

DATE: November 17, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-02401

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 30 years old, married, and works for a defense contractor. He had three arrests between 1995 and 2003, two of which were dismissed. The third resulted in a conviction. Applicant disclosed the 2003 conviction on his security clearance application, but not the first two arrests. Applicant mitigated the criminal conduct and personal conduct security concerns. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On November 25, 2005, DOHA issued a Statement of Reasons⁽¹⁾ (SOR) detailing the basis for its decision-security concerns raised under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on February 10, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on April 13, 2006. On June 14, 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. During the hearing, the Government offered a motion to amend the SOR to add three new allegations. Applicant had no objection and I granted the motion. Applicant denied the new allegations on the record (Tr. 7-13). The Government and the Applicant submitted exhibits that were admitted into evidence. DOHA received the hearing transcript (Tr.) on June 26, 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 30 years old, married in 2002, and has one child from a prior relationship for whom he pays child support. He works for a defense contractor as a videographer. He makes training films on military installations. (Tr. 26, 56;

Exhibit 1)

Applicant was arrested on June 19, 1995, for 2nd degree rape (no force), a felony under his home state's law. When he was 19, he went to a military NCO club as a civilian, met a girl who followed him home. They had consensual sex, and her parents later objected and filed a criminal complaint because she was actually 14 years old. Applicant understood only persons 18 years and older were allowed in the club, so he assumed the girl was at least 18 years old. The girl later explained what happened, and the charges were dismissed after being presented to the grand jury. On August 6, 2002, Applicant's attorney filed a motion to expunge this record. Applicant assumed the charges were no longer on his record because they were dismissed and he had petitioned the local court to expunge his record. (Tr. 26-29, 39-41, 49; Exhibit 3)

Applicant was next arrested on December 10, 1997, on charges of robbery, 2nd degree, a felony. Applicant was 21 years old, and waiting to play basketball with friends in a local park. Some of his friends attacked a man and robbed him. When someone yelled that the police were coming, Applicant got into his car and left the scene. Applicant was questioned about the incident by the police that night because he was recognized by the victim as being in the vicinity. He was arrested two months later was arrested and placed in jail. While in jail, Applicant saw the victim in jail who was there on other charges. The victim meant that the police should talk to Applicant as a witness, not as a perpetrator. The victim spoke with someone about the mistake, and Applicant was later released and the charges were dismissed on the motion of the prosecutor. Applicant filed a motion to expunge this arrest record also on a date unknown. (Tr. 30-34; Exhibit 3)

On April 14, 2003, Applicant was served with a warrant based on a complaint charging Applicant with making false statements about his income on an application to obtain unemployment insurance benefits for the period of October 28, 2000, to December 16, 2000. Applicant had a full-time security job and lost it in October 2000. He applied for benefits, received them, but in the interim found a part-time job. The income would have reduced his unemployment benefits if he had informed the unemployment insurance office. On June 9, 2003, Applicant pled guilty to a reduced charge of theft by deception (cold checks under \$300). He was sentenced to 12 months in jail, but the jail time was changed to two years probation, payment of \$136.50 for court costs, and ordered to pay restitution of \$1,045. Applicant paid the costs and restitution. Applicant thought the charges would be expunged when he completed the probation in 2005. (Tr. 35-39, 59-61; Exhibits 1, 3, 4)

Applicant received an income tax refund from the Internal Revenue Service (IRS) for \$800 in 2002. He spent the money, only to receive a letter from the IRS six months later asking for its return because he owed back child support for a child born in 1997. On January 5, 2004, Applicant gave a written statement to a Government investigator about the IRS check, and stated he was charged with theft by deception because he could not repay the money. The statement claims the charges will be dismissed when the final payment is made. His statement refers to a repayment agreement of \$300 monthly for the unemployment compensation restitution, not the IRS repayment. Applicant never went to court for the IRS claim for repayment. He has not yet repaid the IRS. Applicant did not mention the unemployment insurance payments he received and the theft by deception charges, claiming he was confused about the two situations. Applicant claims confusion in his mind and recollection between the two situations because the amount of restitution was \$1,045, and he put \$1,043 in his statement referring to the IRS refund. He admitted the theft by deception charge pertained to the unemployment compensation payments. (Tr. 42-51, 61; Exhibit 2)

Applicant completed his security clearance application (SCA) on September 5, 2003. On it he disclosed his theft by deception arrest in January 2003 in answer to Question 26 (any arrest, charges, or convictions not listed elsewhere on the SCA). He made this disclosure because he was still paying the restitution when he completed the SCA, and he thought Question 26 was worded in the conjunctive ("and") with the arrests and convictions, so he disclosed his 2003 arrest and conviction. Question 21 asked if Applicant had ever been charged with or convicted of any felony offenses. Applicant answered "no" because the 1995 and 1997 charges were dismissed and he was never convicted. He claims he does not know the difference between charges and convictions, and thought Question 21, as he read it at the time to mean in the conjunctive ("and") and not the disjunctive ("or"), meant that he was convicted of those offenses. He knew he had not been convicted of the felonies. (Tr. 39-41, 46, 51; Exhibits 1, 4)

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 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

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

CONCLUSIONS

Guideline J: The Disqualifying Conditions (DC) that apply are DC 1 (Allegations or admissions 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). Applicant was charged with two felonies which were later dismissed. He was convicted of another charge in 2003.

Mitigating Conditions (MC) MC 4 (The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur. E2.A10.1.3.4), and MC 6 (There is evidence of successful rehabilitation. E2.A10.1.3.6) apply. Applicant had two felony charges dismissed by the prosecutors. The first charge was dismissed because he was deceived as to the age of his lover. The second charge was false because he was not involved in the actual crime. Those offenses occurred when Applicant was 19 and 21, and now he is 30 years old and married. Applicant also filed motions to expunge these arrests from his record because of the dismissals and the facts underlying the arrests. The series of facts in each situation is not likely to recur for obvious reasons. Applicant has not been in any trouble for three years now, and is gainfully employed full-time. His unemployment compensation offense is also not likely to recur because he has been gainfully employed for a number of years. Applicant has matured and rehabilitated himself from those situations.

The SOR as amended alleges his falsification of the SCA and the statement to the Government investigator both violate 18 U.S.C. § 1001, which makes it a criminal offense for knowingly and willfully making false statements to any department or agency of the U.S. Government. Based on the evidence, including his testimony that I found credible, there was no knowing and willful falsification.

It is obvious from Applicant's testimony at the hearing and Exhibit 2 that he was confused about the information sought by Question 21 of the SCA, and was further confused in his statement about his conviction in 2003 and the IRS repayment. With that obvious confusion and lack of understanding of Question 21's meaning, he could not have knowingly and willfully made a false statement. Therefore, I conclude allegation 1.a. to 1.e. for Applicant.

Guideline E: The Government is concerned about Applicant's false answer to Question 21, in his January 5, 2004, statement, and the 2003 theft by deception conviction as showing Applicant has questionable judgment, is dishonest, is untrustworthy and unreliable, and lacks candor for failing to tell the whole truth. However, as noted above, I conclude his explanation for failing to disclose the information is credible. He was confused about what offense he was convicted of in 2003. Additionally, he misread Question 21 so he thought he would be disclosing and admitting he was convicted of the felonies in 1995 and 1997 when those were not the actual facts. I find his explanation and even current display of confusion on this issue convincing and credible. I conclude allegation 2.a. to 2.c. for Applicant.

Whole Person Analysis

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." Directive E2.2.1. "Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination." *Id.* In evaluating Applicant's case, I have considered the adjudicative process factors listed in the Directive ¶ E2.2.1. His age and marital status as behavioral changes, his steady employment currently as another behavioral change, his high school education, the circumstances surrounding the first two arrests resulting in their dismissal and his motions to expunge them in the local court, the motivation for the manner in which he answered Question 21 and made the statement, and the lack of recurrence of these offenses, all were considered and evaluated. I also took into account his lack of sophistication in deciding he was not acting or lying about the reasons he gave for failing to make the fullest disclosure. I also considered the fact he disclosed his most recent conviction because he was still paying restitution. Looking at the whole person under the criteria of the Directive, I conclude Guidelines J and E for Applicant.

FORMAL FINDINGS

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

Paragraph 1. Guideline J: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: For Applicant

Subparagraph 1.e: For Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: For Applicant

DECISION

In light of all of 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.

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).