

DATE: August 18, 2006

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-00613

DECISION OF ADMINISTRATIVE JUDGE

RICHARD A. CEFOLA

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The Applicant's financial difficulties were caused by circumstances largely beyond his control, unemployment or underemployment for more than five years. He has now addressed all of his admitted past due debts, and has a positive monthly cash flow of about \$2,000. His last alcohol related arrest was nearly ten years ago; and as such, his past alcohol abuse is not of current security significance. More problematic, however, is his Personal Conduct and related Criminal Conduct. The Applicant was less than candid with the Government when he executed his May 2003 Security Clearance Application (SCA). This wilful falsification is a violation of 18 U.S.C. 1001. Mitigation is not shown. Clearance is denied.

STATEMENT OF THE CASE

On September 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 the Applicant, which detailed the 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 the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

Applicant filed an Answer to the SOR on October 17, 2005.

This case was originally assigned to another Judge, however, it was reassigned to the undersigned on May 1, 2006. A notice of hearing was issued on May 4, 2006, and the case was heard on May 24, 2006. The Government submitted documentary evidence. Testimony was taken from the Applicant, who also submitted documentary evidence. The transcript (TR) was received on June 2, 2006. The issues raised here are whether the Applicant's past Financial Considerations, past Alcohol Consumption, his Personal Conduct and related Criminal Conduct militate against the granting of a security clearance. [The Applicant admits the allegations in subparagraphs 1.b.~1.c., 2.b., 4.a., 4.c., 4.e., 4.f., and 4.i. He denies the allegations in all of the other subparagraphs.]

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents and the live testimony. The Applicant is 57 years of age, and is employed by a defense contractor who seeks a security clearance on behalf of the Applicant. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact.

Guideline G - Alcohol Consumption

1.a.~1.e. The Applicant consumed alcohol, at times to excess and to the point of intoxication from about 1970 or 1971 to about June of 1997 (TR at page 44 line 4 to page 45 line 5). In about 1970 or 1971, the Applicant was arrested for, and subsequently pled guilty to, Driving Under the Influence (DUI) (TR at page 39 line 22 to page 40 line 18). He consumed beer prior to this arrest (*Id*). In June of 1987, the Applicant was arrested, in part, for DUI, but was found guilty of an amended charge of Reckless Driving (TR at page 40 line 19 to page 41 line 22). He consumed alcohol and admits to being under its influence (*Id*). In December of 1994, the Applicant was again arrested, in part, for, and subsequently pled nolo contendere to, DUI (TR at page 41 line 23 to page 42 line 19, and Government Exhibit (GX) 3). Again, he admits he was under the influence of alcohol when he drove (*Id*). Finally, in February of 1997, the Applicant was arrested, in part, for, and subsequently pled no contest to, DUI (TR at page 42 line 20 to page 44 line 3, at page 45 lines 6~17, and GX 6). The Applicant consumes alcohol more moderately now, has never been diagnosed as being an alcoholic, and has had no alcohol related incidents since 1997 (TR at page 44 line 4 to page 45 line 11).

Guideline J - Criminal Conduct

2.a.~2.c. Above and beyond the alcohol related arrests listed in Paragraph 1, above, in July of 1988, the Applicant was arrested, and subsequently pled guilty to an amended charge of Disturbing the Peace (TR at page 45 line 24 to page 47 line 17, and GX 6). He was involved in an altercation at a festival, where he was the victim of mistaken identity (*Id*). Most recently, in June of 2001, the Applicant was cited for, and subsequently pled nolo contendere to, Entering Any Lands, et al and to Theft (TR at page 47 line 18 to page 48 line 18, and GX 7). He stopped by the side of the road, and went into what he thought was an abandoned orchard to pick cherries (*Id*).

Guideline E - Personal Conduct & Guideline J - Criminal Conduct

2.d. and 3.a. In answer to question 24 on a May 2003 SCA, the Applicant disclosed his alcohol related conviction in 1994, but failed to list his alcohol related convictions in 1970 or 1971, in 1987, and in 1997 (GX 9 at page 6). He avers this was an "oversight" and/or he thought he only had to go back seven years in listing alcohol related offences (TR at page 48 line 19 to page 51). While it is true that the Applicant did disclose the 1970~1971 and 1987 convictions to the Government previously, it is inexplicable that he did not disclose his most recent, 1997, alcohol related conviction (TR at page 61 lines 3~15, *see also* GX 1 at page 5, GX 2 at page 1, and GX 6 at page 5). He continues this denial in his June 2004 sworn statement (GX 13 at page 4). This lack of candor is a violation of 18 U.S.C. 1001.

Guideline F - Financial Considerations

The Applicant's financial difficulties were caused by circumstances largely beyond his control, unemployment or underemployment for more than five years (TR at page 55 line 9 to page 56 line 16, *see also* AppX C at page 2). He has now addressed all of his admitted past due debts, and has a positive monthly cash flow of about \$2,000 (TR at page 57 lines 8~17).

4.a. The Applicant's debt to the Internal Revenue Service, in the amount of about \$7,300, as of October 2005, has been "paid in full" by way of garnishment (TR at page 51 line 22 to page 52 line 5, and AppX A at page 7).

4.b. The Applicant avers credibly that his debt in the amount of about \$1,333 to a bank for a credit card has been paid (TR at page 52 lines 6~11). This debt does not appear on the Applicant's May 2006 credit report (GX 17).

4.c. and 4.f. The Applicant's debt to a second bank in the amount of about \$7,017 has been paid (TR at page 52 lines 12~18, at page 53 lines 15~23, and AppX A at pages 3 and 5). The current balance reflected on his most recent credit

report is "\$.00" (AppX A at pages 3 and 5).

4.d. The Applicant avers credibly that his debt in the amount of about \$85 to a phone company has been paid (TR at page 52 line 14 to page 53 line 2). This debt does not appear on the Applicant's ay 2006 credit report (GX 17).

4.e. and 4.g. The Applicant avers credibly that his debt in the amount of about \$128 to another phone company/cable provider has been paid (TR at page 52 line 14 to page 53 line 2, and at page 53 line 24 to page 54 line 7).

4.h. The Applicant's debt to a third bank in the amount of about \$1,897 has been paid (TR at page 54 lines 8~14, and AppX G at page 3). The current balance is "\$0.00" (AppX G at page 3).

4.i. Finally, the Applicant's debt for an educational loan in the amount of about \$4,269 has been "paid in full," as reflected by a letter from the creditor (TR at page 54 lines 15~19, and AppX A at page 6).

Mitigation

The Applicant has submitted four letters of support, only one of which is signed, which attest to his trustworthiness (AppX F at pages 3 and 4, AppX G at page 4, and AppX H at page 2).

POLICIES

Enclosure 2 and Section E.2.2. of the 1992 Directive set forth both policy factors, and conditions that could raise or mitigate a security concern. Furthermore, as set forth in the Directive, "[each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate:

- a. Nature, extent and seriousness of the conduct and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age and maturity of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequence involved.
- e. Absence or presence of rehabilitation.
- f. Probability that circumstances or conduct will continue or recur in the future."

The Administrative Judge, however, can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature.

The Government must make out its case under Guideline E (Personal Conduct), Guideline F (Financial Considerations), Guideline G (Alcohol Consumption) and Guideline J (Criminal Conduct); which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation, which demonstrates that the past adverse conduct is unlikely to be repeated, and that the Applicant presently qualifies for a security clearance.

Personal Conduct is conduct involving questionable judgement, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations. The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations at all times and in all places.

CONCLUSIONS

Considering first the Applicant's Financial Considerations, he has a "history of not meeting [his] financial obligations," and an "[i]nability . . . to satisfy debts." These are the first and third disqualifying conditions under Financial Considerations. His financial difficulties, however, were caused by circumstances "largely beyond the . . . [Applicant's] control (e.g. loss of employment . . .)," the third mitigating condition. The last mitigating condition is also applicable as the Applicant has "initiated a good-faith effort to repay overdue creditors or otherwise resolve [his] debts." He now has a positive monthly cash flow of about \$2,000. Mitigation is shown; and as such, Guideline F is found for the Applicant.

Considering next the Applicant's admitted Alcohol Consumption, it is evidenced by four alcohol related convictions spanning the period from about 1970 or 1971 to 1997. The first and fifth disqualifying conditions under Alcohol Consumption are therefore applicable as his DUIs were "alcohol-related incident[s] away from work, such as driving while under the influence . . .," and there is evidence of "[h]abitual or binge consumption of alcohol to the point of impaired judgment. However, these are countered the third mitigating condition as there are "[p]ositive changes in behavior supportive of sobriety." He has never been diagnosed as being an alcoholic, he now drinks moderately, and he has had no alcohol related incidents since 1997. Mitigation is shown. Guideline G is also found for the Applicant.

As to his Personal Conduct and related Criminal Conduct, when the Applicant filed out his May 2003 SCA, he withheld from the Government that his most recent DUI conviction was in 1997, and not 1994, as he disclosed. The second Disqualifying Condition is therefore applicable as there is a "deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire . . . or similar form used to conduct investigations . . . determine security clearance eligibility or trustworthiness . . ." No Mitigating Conditions are applicable. When given an opportunity to correct the record in his June 2004 sworn statement, he continued his denial. As there was a wilful falsification, Guideline E is found against the Applicant.

As to his Criminal Conduct, his false representation on his SCA is also a violation of 18 U.S.C. 1001. The first Disqualifying Condition is therefore applicable as there is an "admission of criminal conduct, regardless of whether the person was formally charged." Again, no Mitigating Conditions are applicable; and as such, Guideline J is found against the Applicant.

Considering all the evidence, the Applicant has not rebutted the Government's case regarding his Personal Conduct and related Criminal Conduct. The Applicant has thus not met the mitigating conditions of Guidelines E and J, and of Section E.2.2. of the Directive. Accordingly, he has not met his ultimate burden of persuasion under Guidelines E and J.

FORMAL FINDINGS

Formal Findings required by paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: FOR THE APPLICANT

- a. For the Applicant.
- b. For the Applicant.
- c. For the Applicant.
- d. For the Applicant.
- e. For the Applicant.

Paragraph 2: AGAINST THE APPLICANT

- a. For the Applicant.
- b. For the Applicant.

c. For the Applicant.

d. Against the Applicant.

Paragraph 3: AGAINST THE APPLICANT

a. Against the Applicant.

Paragraph 4: FOR THE APPLICANT

a. For the Applicant.

b. For the Applicant.

c. For the Applicant.

d. For the Applicant.

e. For the Applicant.

f. For the Applicant.

g. For the Applicant.

h. For the Applicant.

i. For the Applicant.

Factual support and reasons for the foregoing are set forth in **FINDINGS OF FACT** and **CONCLUSIONS**, supra.

DECISION

In light 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 the Applicant.

Richard A. Cefola

Administrative Judge