

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant was arrested four times between 1989 and 2000 for relatively minor criminal offenses. The government failed to prove he deliberately falsified a security clearance application he submitted in July 2003. Clearance is granted.

CASENO: 05-01927.h1

DATE: 04/14/2006

DATE: April 14, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-01927

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Jason Perry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was arrested four times between 1989 and 2000 for relatively minor criminal offenses. The government failed to prove he deliberately falsified a security clearance application he submitted in July 2003. Clearance is granted.

STATEMENT OF THE CASE

On August 23, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline J (criminal conduct) and Guideline E (personal conduct). Applicant submitted responses to the SOR that were received by DOHA on October 3, 2005, and November 4, 2005. He admitted all Guideline J allegations, denied all Guideline E allegations, and requested a decision based on the written record without a hearing.

Department Counsel prepared a File of Relevant Material (FORM) on January, 24, 2006, that was mailed to Applicant on January 26, 2006. Applicant acknowledged receipt of the FORM on February 2, 2006. He thereafter did not object to anything contained in the FORM or submit additional information for consideration within the 30-day period provided to him. The case was assigned to me March 17, 2006.

FINDINGS OF FACT

Applicant's admissions to the various SOR allegations are incorporated herein. Additionally, after a thorough review of the record, ⁽²⁾ I make the

following findings of fact:

Applicant is a 39-year-old man who presumably is employed by a defense contractor in some capacity.⁽³⁾ From February 1998 until sometime after he submitted a security clearance application in July 2003, Applicant was employed as a "cleaner" by two different employers outside the defense industry. Applicant married a citizen of Colombia in February 2003. In August 2004, he claimed he had separated from her in November 2003 and was planning on obtaining a divorce. The present status of his marriage is unknown, as is his contact and/or relationship with any of her relatives who may or may not reside in Colombia.

Applicant admitted he spent a weekend in jail and was sentenced to time served in about 1989 for jumping a subway turnstile. He admits, and his arrest record discloses, he was arrested for criminal trespass 2nd and criminal possession of controlled substance on August 23, 1991. The only explanation about this offense is contained in Applicant's response to the SOR in which he states he went into an empty apartment after his mother threw him out. The nature of the controlled substance and the disposition of the offenses are unknown.

Applicant admitted he was charged with and found guilty of 6th degree larceny and fined \$135.00 as alleged in SOR subparagraph 1.c. However, he listed the date of the charge as December 3, 1989, vice December 3, 1998, as alleged in the SOR. In a statement he provided in August 2004, Applicant stated he was never in the city where the alleged offense occurred in 1998, and that he had never been arrested in that state before 2000. The FORM also contains a handwritten court document prepared by an unknown individual in a clerk's office that lists the date of this offense as December 3, 1998. The basis for the information written on the form is unknown.

Applicant admitted he was arrested on or about September 8, 2000, charged with 6th degree larceny, found guilty, and fined \$185.00. He denies ever entering the store from which the shirts in issue were stolen, and claims instead to have purchased the shirts from an individual without knowing they had been stolen. He also claimed the only reason he pled guilty was because he didn't want to hire an attorney and take more time off from work.

The FORM contains a portion of a security clearance application (SF 86) that was apparently submitted by or on behalf of Applicant on or about July 23, 2003 (Item 4). Missing from the SF 86 are the question inquiring about additional remarks, the warning that the answers provided were subject to the provisions of 18 U.S.C. § 1001, and the signature page.

The SF 86 contains the answer "No" in response to question 26, inquiring about arrests, charges, and convictions that occurred in the preceding seven years. Applicant's 1998 conviction, assuming that is the correct date of the offense, and his 2000 conviction should have been disclosed in response to this question. In his response to the SOR, Applicant denied he deliberately failed to disclose his arrest history and went on to state he didn't remember what happened in 1989. In a statement he provided in August 2004 (Item 5), Applicant explained he forgot to list the 2000 arrest in the SF 86. In that same statement, Applicant denied he had been arrested in 1998 as alleged.

SOR subparagraph 1.d alleges Applicant falsified the SF 86 by answering "No" in response to question 37, inquiring about unpaid judgments in the preceding seven years. Applicant's credit report dated July 18, 2005, discloses a judgment was entered against him in December 1999. He admitted the judgment remained unpaid in his response to the SOR. However, he denied that he deliberately failed to disclose the judgement in the SF 86 and

the FORM contains no other information about this allegation.

SOR subparagraph 1.a alleges Applicant falsified the SF 86 by answering "No" in response to question 20, inquiring about being fired from employment. While the SOR alleges he was fired from a job in 2001, there is no information in the FORM to substantiate that allegation. SOR subparagraph 1.c. alleges Applicant falsified the SF 86 by answering "No" in response to question 27 inquiring about his use of controlled substances in the preceding seven years. The SOR then goes on to allege he used marijuana from 1996 until 1999, but the FORM does not contain any information to substantiate that allegation.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline J, pertaining to criminal conduct, and Guideline E, pertaining to personal conduct, with their respective DC and MC, are most relevant in this case.

BURDEN OF PROOF

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽⁴⁾ The government has the burden of proving controverted facts.⁽⁵⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁽⁶⁾ although the government is required to present substantial evidence to meet its burden of proof.⁽⁷⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁸⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽⁹⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁰⁾

No one has a right to a security clearance⁽¹¹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they

must, on the side of denials." ⁽¹²⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security. ⁽¹³⁾

CONCLUSIONS

Criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the nation's secrets. A history of illegal behavior indicates an individual may be inclined to break rules.

Applicant was convicted of and sentenced for the relatively minor criminal offenses alleged in SOR subparagraphs 1.a, 1.c, and 1.d. Although the disposition of the charges alleged in SOR subparagraph 1.b are unknown, Applicant's explanation about the allegation sufficiently establishes he at least committed the alleged trespass. DC1: *Allegations or admissions of criminal conduct, regardless of whether the person was formally charged*; and DC 2: *A single serious crime or multiple lesser offenses* apply.

Applicant denied he intentionally falsified the SF 86 that was submitted. The SF 86 in the file, for unknown reasons, does not contain the question that provides space for explanations, the 18 U.S.C. 1001 warnings, or a signature page containing Applicant's certification that the answers were true, complete, and correct. It does, however, contain an authorization for release of information signed by Applicant on July 23, 2003. There is no basis in the record for speculation on the reason for the omissions from the SF 86, or what they might or might not reveal if they were included. The burden is on the government to prove controverted facts, and the government is the party that would be expected to possess the missing information. The omitted material creates uncertainty about the status and content of the SF 86 at the time it was allegedly submitted by Applicant. Accordingly, I cannot find the government has met its burden to produce record evidence to support the SOR subparagraph 1.e allegation.

Applicant's last criminal offense occurred in September 2000, and there is no indication he has engaged in any criminal conduct since that time. Mitigating Condition (MC) 1: *The criminal behavior was not recent* applies. Considering the minor nature of the criminal offenses Applicant committed, as particularly evidenced by the minimal fines that were imposed for the most recent offenses, and the length of time since Applicant's last criminal conduct, I find he has mitigated the security concern caused by his criminal conduct. Guideline J is decided for Applicant.

Personal conduct under Guideline E is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information.

The FORM is devoid of any information to support the allegations contained in SOR subparagraphs 2.a and 2.c. Those allegations are decided for Applicant without further comment.

While Applicant's credit report discloses a judgment was entered against him in December 1999, and he admitted in his response to the SOR that the judgment remained unpaid, he denied he deliberately failed to disclose the existence of the judgment in the SF 86. Additionally, there is an incorrect answer to the question inquiring about arrests in the SF 86. When asked about the omission, Applicant stated he forgot to list the arrest. Again, in his response to the SOR, Applicant denied he deliberately failed to disclose the arrest and conviction.

To meet its burden to prove Applicant deliberately provided false information in the SF 86, the government submitted a partial copy of the SF 86 it claims was falsified. Significantly omitted from the government's evidence were the signature page and the question providing space for general remarks. Missing from the record evidence is proof that Applicant signed and approved the contents of the SF 86, that he certified the answers were true, complete, and correct, that he was advised of the provisions of 18 U.S.C. 1001, or what information may have been provided in the space provided for general remarks. ⁽¹⁴⁾ Considering the deficiencies in the evidence submitted by the government, I cannot find that Applicant deliberately falsified the SF 86. Accordingly, Guideline E is decided for Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline J: For Applicant

Subparagraphs a-e: For Applicant

SOR ¶ 2-Guideline E: For Applicant

Subparagraphs a-d: For Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. The FORM contains sparse information about Applicant, his family, his educational and work history, the offenses alleged in the FORM, his explanation(s) for the incorrect answers provided in the security clearance application, and/or much of anything else. Accordingly, the factual findings and conclusion in this decision are based upon the very limited information that is available.
3. The only information in the FORM concerning Applicant's present employment status are letters from DOHA addressed to a defense contractor that identify Applicant as the contractor's employee and Department Counsel's statement in the FORM that Applicant is employed by a defense contractor.
4. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
5. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
6. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
7. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
8. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
9. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
10. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
11. *Egan*, 484 U.S. at 528, 531.
12. *Id* at 531.
13. *Egan*, Executive Order 10865, and the Directive.
14. I also note, the SF 86 was computer generated. Considering the handwriting and contents of Applicant's handwritten statement (Item 5) and the handwritten answers he provided on the SOR (Item 3), I am satisfied the SF 86 was prepared by someone other than Applicant acting on his behalf. As such, I am unwilling to assume he reviewed the contents of the SF 86, and/or signed it understanding the contents thereof.