

DATE: August 22, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-11181

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

Christopher Fekete, Esq.

SYNOPSIS

Applicant is 42 years old, and works for a defense contractor. Applicant used controlled substances, alcohol, and tobacco from 1977 until he had a religious conversion on Mothers Day, May 10, 1998, and claims abstinence since then. He used controlled substances while he had a security clearance. On his 1986 initial security clearance applications (SCA) and on his 2003 security clearance renewal application Applicant did not read and disclose his controlled substance use, his criminal arrest history, nor his financial delinquency history, but signed the SCAs prepared for him by the personnel officer. Applicant did not mitigate the drug involvement, personal conduct, and criminal conduct security concerns. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On August 10, 2005, DOHA issued a Statement of Reasons⁽¹⁾ (SOR) detailing the basis for its decision-security concerns raised under Guideline H (Drug Involvement), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on September 30, 2005 and elected to have a hearing before an administrative judge. The case was assigned to me on January 23, 2006. On February 24, 2006, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government and the Applicant submitted exhibits that were admitted into evidence. DOHA received the hearing transcript (Tr.) on March 7, 2006.

At the hearing the Government moved to amend the SOR to add additional allegations to Paragraphs 2 and 3 of the SOR. The Applicant had no objection, and I granted the motion. Applicant answered the amendments by denying those allegations on the record. (Tr. 7, 8)

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated here as findings of fact. After a complete and thorough review of the evidence in the record, and full consideration of that evidence, I make the following additional findings of fact:

Applicant is 42 years old and has a 13-year-old autistic son for whom he cares and for whom he is the sole support. Applicant works as a mainframe computer controller for a defense contractor on the 11 p.m. to 7 a.m. shift. He has worked for this employer for 20 years, and he has had a secret clearance all during that employment time from September 10, 1986. Applicant does not have a college degree. (Tr. 23, 39, 45, 52; Exhibits 1, D)

Applicant has a history of use of controlled substances from the age of 14 in 1977 until he became a born again Christian in May 10, 1998. Since 1998 he has not used alcohol, smoked cigarettes, or used controlled substances. His specific controlled substance use and inclusive dates of use are: purchasing and smoking marijuana from age 14 in 1977 until May 10, 1998, three or four times weekly; purchasing and using cocaine from 1983 at age 20 to May 10, 1998, three or four times monthly; using crack cocaine in marijuana cigarettes, a concoction called a "primo", from 1996 to May 10, 1998. Applicant's substance abuse evaluation in August 1998 was part of the court sentence on a domestic battery disposition. That evaluation resulted in a provisional diagnosis of Applicant as moderate cannabis dependent, cocaine dependent, and alcohol abuse, with early partial remission. A recommendation was for Applicant to complete the 75 hour High Risk Outpatient treatment program to address chemical dependency issues with random drug testing. Applicant completed that program. He has not used controlled substances since his religious conversion experience on May 10, 1998. (Tr. 30-36, 52-56; Exhibits 4, 5, E, F)

Applicant has four arrests and court dispositions between 1982 and 1997. He was arrested in 1982 for attempted theft of a tire when he sought a replacement for his flat tire. He received court supervision under state law for that offense. In 1995 Applicant was arrested for criminal damage to property resulting from his kicking his apartment door during an argument with his girlfriend. The charges were dismissed, Applicant was not financially charged by the landlord, nor was he evicted by his landlord for his actions. The next offense was an arrest on August 11, 1997 for domestic battery after a fight with his girlfriend over the keys to his car. She injured one of his fingers, but he got arrested later on the domestic battery charge. He pled guilty to that charge, was sentenced to 18 months conditional discharge, paid \$218 in fines and costs, performed 40 hours of community service. His final arrest was in April 1998 for theft, that involved another dispute with his girlfriend over \$50 he claims she owed him. Applicant does not recall the disposition of that arrest, but it was not prosecuted by the local prosecutor. His girlfriend left him in 2000 and has not paid the \$38 weekly child support. She used drugs regularly, and had several affairs after they married in 1998, but Applicant later discovered she was not divorced from her first husband when she married him. (Tr. 38-45, 56-64; Exhibits 4, 6-8)

Applicant had 13 delinquent debts more than 180 days delinquent in the previous seven years at the time he completed his security clearance application (SCA) 2003. Those debts were also 90 days delinquent at the time he completed the SCAs. He did not disclose them on his SCA. Applicant had a vehicle repossessed in 1998 and owed a balance on it of \$1,673 on a judgment. He owed \$3,483 on a judgment ordered for a bank debt in 1997. He owed \$91 to a grocery store for a check written on insufficient funds. Next, he owed \$132 for an insufficiently funded check written to a grocery store in March 1998. He owed \$51 to a creditor from March 1998. He owed \$277 from August 1998 to a department store for purchases. He owed two debts to a local community college for \$333 and \$393, from May 1999 and February 2002, respectively. He owed two medical bills for \$150 and \$275, from July 1999 and November 1999, respectively. He owed \$174 and \$105 debts to a corporation from August 1999 and July 2000, respectively. He owed another medical bill for \$275 from November 1999. He owed \$140 to a person from June 2000. He owed \$93 for another medical bill from arch 2002. The final bill owed was for \$123 to a telephone company from October 2002. The medical bills were for his autistic son, who is totally dependent upon Applicant for even the simplest tasks, such as brushing his teeth. While obtaining financing for the house he purchased he was able to pay eight of these debts. (Tr. 49, 116; Exhibits 4, 9, 10, A)

Applicant did not disclose on his three SCAs the illegal drug use, the delinquent debts, nor the arrests as they had occurred up to 1986 and 2003, respectively. Applicant claimed he merely signed the SCAs when they were given to him, and went home after the end of his shift at 7 a.m. on May 9, 2003. The 1986 SCAs he completed when he started working for his present employer. Specifically, on the June 30 and August 1, 1986's SCAs in answer to:

Question 14 (have you ever been arrested, charged, cited, or held by Federal, state, or local law enforcement or juvenile authorities regardless of whether the citation was dropped or dismissed, or you were found not guilty?) he answered "no" instead of listing the August 1982 attempted theft arrest;

Question 15 asked if Applicant ever used any narcotic, depressant, stimulant, hallucinogens or cannabis except as prescribed by a license physician, and he answered "no", when he had been using marijuana since 1977 at that time, and cocaine since 1983. (Tr. 24-28, 65-71; Exhibits 2, 3, F)

On the May 9, 2003, SCA Applicant did not list his August 11, 1997, domestic battery arrest, and April 17, 1998 theft arrest in answer to Question 26 (In the last 7 years, have you been arrested for, charged with, or convicted of any offenses not otherwise listed on the SCA), having answered "no". Nor did Applicant list his controlled substance use of marijuana from 1996 to May 1998, his cocaine use from 1996 to 1998, nor his "primo" use from 1996 to 1998, in answer to Question 27 (In the last 7 years have you used any controlled substance, etc) to which Applicant answered "no". Applicant answered "no" to Question 28 about his illegal use of a controlled substance while possessing a security clearance, when he did use marijuana, cocaine, and "primos" since he was granted a secret security clearance on September 10, 1986. On the same SCA he did not disclose in answer to Question 35 (In the last 7 years have you had any property repossessed for any reason?) his automobile's repossession in 1998. In answer to Question 37 (In the last 7 years, have you had any unpaid judgments against you?) he answered "no" and failed to list the bank's judgment against him for \$3,483. In answer to Question 38 (In the last 7 years have you been over 180 days delinquent on any debts?) and Question 39 (Are you currently over 90 days delinquent on any debts?), he answered "no" and did not list the 13 debts enumerated in the SOR. (Tr. 24-28, 52-100; Exhibits 1-3, E, F)

Applicant did not disclose on his March 29, 2004, statement given to a Government investigator his 1995 arrest for criminal damage to property resulting from his domestic fight with his girlfriend during which he kicked the door of their apartment. Those charges were dismissed and Applicant claims he was not aware of them being on his arrest record. (Tr. 71-76; Exhibits 4, F)

Applicant admits he did not read, correct or change any information on these three SCAs when the documents were presented to him by the personnel officer. He signed the SCA and made no changes. He disclosed none of the arrest information, the delinquent debts, nor any of the arrests.

The personnel officer who completed the SCAs for Applicant and gave them to Applicant to sign testified she took the information from the file documents on Applicant as she did on each employee. Applicant admitted he did not read the SCAs and merely signed them. The 1986 SCA were submitted when he first started working for his employer, and were a simpler form than the 2003 SCA. Each SCA contains a certification signature block with language in which each Applicant states every statement on the SCA is "true, complete, and correct to the best of my knowledge and belief and are made in good faith." (Tr. 77-100; Exhibits 1-3, F)

Applicant is highly regarded by his supervisors who testified at the hearing. He is regarded as an exceptional and valuable employee. Neither supervisor noticed any duty performance adverse effect during the time Applicant used illegal drugs. He has no access at present, nor did he have in the past, to any classified information. (Tr. 94, 97, 105, 108, 109, 112)

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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information with Industry*

§ 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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.

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 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline that must be carefully considered in making the overall common sense determination required.

In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. Those assessments include: (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 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.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established 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. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996). 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 § 3.1(b).

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

Guideline H: Drug Involvement: *The Concern. Improper or illegal involvement with drugs, raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information. E2.A8.1.1*

Guideline E: Personal Conduct: *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. E2.A5.1.1*

Guideline J: Criminal Conduct: *The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. E2.A10.1.1*

In 2000, a federal statute was enacted that prohibited the Department of Defense from granting or continuing a security clearance for any applicant who is an unlawful user of, or is addicted to, a controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802). 10 U.S.C. § 986(c)(2) (2004).

CONCLUSIONS

Regarding the drug involvement, Disqualifying Conditions (DC) 1 (Any drug use. E2.A8.1.2.1) and DC 2 (Illegal drug purchase. E2.A8.1.2.2) apply. Applicant has an evaluation of drug dependence from the program he attended in 1998, so DC 4 (Evaluation of drug dependence by a licensed clinical social worker who is a staff member of a recognized drug treatment program E2.A8.1.2.4) applies. Applicant did use marijuana and cocaine during the 1977 to 1998 period.

The Mitigating Conditions (MC) that might be applicable are MC 1 (The drug involvement is not recent. E2.A8.1.3.1) and MC 3 (A demonstrated intent not to abuse any drugs in the future. E2.A8.1.3.3). However, Applicant did not present a current evaluation to counter the 1998 evaluation to which the court ordered him as part of the domestic violence sentence, and therefore, there is no written favorable prognosis or current information on Applicant's use or dependence on controlled substances. The burden is on Applicant to present persuasive evidence on his current drug involvement, if any, after his 1998 diagnosis. He has not done so, and I am not persuaded in considering his history that any MC should apply. I am not persuaded that Applicant has mitigated these security concerns. Therefore, I conclude this security concern against Applicant.

The personal conduct security concern under Guideline E is based on Applicant's failure to disclose any unfavorable information on his June and August 1986 SCAs, and on his May 2003 SCA, and in the 2004 statement he gave to a Government investigator. I conclude his failures to disclose the arrests, drug use, and financial delinquencies were deliberate, and DC 2 (The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, or similar form used to determine security clearance eligibility or trustworthiness E2.A5.1.2.2) and DC 3 (Deliberately providing false or misleading information concerning relevant and material matters to an investigator or other official representative in connection with a personnel security or trustworthiness determination. E2.A5.1.2.3) apply. Applicant had a duty to make full disclosures on his SCA, to read the form fully and carefully before signing it, and in signing it he certified three times that the information on it was true, complete, and correct, and the answers were made in good faith. On each SCA Applicant signed and the certification was false. I am not persuaded by Applicant's attempts to shift the obligation to provide a truthful SCA to his company's personnel officer, and make himself a mere naive signatory. He had a clear duty in signing these SCA, and on each one he violated that duty. He also had a duty to make full and truthful disclosures to the Government investigator, and he did not do so.

Applicant never disclosed anything unfavorable about himself during the entire time he had a security clearance and completed three SCAs. I am persuaded by the evidence and his admissions the falsifications were deliberate.

No MC apply. Therefore, I conclude this security concern against Applicant.

The final security concern is criminal conduct under Guideline J. DC 1 (Allegations or admission of criminal conduct, regardless of whether the person was formally charged. E2.A10.1.2.1) and DC 2 (A single serious crime or multiple lesser offenses. E2.A10.1.2.2) apply. Applicant had four criminal arrests between 1982 and 1998. This security concern also includes the deliberate falsifications on his SCA about his criminal history, his past drug use, and his financial delinquencies, which constitute felonies for each falsification under 18 U.S.C. § 1001.

In the totality and continuing nature of Applicant's criminal conduct since 1977 I am not persuaded any MC apply. As a result, I conclude this security concern against Applicant.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline H: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: Against Applicant

Subparagraph 1.f: Against Applicant

Subparagraph 1.g: Against Applicant

Subparagraph 1.h: Against Applicant

Subparagraph 1.i: Against Applicant

Subparagraph 1.j: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.a(1): Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.b(1): Against Applicant

Subparagraph 2.b.2: Against Applicant

Subparagraph 2.c: Against Applicant

Subparagraph 2.d: Against Applicant

Subparagraph 2.e: Against Applicant

Subparagraph 2.e.1: Against Applicant

Subparagraph 2.e.2: Against Applicant

Subparagraph 2.f: Against Applicant

Subparagraph 2.f.1: Against Applicant

Subparagraph 2.f.2: Against Applicant

Subparagraph 2.f.3: Against Applicant

Subparagraph 2.g: Against Applicant

Subparagraph 2.h: Against Applicant

Subparagraph 2.i: Against Applicant

Subparagraph 2.i.1: Against Applicant

Subparagraph 2.j: Against Applicant

Subparagraph 2.j.1: Against Applicant

Subparagraph 2.j.2: Against Applicant

Subparagraph 2.j.3: Against Applicant

Subparagraph 2.j.4: Against Applicant

Subparagraph 2.j.5: Against Applicant

Subparagraph 2.j.6: Against Applicant

Subparagraph 2.j.7: Against Applicant

Subparagraph 2.j.8: Against Applicant

Subparagraph 2.j.9: Against Applicant

Subparagraph 2.j.10: Against Applicant

Subparagraph 2.j.11: Against Applicant

Subparagraph 2.j.12: Against Applicant

Subparagraph 2.j.13: Against Applicant

Subparagraph 2.k: Against Applicant

Subparagraph 2.l: Against Applicant

Subparagraph 2.m: Against Applicant

Subparagraph 2.m.1: Against Applicant

Paragraph 3. Guideline J: AGAINST APPLICANT

Subparagraph 3.a: Against Applicant

Subparagraph 3.b: Against Applicant

Subparagraph 3.c: Against Applicant

Subparagraph 3.d: Against Applicant

Subparagraph 3.e: Against 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.

Philip S. Howe

Administrative Judge

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).

