

DATE: September 29, 2006

---

In re:

-----

SSN: -----

Applicant for Security Clearance

---

CR Case No. 05-02318

## **DECISION OF ADMINISTRATIVE JUDGE**

**JACQUELINE T. WILLIAMS**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Richard A. Stevens, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant is 35 years old and has been employed since 2003 as a quality inspector for a defense contractor. He was terminated from former employment in 2003 for violating the company's workplace safety and harassment free workplace policy. He has several arrests for domestic violence assaults. Applicant deliberately falsified questions in his security clearance application. Clearance is denied.

### **STATEMENT OF THE CASE**

On August 27, 2003, Applicant applied for a security clearance and completed a Security Clearance Application (SF 86).<sup>(1)</sup> On August 9, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. The SOR detailed reasons under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) 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, and recommended referral to an Administrative Judge to determine whether a clearance should be granted or revoked.

In a sworn, written statement, dated August 22, 2005, Applicant responded to the SOR allegations and elected to have his case decided on the written record in lieu of a hearing.<sup>(2)</sup> Department Counsel submitted the Government's written case on May 17, 2006. A complete copy of the file of relevant material (FORM)<sup>(3)</sup> was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant chose not to respond. The case was assigned to me on July 25, 2006.

### **FINDINGS OF FACT**

Applicant admitted the factual allegations pertaining to personal conduct under Guideline E, subparagraphs 1.a through 1.c and criminal conduct under Guideline J, subparagraphs 2.a through 2.f. Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following findings of fact:

Since April 2003, Applicant, a 35-year-old, is employed as a quality inspector by a defense contractor. He is twice divorced. His first marriage was from November 1990 through June 1991, and the second marriage was from April 1996 through September 2001. He is currently single.

Applicant has a history of criminal activity, which includes the following allegations:

(1) On July 15, 1989, he was arrested and charged with underage consumption of alcohol. He was 19 at the time. A fine was imposed.

(2) On September 18, 1989, he was charged with offensive touching and terrorist threats. The record is devoid of the identity of the victim. The charges were *nolle prosequi*.

(3) On October 18, 1991, Applicant was involved in a domestic assault on his first ex-wife. On December 18, 1991, he was charged with offensive touching.<sup>(4)</sup> The charge was *nolle prossed* pending successful completion of one year of probation.

(4) Applicant was involved in a domestic assault on November 19, 1991. On December 18, 1991, he was charged with third-degree assault on his first ex-wife.<sup>(5)</sup> The charge was *nolle prossed* pending successful completion of one year of probation.

(5) On October 18, 1997, he was arrested and charged with offensive touching of his second ex-wife.<sup>(6)</sup> The charge was *nolle prossed*.

Applicant worked for a company that had a "Workplace Safety Policy and Harassment Free Workplace Policy."<sup>(7)</sup> The policy stated, in part, that there is zero tolerance regarding threatening behavior toward other employees. He was aware of the employer's policy regarding harassment and the misuse of electronic transmissions. He was aware that if violations of this policy were to occur, immediate termination would be the result.

On or about February 20, 2003, an internal investigation conducted by the above-mentioned company officials revealed Applicant repeatedly harassed a female employee, with whom he had a sexual relationship, through a series of unprofessional and threatening emails communicated at work by him to her.<sup>(8)</sup> Applicant maintained he became infected with a sexually transmitted disease while in the relationship with the coworker. On February 12, 2003, he sent via an email to this coworker a message that stated, in part: "if you don't talk to me about this now, I will go off like you have never seen."<sup>(9)</sup> On February 20, 2003, his employer determined that Applicant had violated the company's harassment and electronic use policy and discharged him

In his SF 86, completed on August 27, 2003, Applicant responded "no" to Question 26, which asked whether he was arrested in the last seven years. He failed to disclose that he was arrested on October 18, 1997 and charged with offensive touching of his second ex-wife.

Applicant responded "no" to Question 27 in the SF 86, which asked whether since the age of 16 or in the last 7 years, whichever is shorter, he used any controlled substance. He failed to disclose that he used marijuana, with varying frequency, from at least 1986<sup>(10)</sup> through 2000. He later stated: "I didn't write it [use of marijuana] in security forms cause Army was there and I didn't want to lose my job."<sup>(11)</sup> Applicant maintains that his use of marijuana occurred seven times. He tried marijuana experimentally twice in 1987, twice in 1991, once in 1995, and twice in 2000.<sup>(12)</sup>

## POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. 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.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>(13)</sup> The government has the burden of proving controverted facts.<sup>(14)</sup> The burden of proof is something less than a preponderance of evidence.<sup>(15)</sup> 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.<sup>(16)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(17)</sup>

No one has a right to a security clearance<sup>(18)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(19)</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.<sup>(20)</sup> The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.<sup>(21)</sup> 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.

Based upon consideration of the evidence, I find the following adjudicative guidelines most pertinent to the evaluation of the facts in 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.

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

Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, pertaining to the adjudicative guidelines are set forth and discussed in the conclusions below.

## CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards, and I reach the following conclusions.

### **Personal Conduct**

Personal conduct is always a security concern because it asks the central question whether the person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Falsifying a SF 86 is the type of personal conduct which causes security concerns. Here, Applicant admitted he deliberately falsified his SF 86 when he failed to disclose that he used marijuana from about 1986 through 2000. He stated that he did not put down his use of marijuana at the time he was completing the form, because his employer was there and he did not want to lose his job. Although he used marijuana sporadically between 1986 and 2000, I conclude that his deliberate failure to disclose his use is more problematic than the use itself. Applicant also disclosed less than complete information concerning his prior

arrests. He was arrested on October 18, 1997 for domestic assault. On February 20, 2003, he was terminated from his employment because of violation of the company's workplace safety and harassment free workplace policy. Consequently, Personal Conduct Disqualifying Conditions (PC DC) E2.A5.1.1 (*reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances*) and PC DC E2.A5.1.2 (*the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities*) apply. None of the available Personal Conduct Mitigating Conditions apply. Under these circumstances, Applicant has failed to mitigate or overcome the Government's case. The evidence leaves me with doubts as to Applicant's security eligibility and suitability. Accordingly, allegations 1.a through 1.c of the SOR are concluded against Applicant.

### **Criminal Conduct**

Under Guideline J, a history or pattern of criminal activities creates doubt about a person's judgment, reliability, and trustworthiness. Applicant has a history of criminal conduct, including domestic assaults, that spans an eight-year period. While some of his offenses that occurred between 1989 and 1997 are remote in time, and others were resolved in his favor through the dismissal of charges, this pattern of unruly behavior nonetheless causes doubt as to his judgment, trustworthiness, and reliability, all of which are important concerns relating to an individual's ability to properly safeguard classified information. His intentional failure to make true, complete, and correct disclosures pertaining to his criminal charges and illegal drug use on his SF 86 constitutes a violation of 18 U.S.C. § 1001. Therefore, Criminal Conduct Disqualifying Conditions (CC DC) E2.A1.1.2.1 (*allegations or admission of criminal conduct, regardless of whether the person was formally charged*) and CC DC E2.A10.1.2.2 (*a single serious crime or multiple lesser offenses*) apply.

Various conditions can mitigate security concerns arising from criminal conduct. Applicant has a long history of arrests going back to 1989 and continuing through 1997. I find the time-span of the criminal offenses to be remote in time, and the record is devoid of any current criminal charges since 1997. Some of his offenses were resolved in his favor through the dismissal of charges. However, it is Applicant's total behavior that casts doubt as to judgment, reliability, and trustworthiness. Consequently, neither Criminal Conduct Mitigating Condition (CC MC) 1 (*the criminal behavior was not recent*) nor CC MC 6 (*there is clear evidence of successful rehabilitation*) applies. Thus, Applicant has not mitigated the Government's case under criminal conduct. Accordingly, allegations 2.a through 2.f of the SOR are concluded against Applicant.

I have considered all the evidence in this case. I have also considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. I conclude that Applicant has not mitigated security concerns because of his deliberate falsification of his SF 86, together with his termination from his employment because of harassment at the workplace. It is clearly not consistent with the national interest to grant Applicant a security clearance. For the reasons stated, I conclude Applicant is not suitable or access to classified information.

### **FORMAL FINDINGS**

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Paragraph 2. Guideline J (Criminal Conduct): AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: Against Applicant

Subparagraph 2.d: Against Applicant

Subparagraph 2.e: Against Applicant

Subparagraph 2.f: Against Applicant

### **DECISION**

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Jacqueline T. Williams

Administrative Judge

1. Item 5 (Security Clearance Application, dated August 27, 2003).
2. Item 4 (Applicant's Answer, dated August 22, 2005).
3. The Government submitted 11 items in support of the allegations.
4. Item 11 (Court records), at 4, 19, 22.
5. *Id.* at 7, 18.
6. *Id.* at 13. Applicant's Answer notes that he was not arrested on this domestic violence charge, but voluntarily surrendered himself to the state police.
7. Item 9 (Employment records), at 6, 7.
8. *Id.* at 1.
9. *Id.*
10. Although the SOR uses the year 1996, in his sworn statement, Applicant states that his marijuana use began in 1986.
11. Item 7 (Applicant's sworn statement, dated January 6, 2005) at 1.
12. Item 6 (Applicant's sworn statement, dated April 29, 2004).
13. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
14. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, ¶ E3.1.14.
15. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
16. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, ¶ E3.1.15.
17. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, ¶ E3.1.15.
18. *Egan*, 484 U.S. at 531.

19. *Id.*

20. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.

21. Executive Order 10865 § 7.