

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant's intentional falsifications on his security clearance application are a violation of Title 18, USC 1001, a felony and have not been mitigated. Clearance is denied.

CASENO: 04-07713.h1

DATE: 01/06/2006

DATE: January 6, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-07713

DECISION OF ADMINISTRATIVE JUDGE

DARLENE LOKEY ANDERSON

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Department Counsel

FOR APPLICANT

Alan V. Edmunds, Attorney At Law

SYNOPSIS

Applicant's intentional falsification on his security clearance application is a violation of Title 18, USC 1001, a felony, and his other criminal conduct have not been mitigated. Clearance is denied.

STATEMENT OF THE CASE

On May 27, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, (as amended) issued a Statement of Reasons (SOR) to the Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

The Applicant responded to the SOR in writing on June 15, 2005, and requested a hearing before a DOHA Administrative Judge. This case was assigned to the undersigned on August 10, 2005. The hearing in this matter was originally scheduled for September 28, 2005. The Applicant submitted a motion for continuance based upon good cause and the matter was rescheduled. A notice of hearing was issued on September 15, 2005, scheduling the hearing for October 5, 2005. At the hearing the Government presented six exhibits. The Applicant presented fifteen exhibits. He testified and called three witnesses to testify on his own behalf. The official transcript (Tr.) was received on October 17, 2005.

FINDINGS OF FACT

The following Findings of Fact are based on the Applicant's Answer to the SOR, the Applicant's testimony, his three

witnesses and fifteen exhibits and the Government's six exhibits. The Applicant is 35 years old. He is employed by a defense contractor as a Information Technology Administrator and is seeking to obtain his security clearance in connection with his employment.

The Government opposes the Applicant's request for a security clearance, on the basis of allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR:

Paragraph 1 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because he intentionally falsified material aspects of his personal background during the clearance screening process.

The Applicant completed an electronic Security Clearance Application (Standard Form 86) dated December 11, 2002. Question 26 of the application asked the Applicant if in the last seven years he had been arrested for, charged with, or convicted of any offenses not listed in modules 21, 22, 23, 24, or 25. The Applicant answered, "NO." (See Government Exhibit 1). This was a false answer. The Applicant failed to disclose that he was arrested in September 1995, for Burglary among other charges and in November 2000, for Domestic Violence. The Applicant explained that he misread or misunderstood the question when he answered it. (Tr. p. 45). The Applicant was also in a rush to get the paperwork done. (Tr. p. 51). With regard to Applicant's arrest in September 1995, I find that it occurred so close in time to the seven year cut off that the Applicant could have reasonably left it off of the application. His arrest for Domestic Violence in November 2000 is another matter. The Applicant was still on probation for the offense at the time he completed the security clearance application. I find that the Applicant knew or should have known to reveal the truth about his arrest history. The fact that he did not indicates that he was simply not being truthful at the time he completed the security clearance application. He did not take the process of filing out the application seriously and it obviously shows. Accordingly, I find that the Applicant deliberately attempted to conceal this information from the Government on his security clearance application.

Paragraph 3 (Guideline J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he engaged in criminal conduct.

The Applicant's deliberate falsifications on his security clearance application, discussed above, are a violation of Title 18 of the United States Code, Section 1001, a felony.

The Applicant was arrested as mentioned above in September 1995 for (1) Burglary, Enter a Residence, Room, or any Structure, (2) Using Access Card Obtained Without Consent of Cardholder or Issuer, and (3) Disobey Court Order, Written Terms or Out-of State Order Willfully. The Applicant purchased clothing with a credit card he knew to be stolen. The Applicant pled guilty to a lesser offense of Count 1, and was sentenced to 45 days confinement, 40 days suspended, was placed on three years probation, ordered to pay restitution and was fined \$500.00. Count 2 and 3 were dismissed. (See Government Exhibits 4 and 5).

The Applicant was arrested again in November 2000, and charged with (1) Domestic Violence, Inflicting Injury on Currently or Former Spouse or Cohabitant, and (2) Resisting, Obstructing or Delaying a Peace Officer or EMT While in Discharge of their Duties. The Applicant was under the influence of alcohol when he came home one evening. He started to leave the house and his wife stood in his path to try to stop him. He picked her up, threw her around, pushed her, and choked her neck with his hands until she was able to bite his arm and run for help. The Applicant pleaded guilty in March 2001 to a lesser offense of Count (1) and was granted three years of probation. He was ordered to perform 20 days in a public work program, attend 52 sessions in a Domestic Violence Recovery Program and pay a total of \$325.00 in fines. Count 2 was dismissed. The Applicant and his wife lived apart following this arrest for one year. The Applicant was subsequently charged with failure to appear on or about April 13, 2001, July 3, 2001 and November 12, 2002. The Applicant's fine was referred to collection on July 1, 2003. (See Government Exhibits 4 and 5). The Applicant's Domestic Violence Treatment Program Reports show that he attended the counseling program in 2001 and 2002. (See Applicant's Exhibits D, E, F, G, H, I and J).

In January 1992, the Applicant was arrested and charged with Illegal Discharging of a Firearm in a Negligent Manner, a felony, and (2) Firing of Certain Firearms and /or Fireworks within the City limits. On New Years Eve, while under the influence of alcohol, the Applicant fired off his pistol at the stroke of midnight to celebrate. He was forced to surrender the weapon. The charges were dismissed. (See Government Exhibits 4 and 5).

The Applicant's wife and two coworkers and friends testified that the Applicant is an intelligent and honest person who has rehabilitated himself. He has no problem reading and writing. They know about his criminal past and do not find a problem with recommending him for a security clearance. (Tr. pp.17- 42).

Letters of recommendation from professional colleagues, coworkers and friends of the Applicant indicate that he is considered to be a person of high integrity, a diligent worker, responsible and ambitious. (See Applicant's Exhibits K, L, M, N and O).

Performance evaluations of the Applicant from 1990 to 1993, during the period he was in the military, show that he was a productive member of the Armed Forces and was recommended for retention. (See Applicant's Exhibits A, B and C).

POLICIES

Enclosure 2 of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

Guideline E (Personal Conduct)

Condition that could raise a security concern:

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.

Condition that could mitigate security concerns:

None.

Guideline J (Criminal Conduct)

Conditions that could raise a security concern:

1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;
2. A single serious crime or multiple lesser offenses.

Condition that could mitigate security concerns:

None.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature and seriousness of the conduct and surrounding circumstances
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are

reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned."

CONCLUSIONS

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for clearance may be involved in instances of financial irresponsibility which demonstrates poor judgment or unreliability.

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance.

In this case the Government has met its initial burden of proving that the Applicant has been untruthful on his security clearance application (Guideline E); in violation of a criminal statute (Guideline J). This evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with his security clearance eligibility.

Considering all of the evidence, the Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case against him.

With respect to Guidelines E and J, the Applicant has presented no reasonable excuse as to why he did not reveal his arrest for Domestic Violence in November 2000, in response to question 26 on his security clearance application. With the particular evidence that I have been provided, there is no reasonable excuse for his failure to answer the questions truthfully. It is noted that the application was electronically transmitted however, that had nothing to do with why the Applicant did not reveal the information. Furthermore, the Applicant was on probation for the November 2000 offense and had three failures to appear concerning the offense when he completed the security clearance application. Consequently, the evidence shows that the Applicant has not been completely honest with the Government regarding his criminal history and he sought to conceal the truth. Disqualifying Condition (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* applies. None of the mitigating conditions are applicable. I find that the Applicant deliberately failed to reveal this information to the Government and that he violated Title 18, United States Code, Section 1001, a felony. In addition, the Applicant's history of criminal conduct that includes three other arrests spread over a period of eight years, the most recent of which occurred in 2000 has not been mitigated. Accordingly, I find against the Applicant under Guidelines E and J.

On balance, it is concluded that the Applicant has failed to overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 and 2 of the Government's Statement of Reasons.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: Against the Applicant.

Subpara. 1.a.: Against the Applicant.

Paragraph 2: Against the Applicant.

Subpara. 2.a.: Against the Applicant.

Subpara. 2.b.: Against the Applicant.

Subpara. 2.c.: Against 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 the Applicant.

Darlene Lokey Anderson

Administrative Judge