

DATE: September 29, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 04-12778

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 51 years old, married with two adult children and two grandchildren. He works as a locksmith and general maintenance man for a defense contractor. His work performance is very good. However, he smoked marijuana from 1992 to 1999, was arrested for possession of it in 1996, and deliberately falsified his answers on his 2002 security clearance application when asked about any past drug arrests, convictions, or usage in the previous seven years. Applicant did not mitigate the personal 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 5, 2005, DOHA issued a Statement of Reasons⁽¹⁾ (SOR) detailing the basis for its decision—security concerns raised under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on September 27, 2005 and elected not to have a hearing before an administrative judge. Then, he submitted a request on February 21, 2006, to have a hearing. The case was assigned to me on March 9, 2006. On April 26, 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 May 8, 2006.

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 51 years old, married, and works for a defense contractor as a locksmith and general maintenance man on a government installation. He has two adult children, and two grandchildren. He has worked at his job since 1984. (Tr. 15, 18, 29; Exhibit 1)

Applicant was arrested in October 1996 in his automobile when a small amount of marijuana was found in it by the police. His arrests were for speeding and possession of marijuana. He told the arresting officer the marijuana belonged to his son, but it was Applicant's marijuana. In 1998 he pled guilty to the possession charge, the speeding charge was dropped, and he was put on probation with deferred judgment under state law. (Tr. 19-22; Exhibits 2, A)

In June 1999 Applicant went to Florida for vacation. While there, he smoked marijuana once with a friend. When he returned home, the probation officer ordered a drug screen test as part of the probation requirements. Applicant tested positive for marijuana, and his probation was extended for two years. The extension included the requirement to report monthly to a clinic for drug screen tests. In June 2000 his test was positive. Applicant claims he did not smoke marijuana then, so he paid for his own drug test. The test was negative, according to Applicant. There is no test report from 2000 submitted by Applicant. He also claims the state court dismissed the case then. Since then Applicant has been attending his employer's employee assistance program on a monthly basis, where he participates in discussions on drugs and alcohol, and watches movies on the same subjects. (Tr. 22-25; Exhibits 2, A, B)

Applicant used marijuana from 1992 to 1999. He started smoking it at age 36 with his wife in 1992. He started smoking on a weekly basis, then in 1994 he increased his usage to several times per week. In 1996 he used marijuana weekly until the June 1999 incident. He decided to stop using it then and "grow up." He no longer associates with his marijuana smoking friends, and does not intend to use it in the future. Applicant's voluntary drug screen test in February 2006 shows a negative result for marijuana and other controlled substances. (Tr. 26-29; Exhibits 2, A, C)

Applicant completed his security clearance application (SCA) on April 3, 2002. He completed it at home with the help of his wife, apparently having adequate time to complete it. He answered Question 24 (Have you ever been charged with or convicted of any offense related to alcohol or drugs?) with a "no" answer, explaining at the hearing he did not understand the question because his charges were dismissed in 2000, and he thought that meant his record was clean. Question 27 (Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, including marijuana?) was also answered "no", meaning since 1995 Applicant was telling the Government he had not used marijuana. Applicant was afraid to list his marijuana usage because the information would affect his employment. (Tr. 30-33; Exhibits 1, 2, A)

Applicant submitted several character and performance letters, and letters of appreciation from his customers on base. He also submitted several commendation certificates, completion certificates for technical courses he took, and other documents recognizing his support of activities on base. He submitted numerous customer survey sheets for 2004 and 2005 to show the quality of his work. (Tr. 15, 18; Exhibits D-H)

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 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

CONCLUSIONS

The Government established by substantial evidence and Applicant's admissions each of the allegations in the SOR. The first security concern is Applicant's personal conduct in making false answers to the SCA. Applicant admitted he deliberately falsified the answers to Questions 24 and 27 on the SCA. While Applicant asserts he misunderstood Question 24, his claim is not persuasive. The question is simple and straightforward in its request for information about a charge or conviction. Applicant was charged with marijuana possession, and pled guilty to it. Therefore, he should have answered "yes".

Applicant also admits he deliberately falsified his answer to Question 27 because he was afraid it might affect his employment. Therefore, Disqualifying Condition (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) applies to both his answers to these SCA questions.

Applicant's statement to the Government investigator was given in June 2002. He wrote a letter in March 2006 trying to

explain his negative answers to Questions 24 and 27. His testimony at the hearing gave further definition to his thought process. But none of it is persuasive that he did not intend to deceive the government. The major negative information about his life Applicant kept hidden from the Government when it asked him direct questions about any experiences he had with controlled substances. While the answers were four years ago, he did not provide correct information voluntarily, nor promptly on a good-faith basis before the Government investigator confronted him in the June 2002 interview. Therefore, I conclude no Mitigating Conditions (MC) apply, and resolve this security concern against Applicant.

The next security concern is the criminal conduct for the 1996 marijuana arrest, and the deliberate falsification of answers to Questions 24 and 27 on the SCA. These deliberate falsifications are alleged to be violations of 18 U.S.C. § 1001. This section of the federal code holds a person criminally liable for knowingly and willfully making false statements or representations to any agency of the U.S. Government. On his SCA Applicant made knowing and willful false statements.

The DC applicable here are 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).

The MC that might apply are MC 1 (The criminal behavior was not recent. E2.A10.1.3.1) and MC 6 (There is clear evidence of successful rehabilitation. E2.A10.1.3.6). Applicant is not using marijuana anymore. His February 2006 drug test shows at that time he was not using any controlled substance. He has rehabilitated his drug usage situation. However, his deliberate falsification on his SCA is not mitigated under those MC. Therefore, I conclude this security concern against Applicant.

FORMAL FINDINGS

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

Paragraph 1. Guideline E: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.a.1: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.b.1: Against Applicant

Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: 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).