

DATE: May 30, 2006

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-04748

DECISION OF ADMINISTRATIVE JUDGE

DARLENE LOKEY ANDERSON

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's history of criminal conduct that includes three moving violations and one Assault and Battery, that occurred between 1997 and 1999, are considered recent, and not mitigated, since the Applicant has ignored the court's sentencing requirements associated with the offenses, and a warrant for his arrest remains outstanding. His falsification on his security clearance application concerning his arrest and charge for Assault and Battery in 1999, has also not been mitigated by sufficient evidence of rehabilitation. Clearance is denied.

STATEMENT OF THE CASE

On September 21, 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 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 clearance should be denied or revoked.

The Applicant responded to the SOR in writing on November 8, 2005, and requested a hearing before a DOHA Administrative Judge. This case was assigned to the undersigned on December 28, 2005. A notice of hearing was issued on February 8, 2006, and the hearing was scheduled for March 7, 2006. At the hearing the Government presented seven exhibits. The Applicant presented no exhibits, but he did testify on his own behalf. The official transcript (Tr.) was received on March 17, 2006.

FINDINGS OF FACT

The following Findings of Facts are based on the Applicant's Answer to the SOR, the documents and the testimony. The Applicant is 35 years old, married and received his GED in 1998, and obtained a certificate for electronic assembly. He is employed as a Mover for a defense contractor. He seeks to obtain a security clearance in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a security clearance, on the basis of allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR:

Paragraph 1 (Guideline J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he engaged in criminal conduct.

The Applicant admits to each of the allegations set forth under this guideline.

On August 14, 1997 the Applicant was charged with (1) No insurance and (2) Failure to appear. He was driving without a license and was pulled over. As of January 2005, an outstanding fine of \$1,600.00 was owed to the court for the offense. The fine remains owing. The Applicant stated that he has been too busy working and has not had the time to pay the fine. Following this offense, the Applicant continued to drive without a license and insurance.

On September 27, 1997, the Applicant was charged with (1) Failure to Appear, (2) No License and (3) No Insurance. As of January 2005, an outstanding fine of \$505.00 was owed to the court for the offense. The Applicant stated that he has not paid this fine either.

On March 28, 1999, the Applicant was charged with (1) Driving With a Suspended License and (2) No Proof of Car Insurance. He was found guilty and was sentenced to summary probation for a period of 24 months and required to pay a fine of \$300.00 plus a State Penalty Fund Assessment of \$510.00, a \$1.00 night court fee and a \$35.00 Installment and Accounts Receivable Fee. In lieu of the fine the Applicant was given the option to perform 158 hours of community service and pay \$100.00 in restitution. The Applicant failed to appear in court for proof of community service on January 9, 2002, and again on January 16, 2002. On February 8, 2005, a Bench Warrant for his arrest was issued in the amount of \$12,500.00. The bench warrant is still outstanding and the fine remains owing.

The Applicant was arrested on June 8, 1999, and charged with (1) Assault and (2) Battery. The Applicant explained that his pregnant girlfriend called the police and told them that the Applicant had beat her and that she was having a miscarriage. He contends that he did not hit his girlfriend, that she never went to the hospital, and that she did not have a miscarriage because his daughter was ultimately born from that pregnancy. The Applicant was found guilty of Count 1 and was sentenced to serve 90 days in jail and pay restitution of \$100.00. Count 2 was dismissed. The Applicant served 45 days in county jail. As of January 4, 2005, the Applicant had not paid the \$100.00 restitution. The Applicant states that he does plan to pay the restitution associated with this charge.

The Applicant testified that he earns \$9.25 per hour and works 40 hours a week. After his child support, which is automatically deducted out of his paycheck, he grosses between 3 and 4 hundred dollars every two weeks. (Tr. p. 32).

Paragraph 2 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because he intentionally falsified material aspects of his personal background during the clearance screening process.

The Applicant admits the allegation set forth under this guideline.

The Applicant completed an electronic Security Clearance Application (Standard Form 86) dated August 6, 2004. Question 26, asked the Applicant if in the last seven years he had been arrested for, charged with, or convicted of any offenses(s) not listed in modules 21, 22, 23, 24, or 25? The Applicant answered, "NO". This was a false answer. The Applicant failed to disclose that he had been arrested and charged in 1999, for Assault and Battery. (See Government Exhibit 1). He explained that he failed to list the charge and conviction since the judge had dropped the charge to a misdemeanor, he did not feel it was important. (Tr. p. 48).

Based upon the evidence, I find that the Applicant knew or should have known to reveal his complete criminal record to the government in response to question 26. I do not find the Applicant's excuses credible. Accordingly, I find that the Applicant deliberately attempted to conceal this information from the Government on his security clearance application.

POLICIES

Enclosure 2 and Section E.2.2. of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and

"Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

Guideline J (Criminal Conduct)

Conditions that could raise a security concern:

1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;
2. A single serious crime or multiple lesser offenses.

Condition that could mitigate security concerns:

None.

Guideline E (Personal Conduct)

Condition that could raise a security concern:

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.

Condition that could mitigate security concerns:

None.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature and seriousness of the conduct and surrounding circumstances
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful

weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have 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. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned."

CONCLUSIONS

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for clearance may be involved in criminal conduct and dishonesty that demonstrates poor judgment or unreliability.

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation, which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance.

In this case the Government has met its initial burden of proving that the Applicant has engaged in criminal conduct (Guideline J); and dishonesty (Guideline E). This evidence indicates

poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with his security clearance eligibility.

Considering all of the evidence, the Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case under Guidelines J and E of the SOR.

The Applicant's criminal history includes four charges and convictions that occurred between 1997 and 1999, almost seven years ago. However, since the Applicant has failed to fulfill the court's sentencing requirements associated with these charges, the conduct remains recent. Taken together, Applicant history and pattern of criminal conduct establishes that the exercise of poor judgment by him is not an aberration, but has been a basic part of Applicant's character for almost all of his adult life.

Under Guideline J (Criminal Conduct), Disqualifying Conditions (1) *any criminal conduct, regardless of whether the person has been formally charged* and (2) *a single serious crime or multiple lesser offenses* are clearly applicable. None of the mitigating conditions apply. The Applicant's behavior indicates a pattern of intentional illegal or irresponsible conduct that raises serious doubt about his judgment, reliability and trustworthiness. Except for the 45 days he spent in country jail in 1999, the Applicant has ignored the sentences imposed on him by the court in each circumstance. He has failed to pay any of the fines, or court costs, which at this point are quite substantial. To this day, a warrant remains outstanding for his arrest. In the context of so many criminal acts that have not been resolved, there is no substantive indication of a fundamental change in the Applicant's thinking process or character. On this basis, I conclude that the criminal conduct remains current and is clearly not an isolated incident (Mitigating Condition 1 and 2). There is also no clear indication of the Applicant's rehabilitation. Accordingly Guideline J is found against the Applicant.

With respect to Guideline E, I find that the Applicant deliberately falsified his criminal history in response to question 26 on his security clearance application. He was not candid, honest or forthcoming and he has provided no reasonable excuse for this. Disqualifying Condition (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* applies. None of the mitigating conditions are applicable. I find that the Applicant deliberately failed to reveal this information to the Government.

The Government relies heavily upon the integrity and honesty of clearance holders. It is a negative factor for security clearance purposes when an Applicant has deliberately provided false information about material aspects of his personal background. This Applicant has not demonstrated that he is trustworthy, and does not meet the eligibility requirements for access to classified information. Accordingly, I find against the Applicant under Guideline E (Personal Conduct).

On balance, it is concluded that the Applicant has failed to overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 and 2 of the SOR.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: Against the Applicant.

Subpara. 1.a.: Against the Applicant.

Subpara. 1.b.: Against the Applicant.

Subpara. 1.c.: Against the Applicant.

Subpara. 1.d.: Against the Applicant.

Subpara. 1.e.: Against the Applicant.

Paragraph 2: Against the Applicant.

Subpara. 2.a.: 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 the Applicant.

Darlene Lokey Anderson

Administrative Judge