

DATE: June 30, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 04-11129

DECISION OF ADMINISTRATIVE JUDGE

ROBERT J. TUIDER

APPEARANCES

FOR GOVERNMENT

Richard Stevens, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has a 30-year history of criminal activity involving numerous arrests. While in the Marine Corps, he was awarded nonjudicial punishment four times and his career ended following a two-year unauthorized absence terminated by apprehension. He was discharged under other than honorable conditions in lieu of court-martial. When completing his security clearance application, he falsified five responses which dealt with his past criminal conduct and military service. Applicant failed to mitigated criminal and personal conduct concerns. Clearance is denied.

STATEMENT OF THE CASE

On August 10, 2005, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel 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 Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) 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.

Applicant submitted a signed and sworn statement, dated August 19, 2005. He admitted to ¶ 1., ¶¶ 1.a through 1.e., 1.g. through 1.p. and ¶ 2., ¶¶ 2.a. through 2.e. He denied ¶ 1.f. of the SOR.

On March 2, 2006, Department Counsel submitted the government's written case. A complete copy of the file of relevant material (FORM) was provided to the Applicant. He was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. The Applicant did not submit any information within the required time period after receipt of copy of the FORM. The case was assigned to me on April 28, 2006.

FINDINGS OF FACT

Applicant's admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following additional findings of fact:

Applicant is 50-year-old employee of a defense contractor seeking to obtain a security clearance. Since November 2002, he has been employed by his defense contractor employer as a tradesperson. On February 7, 2003, he submitted a security clearance application. That application initiated a background investigation of Applicant's eligibility for a security clearance, which revealed the following information.

Applicant has a history of criminal conduct and involvement with law enforcement spanning a period of 30 years. In September 1973, he was arrested and charged with armed robbery, a felony. One month later, in October 1973, he was again arrested and charged with another armed robbery.

These arrests did not prevent Applicant from enlisting in the Marine Corps in May 1974. His disciplinary infractions while in the Marine Corps include being charged with Article 113, Uniform Code of Military Justice (UCMJ), sleeping on post as a sentry, and was awarded nonjudicial punishment in May 1975; being charged with Article 89, UCMJ, disrespect towards a superior commissioned officer, Article 90, UCMJ, disobeying a lawful order from a superior commissioned officer, Article 91, UCMJ, disrespectful in language towards a non-commissioned officer, and Article 134, UCMJ, incapacitated as a result of previous indulgence in intoxicating liquor, and was awarded nonjudicial punishment in June 1975; charged with Article 86, UCMJ, unauthorized absence from January 8, 1976 to January 19, 1976, and was awarded nonjudicial punishment in January 1976; and being charged with Article 108, loss of government property, and was awarded nonjudicial punishment in April 1976. This is the only SOR allegation (§ 1.f.) Applicant denied. He provided no evidence or explanation in support of his denial. His career in the Marine Corps came to an end after he went on an extended period of unauthorized absence from March 1976 to July 1978, which was terminated by apprehension. In August 1978, he requested and was discharged under other than honorable (OTH) conditions in lieu of court-martial.

In October 1979, Applicant was arrested and charged with unauthorized use of a motor vehicle and malicious injury - caustic agent, both felonies. He plead guilty to both charges and was sentenced to five years confinement (suspended) on the first charge, and sentenced to 30 days confinement, and sentenced to six years probation and one year confinement (suspended) on the second charge.

In October 1980, Applicant was arrested and charged with fugitive from justice. The charge was dismissed. In September 1987, he was arrested and charged with simple assault. The charge was dismissed. In August 1988, he was arrested and charged with simple assault. The charge was dismissed. In April 1992, he was arrested and charged with simple assault. The charge was dismissed.

In October 1995 and in August 2003, Applicant was arrested and charged with no saltwater fishing license. Both times, the charges were dismissed. In December 1998, Applicant was arrested and charged with indecent exposure. He was adjudged guilty of the charge, however, the charge was later dismissed after Applicant attended a psychological evaluation and paid a \$50.00 fine.

Applicant admitted he falsified his security clearance application when he denied he served in the Marine Corps (§ 2.a.), when he failed to list his OTH discharge from the Marine Corps (§ 2.b.), when he failed to list his felony arrests (§ 2.c.), when he failed to list alcohol/drug offenses (§ 2.d.), and when he failed to list in the last seven years offenses not previously listed (§ 2.e). He explained in his statement to DSS that he only went back 10 years and "misunderstood the criminal conduct questions . . . and did not realize that it was a question with no time limitation." Item 6, at 2. No time limitations are specified in the first four questions above asked of Applicant on the security clearance application.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, 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." *Id.* At 527. The president has restricted eligibility for access to classified information to

United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgement, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* Section 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicted upon the applicant meeting the security guidelines contained in the Directive.

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 case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. See *Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. See Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. 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. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. See Exec. Or. 12968 Section 3.1(b).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guideline most pertinent to an evaluation of the facts of this case:

Guideline J: Criminal Conduct

(A) The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. Directive, ¶ E2.A10.1.1.

(B) Conditions that could raise a security concern and may be disqualifying include:

(1) Allegations or admission of criminal conduct, regardless of whether the person was formally charged; E2.A10.1.2.1

(2) A single serious crime or multiple lesser offenses. E2.A10.1.2.2.

(C) Conditions that could mitigate security concerns include:

(1) The criminal behavior was not recent. E2.A10.1.3.1.

(6) There is clear evidence of successful rehabilitation. E2.A10.1.3.6.

Guideline E - Personal Conduct:

(A) The Concern: 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. Directive, ¶ E2.A5.1.1.

(B) Conditions that could raise a security concern and may be disqualifying also include:

(2) *The deliberate omission, concealment, or falsification of relevant and material facts from any personnel 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.* E2.A5.1.2.2.

Conditions that could mitigate security concerns include:

(1) The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress. E2.A5.1.3.5.

CONCLUSIONS

Guideline J - Criminal Conduct

I conclude the government proved its case under Guideline J (Criminal Conduct). Disqualifying Conditions (DC) 1 (*Allegations or admissions or criminal conduct, regardless of whether the person was formally charged*), and DC 2 (*A single serious crime or multiple lesser offenses*) apply. Applicant admissions and record evidence establish all allegations alleged. Applicant has a history of criminal conduct and involvement with law enforcement that spans 30 years. While some of the charges are remote in time and others were dismissed, this pattern of behavior casts doubt regarding his judgment, trustworthiness, and reliability. Furthermore, his falsifying his security clearance application violates 10 U.S.C. § 1001. I find Disqualifying Conditions 1 and 2 under Guideline J apply. Applicant has offered no evidence to extenuate or mitigate his behavior. I find against Applicant on this concern.

Guideline E - Personal Conduct

I conclude under Guideline E (Personal Conduct) the Government proved its case. DC 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 benefit status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities*) applies. The record evidence and Applicant's admissions support a finding that Applicant deliberately failed to provide correct information to five questions on his security clearance application. No plausible explanation exists for his failure to do so.

Applicant's past criminal record and prior military service are clearly material and relevant to a determination regarding his suitability to hold a clearance. While he admits to the Guideline E allegations, his DSS statement undermines that admission by suggesting he simply misread five questions on the security clearance application. Viewing that application as a whole, it is inconceivable that he failed to understand each of those relatively simple questions. Additionally, he fails to offer any explanation why he failed to disclose his three years in the Marine Corps and his OTH discharge. Applicant has offered no evidence to extenuate or mitigate his behavior. I find against Applicant on this concern.

FORMAL FINDINGS

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline J: Against Applicant

Subparagraph 1.a. - q: Against Applicant

Paragraph 2 Guideline E: Against Applicant

Subparagraph 2.a. - e: Against Applicant

DECISION

In light of all the circumstances and facts presented by the record in this case, it is not clearly consistent with the interest of national security to grant a security clearance to Applicant. Clearance is denied.

Robert J. Tuidor

Administrative Judge