. Similarly, under ¶ E2.A10.1.2.2 of the Directive, it may be disqualifying where an applicant committed "a single serious crime or multiple lesser offenses." The available evidence indicates Applicant committed several criminal offenses serious enough to raise security concerns. A court found Applicant guilty of carrying a concealed handgun in December 1986; although Applicant asserts he simply forgot the handgun in his back pocket, I find his explanation unpersuasive. A court also found Applicant guilty of Petit Larceny after the theft of merchandise from the department store in August 2002. At the hearing, Applicant denied any knowledge that the crime was taking place. Considering all

the circumstances, including the closeness of his relationship with his wife and the fact that she invited him to sign the fraudulent charge slip, I find Applicant's contention unpersuasive. Finally, I find the evidence sufficient to raise concerns about Applicant's battery of his minor daughter. Regardless of the reason she reported the incident, state authorities found evidence of physical abuse sufficient to bring criminal charges and to require Applicant to undergo formal education programs. I find both these potentially disqualifying conditions raised in this case.

Paragraph 1.d of the SOR alleges Applicant's 1980 arrest for drinking in public as a security concern. Considering the nature of the offense, Applicant's young age at the time, and the number of years that have passed since then, I conclude this incident is insufficient to raise a security concern.

Under the Directive, the security concerns arising from a history of criminal conduct may be mitigated. Under ¶ E2.A10.1.3.1 of the Directive, it may be mitigating when "the criminal behavior was not recent." The Directive does not define the term "recent"; the recency of an incident is determined by considering all the circumstances, including the applicant's age, his pattern of behavior over a period of time, and the number of years since the last incident relative to the entire course of conduct. Applicant's arrest for carrying a concealed weapon occurred in 1986, almost 20 years ago; therefore, it is not recent. However, he was convicted of larceny in 2002, and charged with criminal assault in 2003; therefore, I find these incidents recent. This potentially mitigating condition does not apply to the two latest incidents of criminal conduct.

The Directive, ¶ E2.A10.1.3.2, also provides that it may be mitigating where "the crime was an isolated incident." As noted above, Applicant has a history of criminal conduct, including two offenses resulting in charges and court action in 2002 and 2003. This potentially mitigating condition does not apply.

Paragraph E2.A10.1.3.4 of the Directive states it may be mitigating where "the factors leading to the violation are not likely to recur." Similarly, under ¶ E2.A10.1.3.6 of the Directive, it may be mitigating where "there is clear evidence of successful rehabilitation." Applicant was involved in two criminal incidents in 1980 and 1986, when he was about 19 and 25 years old, respectively. If those were the only incidents, and Applicant had a 20-year record of good citizenship since then, one could readily find that he was completely rehabilitated and such incidents were not likely to recur. However, Applicant's two most recent incidents occurred when he was over 40 years old, after he had served in positions of responsibility and trust for many years. This raises significant questions about his judgment and responsibility, that Applicant failed to mitigate. Applicant refuses to accept responsibility for his part in the larceny, notwithstanding his plea, reflecting poorly on his potential for rehabilitation. I conclude these potentially mitigating conditions do not apply.

I carefully considered Applicant's eligibility for a security clearance in light of the "whole person" concept, and the disqualifying and mitigating conditions raised in this case. I conclude Applicant has not mitigated the security concerns arising from his history of criminal conduct.

FORMAL FINDINGS

My conclusions as to each allegation in the SOR 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

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.

Michael J. Breslin

Administrative Judge