

DATE: April 28, 2006

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 04-10752

DECISION OF ADMINISTRATIVE JUDGE

MARTIN H. MOGUL

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, who is now 60 years old, engaged in criminal conduct, including House Breaking and Shoplifting, in 1978, 1995, and 2001. Additionally, Applicant knew that information that he provided to the Government, regarding his criminal history, in a Security Clearance Application (SCA) and in a signed, sworn statement, was materially incorrect and incomplete. Mitigation has not been shown. Clearance is denied.

STATEMENT OF THE CASE

On June 23, 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, issued a Statement of Reasons (SOR) to 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 Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

In a signed, sworn statement, dated July 26, 2005, Applicant responded to the SOR allegations. He requested that his case be decided on the written record in lieu of a hearing. Department Counsel submitted the Department's written case, which was prepared on November 18, 2005. A complete copy of the File of Relevant Material (FORM) was provided to Applicant, and he was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant filed a timely response to the FORM. The case was assigned to this Administrative Judge on January 23, 2006.

In the FORM, Department Counsel offered nine documentary exhibits (Items 1- 9). Applicant subsequently offered a two page statement and nine pages of documentary evidence into the record in response to the FORM, which has been marked collectively as Item A. All of the exhibits have been admitted into evidence without objection.

FINDINGS OF FACT

In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of the Directive. The SOR contains four allegations, 1.a. through 1.d., under Guideline J, and five allegations, 2.a. through 2.e., under Guideline E. In his Response to the SOR (Item 2), Applicant admitted SOR allegations 1.a. through 1.d., 2.a. and 2.c. He denied 2.b, 2.d., and 2.e. The admitted allegations are incorporated herein as Findings of Fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the FORM, and the admitted documents, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 60 years old. He is employed by a defense contractor, and he seeks to retain a DoD security clearance in connection with his employment in the defense sector.

Paragraph 1 (Guideline J - Criminal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he engaged in criminal acts. Applicant's conduct that occurred in 1978, 1995, and 2001, and which has been alleged in the SOR as 1.a., through 1.c. respectively, is included in this paragraph as criminal conduct.

1.a. On April 24, 1978, Applicant was arrested and charged with House Breaking, Larceny. On May 2, 1978, Applicant's access to classified material was suspended by the Department of the Army as a result of this arrest (Item 7). Applicant denied that he was aware that his access had been suspended (Item 2). Applicant was 31 years old when this incident occurred.

1.b. On January 11, 1995, Applicant took a scanner valued at \$259 without paying for it from an army post exchange. He was arrested and charged with Shoplifting. He plead nolo contendere, and he was placed on six months probation (Item 8). Applicant was 48 years old when this incident occurred.

1.c. On November 23, 2001, Applicant was arrested and charged with Larceny of AAFES Property, Shoplifting for attempting to take a bottle of perfume without paying for it from an army post exchange. He was placed on one year probation (Item 9). Applicant was 54 years old when this incident occurred.

1.d. The Government alleges under 2.a. through 2.e., of the SOR that information furnished to the Government by Applicant was materially incorrect or untrue. Such conduct, which is discussed below, constitutes a violation of Federal Law, Title 18, United States Code 1001, which is a felony.

Paragraph 2 (Guideline E - Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has exhibited questionable judgment, untrustworthiness, and unreliability.

2.a. Applicant completed a SCA on September 24, 2002. Question #22 of the SCA asked whether in the last 7 years Applicant was arrested, charged with or convicted of any offense not listed in modules 21, 22, 23, 24, or 25 of the SCA. Applicant answered "No" to this question. He should have answered "Yes" and listed the incidents, in which he was arrested and charged with Shoplifting in 2001, as alleged in 1.c., of the SOR and discussed above.

2.b. Question #32 of the SCA asked whether to Applicant's knowledge he ever had a clearance or access authorization denied, suspended or revoked. Applicant answered "No" to this question. The Government argues that Applicant should have answered "Yes" and included the information regarding his having his access authorization suspended in 1978, as set forth in 1.a., above. In Items 2 and A, Applicant claimed that he was never aware that his access authorization was suspended in 1978. I find that the his consistent denial that he was unaware of his suspension is credible, and the Government has not established that he was aware that his access was suspended.

2.c. In a signed, sworn statement, dated January 7, 2004, after an interview with a Special Agent of the Defense Security Service (DSS) Applicant stated that his 2001 Shoplifting arrest was the first time that he had been engaged in an

incident such as this or any criminal conduct (Item 5). Applicant knowingly and deliberately failed to disclose his arrests for criminal conduct as alleged in 1.a. and 1.b., above.

2.d. In the signed, sworn statement, dated January 7, 2004, Applicant stated that he was not aware that the perfume bottle, which was the reason for his 2001 shoplifting arrest, was in his pocket when he left the post exchange (Item 5). In a subsequent sworn statement, dated May 23, 2004, Applicant admitted that he knew he had not paid for the perfume when he attempted to exit the store (Item 6).

2.e. In the signed, sworn statement, dated January 7, 2004, Applicant stated that he did not intend to steal the scanner when he left the post exchange (Item 5). In a subsequent sworn statement, dated ay 23, 2004, Applicant admitted that he knew he had not paid for the scanner when he attempted to exit the store (Item 6).

POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines that must be carefully considered according to the pertinent Guideline in making the overall common sense determination required.

Each adjudicative decision must also include an assessment of: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (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 (See Directive, Section E2.2.1. of Enclosure 2).

Because each security case presents its own unique facts and circumstances, it should not be assumed that Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented.. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*

BURDEN OF PROOF

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

CONCLUSIONS

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 continued 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. This the

Applicant has not done.

Since this matter is being decided without a hearing, my evaluation is necessarily limited to the contents of the various documents that are found in the case file.

(Guideline J - Criminal Conduct)

Based on the evidence submitted, I conclude that Applicant engaged in criminal conduct, including House Breaking and Shoplifting, in 1978, 1995, and 2001. Additionally, Applicant's failure to list this conduct on his SCA and in a statement made to an Agent of the DSS, is criminal conduct under Title 18 of the United States Code, Section 1001.

Both Disqualifying Conditions (DC) E2.A10.1.2., allegations or admissions of criminal conduct, regardless of whether the person was formally charged, and DC E2.A10.1.2.1., a single serious crime or multiple lesser offenses, apply in this case. Applicant has not mitigated this allegation. Paragraph 1 is found against Applicant.

(Guideline E - Personal Conduct)

With respect to Guidelines E, the evidence establishes that Applicant knowingly provided less than complete material information to the Government in questions on a SCA that he executed on September 24, 2002, and in a sworn statement made on January 7, 2004. The Government relies heavily on the honesty and integrity of individuals seeking access to our nation's secrets. When such an individual intentionally falsifies material facts, it is extremely difficult to conclude that he nevertheless possesses the judgment, reliability and trustworthiness required of clearance holders.

In reviewing the DCs under Guideline E, I conclude that DC E2.A5.1.2.2. applies because the information that Applicant provided in his SCA was known by him to be an omission and concealment of relevant and material facts. DC E2.A5.1.2.3. also applies because the information

that Applicant provided in his sworn statement to a Government investigator was not true. No MCs apply. I resolve Guideline E against Applicant.

FORMAL FINDINGS

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph a: Against Applicant

Subparagraph b: Against Applicant

Subparagraph c: Against Applicant

Subparagraph d: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph a: Against Applicant

Subparagraph b: For Applicant

Subparagraph c: Against Applicant

Subparagraph d: Against Applicant

Subparagraph e: Against 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.

Martin H. Mogul

Administrative Judge