

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant is 36 years old and has worked as a network designer for a federal contractor since July 2003. Prior to this position he was on active military duty overseas for a number of years. After leaving the military service, he worked for the federal government and other federal contractors. In 2002, he was convicted of a misdemeanor, and in 2003 he was charged with three minor offenses, all of which were dismissed. When he filled out his security clearance application in 2003, he did not disclose the misdemeanor conviction or the three charges. He mitigated the security concerns raised by his criminal history and personal conduct. Clearance is granted.

CASENO: 04-10603.h1

DATE: 03/29/2006

DATE: March 29, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-10603

DECISION OF ADMINISTRATIVE JUDGE

SHARI DAM

APPEARANCES

FOR GOVERNMENT

Jason Perry, Esq.

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 36 years old and has worked as an network designer for a federal contractor since July 2003. Prior to this position he was on active military duty overseas for a number of years. After leaving the military service, he worked for the federal government and other federal contractors. In 2002, he was convicted of a misdemeanor, and in 2003 he was charged with three minor offenses, all of which were dismissed. When he filled out his security clearance application in 2003, he did not disclose the misdemeanor conviction or the three charges. He mitigated the security concerns raised by his criminal history and personal conduct. Clearance is granted.

STATEMENT OF THE CASE

On July 13, 2005, the Defense Office of Hearings and Appeals (DOHA) under Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons under Guidelines J (Criminal Conduct) and E (Personal Conduct) why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant a security clearance to Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted.

On August 1, 2005, Applicant filed his Answer and requested a hearing. He admitted all of the allegations in the SOR. The case was assigned to me on November 4, 2005. A Notice of Hearing was mailed on November 9, 2005, setting the case for hearing on December 1, 2005. At the hearing the Government entered Exhibits (GX) 1-4 into evidence, and Applicant entered Applicant Exhibits (AX) A-K into evidence. He testified in his case-in-chief and called one witness. Although the record was closed, on February 24, 2006, Applicant submitted AX L and M and on March 16, 2006, he submitted AX N-P without objection by Government Counsel on either date. DOHA received the Transcript (Tr.) on

December 21, 2006.

PROCEDURAL MATTERS

At the commencement of the hearing the Government moved to amend the date listed in Subparagraph 2.d. of the SOR from May 13, 2004 to May 13, 2003. Applicant did not object and the motion was granted.

FINDINGS OF FACT

Based on the entire record, including Applicant's admissions in his Answer to the SOR and at the hearing, I make the following findings of fact:

Applicant is 36 years old. From May 1988 until February 1996, he was on active military duty. In 1993, he was sent to Germany where he resided until July 2003. After leaving the armed forces in February 1996, he worked for federal contractors until December 2001. He then took a position with the federal government until December 2002. He was subsequently unemployed for over a year until he obtained a position with the Army and Air Force Exchange Service (AAFES). He worked there from March 11, 2003 until May 13, 2003.⁽¹⁾ He returned to the United States in July 2003, and began his present position as a network designer for a federal contractor.⁽²⁾ He recently married a woman he met in Germany and has a young child.

While in Germany, Applicant was arrested on January 26, 1994 and charged with Aggravated Assault Involving More Than One Individual Striking the Victim.⁽³⁾ (SOR ¶ 1.a) At the time of the arrest Applicant and three other men were involved in a physical altercation, which Applicant stated he did not initiate but attempted to break up.⁽⁴⁾ Applicant was not disciplined for the incident.⁽⁵⁾

In May 2002, Applicant became embroiled in a heated argument with his former girlfriend over the care of their young son. When she attempted to strike him with a screwdriver, he hit her, resulting in an injury that required medical treatment.⁽⁶⁾ Two months later, in July, she brought criminal charges. In March 2003, he went to court and a German judge convicted him of a misdemeanor and fined him 1,300 euros.⁽⁷⁾ He did not pay the fine and appealed the case.

(SOR ¶ 1.b) At his pastor's request, he attended two months of anger management classes and gave the pastor his gun. (8) As of January 13, 2005, the criminal prosecution of the Assault, Duress and Communicating A Threat case, arising from the May incident with his girlfriend, was still pending in Germany. (SOR ¶ 1.g) However, in December 2005, he paid the outstanding fine and the case was concluded. (9) He has not been involved in any other incidents or arrests involving violence since that arrest. (10) He has learned to "walk away." (11)

Applicant submitted a letter written by his pastor on November 11, 2002, to his lawyer regarding the 2002 assault. The pastor stated, "I discontinued counseling in July after [Applicant's girlfriend] informed me that she would not follow counseling instructions and she began to manipulate both the military and German police systems to cause legal troubles for [Applicant]." He suggested the girlfriend obtain mental health treatment and encouraged her to cooperate with [Applicant] in his attempt to establish a relationship with their son. (12) Applicant subsequently terminated his relationship with her and has not seen her since March 2003. (13)

In March 2003, while on his way to church, Applicant was stopped by the United States Military Police and asked to show his insurance card, which he did not have. Some type of altercation ensued and he was charged with Disregarding Traffic Control Device, Indecent Language, and Failure to Maintain Auto Insurance in Germany. The case was not prosecuted. (14) (SOR ¶ 1.e)

On or about May 20, 2003, Applicant was charged with Unlawful Use and Possession of Government Property (License Plates) and Possession of Ammunition Without Proper Paperwork by the United States Military Police in Germany, and a violation of German Weapons law. The charges arose after Applicant was terminated from his position with AAFES on May 13, 2003. According to Applicant, at the end of May he was in the process of returning his government license plates and identification card to AAFES, located on the military base, when he was stopped by the military police and questioned about the use of his government identification card (invalid as of May 13, 2003) to enter the base, and the possession of a firearm. He explained he no longer possessed the firearm because he had given it to his pastor in the summer of 2002, and it was confiscated by the military police in September 2002. (15) He admitted that he had the ammunition for the gun at his home. (16) All of the charges were dismissed. (SOR ¶¶ 1.d, 1.e, and 1.f) (17)

Applicant believes the weapon charge arose because his former girlfriend phoned the military police and told them he owned a gun, and unbeknownst to her, he had disposed of it the previous year. (18)

Applicant admitted that on May 13, 2003, he was terminated from AFFES for abandoning his position during his probationary period without giving them notice that he quit. (SOR ¶ 2.d) He left the job on that day because his former girlfriend's friends were interfering with his work. (19)

In August 2003, Applicant completed a security clearance application (SCA). In executing that form he certified that his answers were "true, complete, and correct" to the best of his knowledge and belief. In response to Question 22. [Your Police Record - Firearms/Explosives Offenses: *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. (Have you ever been charged with or convicted of a firearms or explosives offenses?)*], Applicant answered "No." This was incorrect because he had been charged with a firearm violation in April or May 2003, although it was dismissed after the police discovered he possessed ammunition, but not a gun. (SOR ¶ 2.a)

In response to Question 26. [Your Police Record - Other Offenses (*In the last 7 years have you been arrested for, charged with, or convicted of any offense (s) not listed in modules 23, 22, 23, 24 or 25? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related)*], Applicant "No," which was incorrect as he was convicted of a misdemeanor assault in 2002, and charged with a traffic related incident in 2003. (SOR ¶ 2.b)

Applicant failed to disclose the charges because he misunderstood the questions. He thought he had to list only crimes for which he was arrested, convicted, and sentenced to jail, essentially, felonies. Because the three 2003 charges never involved formal charges or caused him to be arrested, he did not know he was required to disclose them. He did not list the assault conviction, as he was never arrested or sent to jail. (20) When he completed the December 2003 statement about the assault conviction, he was still confused about the scope of the matters he was required to disclose, as the other matters were dismissed and had not become formal charges. (SOR ¶ 2.c) Subsequent to that meeting, he spoke to a lawyer and learned that all incidents, regardless of whether or not they involved an arrest or jail sentence, were to be disclosed. (21) In his December 2004 statement to the Government investigator, he went into detail about the 2003 incidents.

While testifying, Applicant denied that he deliberately failed to disclose the requested information. (22) He stated that he did not intentionally complete the form "the wrong way to make it seem like the right way." (23) Based on Applicant's forthright and elaborate answers, I find his explanation that he was confused by the scope of the questions and the circumstances surrounding the charges credible.

Applicant has attempted to locate his son, but has been unable to do so. In his requests for assistance to his senator and the State Department, he disclosed the assault charges, as well as the other problems he had encountered in trying to gain custody of the child. (24)

Applicant's colleague and friend testified. He considers Applicant to be trustworthy and reliable. (25)

POLICIES

Enclosure 2 of the Directive, *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, sets forth criteria which must be evaluated when determining security clearance eligibility. Within those adjudicative guidelines are factors to consider in denying or revoking an individual's request for access to classified information (Disqualifying Conditions), and factors to consider in granting an individual's request for access to classified information (Mitigating Conditions). By recognizing that individual circumstances of each case are different, the guidelines provide substantive standards to assist an administrative judge in weighing the evidence in order to reach a fair, impartial and common sense decision.

The adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at a balanced decision. Section E2.2. of Enclosure 2 of the Directive describes the essence of scrutinizing all appropriate variables in a case as the "whole person concept." In evaluating the disqualifying and mitigating conduct an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 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.

Granting an applicant's clearance for access to classified information is based on a high degree of trust and confidence in the individual. Accordingly, decisions under the Directive must include consideration of not only the *actual* risk of disclosure of classified information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information. Directive, Enclosure 2, ¶ E2.2.2. The decision to deny an individual a security clearance is not necessarily a judgment about an applicant's loyalty. Executive Order 10865, § 7. Instead, it is a determination that an applicant has not met the strict guidelines established by the Department of Defense 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. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988). The Directive presumes a rational connection between past proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the corresponding burden of rebuttal shifts to the applicant to present evidence in refutation, extenuation, or mitigation sufficient to overcome the position of the government. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); Directive, Enclosure 3, ¶ 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 clearance." *Id.*

Based upon the allegations contained in the SOR and a consideration of the evidence as a whole, the following adjudicative guidelines are pertinent to an evaluation of the facts of this case:

Guideline J - Criminal Conduct: A security concern may exist when a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Guideline E - Personal Conduct: A security concern may exist when conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

The disqualifying and mitigating conditions, either raising security concerns or mitigating security concerns applicable to this case, are discussed in the Conclusions section below.

CONCLUSIONS

After consideration of all the facts in evidence, an assessment of credibility, and the application of the appropriate legal standards, I conclude the following with respect to the allegations set forth in the SOR:

Guideline J: Criminal Conduct

The Government established its case under Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged.*) In 2002, Applicant was convicted of a misdemeanor involving an assault on his girlfriend. The 1994 charge and the three 2003 charges involved potential criminal misconduct, despite their dismissals.

The Government having established its case, the burden shifted to Applicant to mitigate or rebut the allegations. After reviewing all of the mitigating conditions under this guideline, I conclude that two of them apply. (1) Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3 (*The criminal behavior was not recent*). The charges of misconduct occurred in May 2003, almost three years ago, and the criminal conduct underlying the misdemeanor conviction took place in May 2002, almost four years ago. Hence, the criminal behavior is not recent. (2) CC MC E2.A10.1.3.6 (*There*

is clear evidence of successful rehabilitation.) Since leaving Germany in July 2003, Applicant started a new job and has not had any contact with his former girlfriend for three years. He recently married and is the father of a newborn child. In December 2005, he paid the outstanding debt related to the 2002 misdemeanor, which resolved the matter, albeit during this hearing process.

At this time, he has mitigated the security concerns raised in the SOR ¶¶ 1. a through 1.g. In addition, as noted below, I conclude that Applicant did not deliberately falsify the information on his SCA, such that SOR ¶ 1.h is found for him. Accordingly, Guideline J is concluded in Applicant's favor.

Guideline E: Personal Conduct

The Government alleged in SOR ¶¶ 2.a, 2.b and 2.c that Applicant deliberately falsified his SCA by failing to disclose the three 2003 charges and a 2002 misdemeanor conviction. Based on all of the evidence, I find that none of the disqualifying conditions under this guideline apply to those allegations. Given the nature of the three 2003 charges and his misunderstanding of the disclosure requirements, I find that his omissions of the information were not deliberate or intentional. Hence those allegations are resolved in his favor.

The Government alleged in SOR ¶ 2.d that Applicant's termination from employment for abandoning his position within three months of his starting date created a security concern under this guideline. Based on all of the evidence, I find that none of the disqualifying conditions apply. This incident arose shortly after he terminated his relationship with his former girlfriend, who attempted to engage him through her friends, and is not a situation that would indicate a potential lack of reliability or trustworthiness in handling classified information as contemplated under this guideline. This allegation is concluded for him. Accordingly, Guideline E is concluded in favor of the Applicant.

I considered Applicant's credibility, appearance and demeanor while testifying. I considered all of the evidence provided, including, his present age, history of interactions with the law while overseas, the termination of his relationship with a former girlfriend, his disclosure of the assault conviction and other matters to the State department in an attempt to locate his son, and his appreciation for his previous anger issues. After doing so, I find Applicant has sufficiently mitigated the security concerns raised by the Government. Therefore, I am persuaded by the totality of the evidence in this case that it is clearly consistent with the national interest to grant him a security clearance.

For the reasons stated, I conclude Applicant is eligible for access to classified information.

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 as follows:

Paragraph 1 Guideline J (Criminal Conduct) FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: For Applicant

Subparagraph 1.e: For Applicant

Subparagraph 1.f: For Applicant

Subparagraph 1.g: For Applicant

Subparagraph 1.h: For Applicant

Paragraph 2: Guideline E (Personal Conduct) FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: For Applicant

Subparagraph 2.d: For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant a security clearance. Clearance is granted.

Shari Dam

Administrative Judge

1. AX J.
2. GX 1 at 1-3.
3. GX 4.
4. Tr. 14.
5. AX G.
6. GX 2 at 1-2.
7. AX I.
8. GX 3 at 8.
9. Tr. 34; AX N, O and P.
10. Tr. 48.
11. Tr. 49.
12. AX D.
13. GX 2 at 5.
14. Tr. 25.
15. AX B and C.
16. Tr. 60.
17. The evidence detailing the specific dates of these allegations is unclear, but it appears from the record that the allegations arose from an incident occurring at the end of May 2003 or thereabout.
18. Tr. 28.
19. Tr. 63.
20. Tr. 39.

21. Tr. 36.

22. Tr. 41.

23. Tr. 67.

24. Tr. 41.

25. Tr. 76.