

DATE: October 30, 2006

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-02313

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Ray T. Blank, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant engaged in a pattern of drug-related criminal conduct from approximately 1977 to January 1993. However, the passage of time and a credible case in rehabilitation justifies a finding for him under the drug involvement guideline. A finding in his favor would also be warranted under the criminal conduct guideline. However, his criminal conviction and four year prison sentence requires a finding he is ineligible for a security clearance under 10 U.S.C. § 986. Moreover, he has failed to mitigate his deliberate falsifications of his security form in July 2003. Clearance is denied.

STATEMENT OF THE CASE

On January 6, 2006, the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6, dated January 2, 1992, as reissued through Change 4 thereto, dated April 20, 1999, issued a Statement of Reasons (SOR) to the Applicant which detailed 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 Applicant. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. On February 22, 2006, Applicant responded to the SOR and requested a hearing before an Administrative Judge.

The case was assigned to me on July 11, 2006. On July 15, 2006, this case was set for hearing on August 8, 2006. The Government submitted seven exhibits (GE 1-4). Applicant submitted no exhibits. Testimony was taken from Applicant. The transcript was received on August 16, 2006.

FINDINGS OF FACT

The SOR alleges adverse conduct under three guidelines: (1) criminal conduct (Guideline J); (2) drug involvement (Guideline H); and, (3) personal conduct (Guideline E). Applicant admitted the criminal conduct allegations. Though he did not answer subparagraph 2. a., I find his testimonial admissions of drug use between 1977 and January 1993 provide a firm basis to find he admits subparagraph 2. a. He denied subparagraph 2. b. claiming he quit all drug use in 1993

rather than 2003 as alleged in the SOR. Applicant also denied all personal conduct allegations listed under paragraph 3. Applicant is 46 years old and has been employed as an outside machinist for a defense contractor since June 2001.

Criminal Conduct. On October 17, 1981, Applicant was arrested and charged with breaking and entering, a felony (1.a.). On December 17, 1981, he pled guilty and received a three-year suspended sentence, and was placed on three years probation.

On December 17, 1981, Applicant was charged with a forgery (felony) (1.b.). After pleading guilty to the charge, he was sentenced to three years in prison. Following imprisonment from April 2, 1982 to April 12, 1983, Applicant was released on parole.

On April 12, 1985, Applicant was arrested and charged with breaking and entering, larceny, sale and delivery of marijuana, and possession of marijuana, all felonies (1.c., 1.f.). On September 17, 1985, Applicant received an eight-year sentence for breaking and entering, and a two-year sentence for sell and delivery of marijuana. The record does not indicate whether the sentences were concurrent or consecutive. Applicant began a prison sentence on September 18, 1985 and was released on parole on April 27, 1990.

In May 1992, Appellant was arrested and charged with creating a counterfeit controlled substance, a felony (1.d.). On June 10, 1992, the charge was dismissed.

On December 18, 1992, Applicant was charged with possession with intent to manufacture, sale or delivery of crack cocaine, a felony (1.e.). On March 5, 1993, he pled guilty to sale or delivery of cocaine and sentenced to three years. Applicant was imprisoned on March 19, 1993 and paroled on July 6, 1993.

Drug Involvement. Subparagraph 2.a. identifies three criminal offenses in 1985 and 1992 where Applicant was either selling or concocting counterfeit drugs for sale. These three offenses occurred inside a 16-year period of admitted drug addiction between 1977 and 1993 (Tr. 45). He began using marijuana in 1977 followed by cocaine. Next, he mixed cocaine and heroine before finally using crack cocaine. He recalled attending drug rehabilitation three or four times but was not successful. His reason for the failed efforts was trying to satisfy others and not himself (Tr. 47; GE 4). The breaking and entering offenses and the drug selling offenses were committed so that Applicant could support his drug habit.

Subparagraph 2.b. alleges Applicant was addicted to illegal drugs until January 2, 2003. Having weighed and balanced GE 4 with the surrounding evidence and Applicant's credible testimony, I find Applicant quit using drugs in January 1993, not January 2003 as set forth in 2.b. of the SOR. First, Applicant stated in the last full sentence of the first paragraph of the letter in GE 4 that at the end of 1992, he was preparing to cease drug use. While one possible explanation is that ten years actually passed before Applicant finally stopped all drug use, this explanation is not reasonable. The most reasonable account, and credibly explained by Applicant at the personal appearance is that he was negligent in not reading the letter carefully before he signed and submitted the document to the investigator (Tr. 43). Though "July 6, 2003" is quoted in the letter (GE 4) as his parole date from the 1.e. offense, the balance of the second paragraph in GE 4 accurately describes the details of the 1.e. Accordingly, I find for Applicant under this allegation.

Personal Conduct. Concerning subparagraph 3.a. of the SOR, I find for Applicant based on his credible testimony for the discrepancies appearing in the letter explaining when he stopped drug use (GE 4).

Applicant's explanations for the omitted information from his July 7, 2003 security form (as alleged in subparagraphs 3.b. and 3.c.) are either vague or inconsistent with one another. ⁽¹⁾ Not knowing why he did not list the omitted information (Tr. 42) is inconsistent with not listing information based on advice not to disclose information more than seven to ten years old (Tr. 31). While he may have had no reason to conceal information from the July 2003 security form (Tr. 32), certain material information concerning his criminal record was not disclosed on the form. Answering question 21 (3.b.) correctly, but listing only the 1985 offense does not provide a full history of his charges or convictions for felony offenses. Answering question 24 (3.c.) correctly, but listing only the 1985 offense does not provide a complete account of the alcohol or drug-related crimes Applicant was involved in. Because he has not provided a credible explanation for the missing information from questions 21 and 24 of the security form, I find

Applicant deliberately falsified information under subparagraphs 3. b. and 3. c. of the SOR.

Applicant has used no drugs since January 1993. He attributes his success to his decision to embrace certain religious tenets that have helped him to put down all mind-altering substances. He has joined the prison ministry to show inmates how sound religious beliefs can influence people to make choices that turn their lives in positive directions. Applicant has been married to a school principal since 1994, and has three children. Though there have been fretful times in their marriage, they are trying to resolve the points of friction. Applicant indicated a desire to submit character statements, but none were produced.

POLICIES

Enclosure 2 of the Directive sets forth guidelines containing disqualifying conditions (DC) and mitigating conditions (MC) that should be given binding consideration in making security clearance determinations. These conditions must be considered in every case along with the general factors of the whole person concept. However, the conditions are not automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense.

Burden of Proof

Initially, the government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualifies, or may disqualify, the applicant from being eligible for access to classified information. *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988) "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *See Egan*, 481 U.S. at 531; *see* Directive E2.2.2.

Criminal Conduct

A history or pattern of criminal activity raises security concerns about an applicant's judgment, reliability, trustworthiness.

Drug Involvement

Drug use raise concerns about an individual's willingness to safeguard classified information.

Personal Conduct

Actions that reflect poor judgment and dishonesty could indicate the person may not properly safeguard classified information.

CONCLUSIONS

Criminal Conduct. Applicant's commission of five serious felonies establishes a pattern of criminal conduct (CC) under CC disqualifying conditions CC DC E2.A10.1.2.1. (*allegations or admission of criminal conduct, regardless of whether the person was formally charged*) and (DC) E2.A10.1.2.2. (*a single serious crime or multiple lesser offenses*). The record reflects a pattern of criminal activity that lasted at least 16 years from 1977 to 1993. Driven by drug addiction, Applicant broke into a dwelling in 1981. Late in the same year, he committed forgery. In 1985, he pled guilty to breaking and entering, and selling marijuana. Even after spending more than four years in prison, Applicant was again charged with creating counterfeit drugs in May 1992, although the charge was dismissed. At age 32 in December 1992, Applicant spent almost four months in prison for selling crack cocaine.

In addition to applicability of CC DC E2.A10.1.2.2., 10 United States Code (U.S.C.) § 986 (c) (1) prohibits the Department of Defense from granting or renewing a security clearance to any employee of a DoD contractor who has been convicted of a crime in any court of the United States, was sentenced to a term of imprisonment exceeding a year, and was incarcerated for not less than a year. The statute also provides that meritorious cases the Secretary of Defense or his designee may authorize a waiver of the prohibition. The facts of this case reflect that Applicant was convicted in a state court on September 17, 1985 of breaking and entering, and selling marijuana; he served at least four years in custody from September 1985 to April 27, 1990. Under 10 U.S.C. § 986, absent a waiver by the Secretary of Defense, Applicant is ineligible for access to classified information.

I have reviewed the mitigating conditions (MC) under the CC guideline and two apply to Applicant's case. Though Applicant committed a subsequent drug offense in 1992, and served four months before his parole in July 1993, CC MC E2.A10.1.3.1. (*the behavior was not recent*) applies albeit on a limited basis. CC MC E2.A10.1.3.6. (*there is clear evidence of successful rehabilitation*) also applies as Appellant has taken positive steps to prevent a recurrence of criminal activity. He has not used drugs for 13 years. He has been married for 12 of those years and is trying to keep his marriage together. As part of the prison ministry, he is counseling with inmates about why they are in prison and the steps they need to take to turn their lives around. Considering the evidence as a whole, together with the whole person concept, I conclude Applicant has mitigated the security concerns of his criminal conduct. I find in his favor under subparagraphs 1.a. through 1.e. However, because Applicant is subject to 10 U.S.C. § 986 based on his conviction and actual imprisonment for four years, subparagraph 1.f., as well as the criminal conduct guideline must be found against Appellant.

Drug Involvement (DI). Applicant was addicted to drugs for about 16 years. He began abusing marijuana and moved to cocaine and heroin. Finally, he abused crack cocaine before quitting all drug use in January 1993. He candidly admitted that he sold drugs to support his drug habit. The circumstances of this case warrant the application of DI DC E2.A8.1.2.1. (*any drug use*) and DI DC E2.A8.1.2.2. (*illegal drug possession, including cultivation, processing, manufacture, sale, or distribution*).

Applicant's addiction to drugs for a 16-year period ended in January 1993. Applicant testified credibly about the surrounding circumstances leading to his decision to stop all drug use. The previous three or four unsuccessful rehabilitation efforts occurred because he was not ready to surrender the lifestyle he had become accustomed to for about 16 years. Given his strong religious beliefs that have been growing steadily since his decision to be drug free in January 1993, and his deep involvement in the prison ministry, I am convinced Applicant will enjoy a future free of drugs. Therefore, DI MC E2.A8.1.3.1. (*the drug involvement was not recent*) and DI MC E2.A8.1.3.3. (*a demonstrated intent not to abuse drugs in the future*) apply to mitigate Applicant's drug history.

Personal Conduct (PC). Behavior that involves dishonesty or questionable judgment could also indicate the person is not a suitable candidate to properly handle classified information. The omissions of material information from his security form on July 7, 2003 raise security concerns under PC DC E2.A5.1.2.2. (*the deliberate omission or falsification of relevant and material facts from any personnel security questionnaire to determine security clearance eligibility*) Though I find for Applicant under subparagraph 3. a. of the SOR because he truthfully answered question 27 of the security form, I find he deliberately failed to disclose material information as required under questions 21 and 24 of the security form. If he really did not understand the questions on the form, then why would he claim he really did not know why he did not provide complete information on the form or that he was advised not to disclose any information more than seven years old?

I have evaluated the mitigating conditions under the PC guideline and concluded that none apply. PC MC E2.A5.1.3.1. (*the information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness and reliability*) is not applicable because a person's criminal record is relevant to determining whether he possesses the judgment to safeguard classified information. Neither PC MC E2. A5. 1.3.2. (*the falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*) PC MC E2.A5.1.3.3. (*the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*) mitigate the security concerns of Applicant's deliberate omissions. The falsifications were not isolated in that Applicant provided the same answers in an earlier security form in May 2003. The record reveals no action taken by Applicant to correct the falsification before being confronted with the omitted material at the hearing in August 2006. Having balanced all the

evidence against the specific conditions under the PC guideline and the general conditions of the whole person concept, I find Applicant's deliberate omission of material information has not been mitigated.

FORMAL FINDINGS

Formal Findings required by Paragraph 25 of Enclosure 3 are:

Paragraph 1 (Criminal Conduct, Guideline J): AGAINST THE APPLICANT.

Subparagraph 1.a. For the Applicant.

Subparagraph 1.b. For the Applicant.

Subparagraph 1.c. For the Applicant.

Subparagraph 1.d. For the Applicant.

Subparagraph 1.e. For the Applicant.

Subparagraph 1.f. Against the Applicant.

Paragraph 2 (Drug Involvement, Guideline H): FOR THE APPLICANT.

Subparagraph 2.a. For the Applicant.

Subparagraph 2.b. For the Applicant.

Paragraph 3 (Personal Conduct, Guideline E): AGAINST THE APPLICANT.

Subparagraph 3.a. For the Applicant.

Subparagraph 3.b. Against the Applicant.

Subparagraph 3.c. Against the Applicant.

DECISION

In light of all 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.

Paul J. Mason

Administrative Judge

1. Applicant omitted the same information in an earlier security form he certified on May 30, 2003 (GE 2).