

DATE: December 29, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-07827

DECISION OF ADMINISTRATIVE JUDGE

JOHN GRATTAN METZ, JR

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esquire, Department Counsel

FOR APPLICANT

Anthony J. Easter, Esquire

SYNOPSIS

Applicant's deliberate falsification of his clearance application renders him an unsuitable candidate for a security clearance. Record did not support disqualification under drug involvement, sexual behavior, or criminal conduct. Clearance denied.

STATEMENT OF THE CASE

Applicant challenges the 31 March 2006 Defense Office of Hearings and Appeals (DOHA) Statement of Reasons (SOR) recommending denial or revocation of his clearance because of drug involvement, sexual behavior, criminal conduct, and personal conduct. ⁽¹⁾ He answered the SOR 21 April 2006, and requested a hearing. DOHA assigned the case to me 20 June 2006, and I convened a hearing 15 August 2006. DOHA received the transcript 23 August 2006.

FINDINGS OF FACT

Applicant denied the SOR allegations. He is a 28-year-old security officer employed by a defense contractor since April 2004. He previously held a clearance while in the U.S. Army from October 1995 to December 2003. He received an honorable discharge from the Army.

When Applicant applied for a clearance in April 2004 (G.E. 1), he deliberately concealed his January 2002 arrest for indecent assault and rape (question 23e). He also allegedly concealed being charged with marijuana use in September 2001 (question 23d), and using marijuana during the same time frame (question 24). Applicant testified (Tr. 50-51) that he initially thought about reporting the January 2002 arrest, but decided against it because his commanding officer had told him not to worry about the charges and assured him there would be no record.

In September 1991, Applicant was reported to have had a positive urinalysis for the metabolite of marijuana while stationed overseas (G.E. 2). ⁽²⁾ However, by the time the results became known, Applicant had transferred back to the

U.S., so no action was taken by his overseas command (G.E. 3). Applicant testified that the first he knew of the alleged positive urinalysis was when the government provided discovery in this case in May 2006, and the government has produced no evidence that the allegations were ever adjudicated by Army authorities.

In January 2002, at his military post in the U.S., Applicant was arrested and spent much of the night in a holding cell on allegations of indecent assault and rape. The Army Criminal Investigation Command (CID) prepared a detailed report (G.E. 4) and gathered voluminous evidence--including a sworn statement by Applicant--none of which is included in the hearing record. The offense was eventually adjudicated at a company grade non-judicial punishment (Article 15, Uniform Code of Military Justice) during which Applicant was awarded a forfeiture of \$780 pay for one month, 14 days extra duty, and 14 days restriction. Applicant testified that he did not remember receiving non-judicial punishment.

Applicant's account of the incident is that he had consensual intercourse with a woman of his brief acquaintance in his barracks room on post. After she left his room, and left the post, she reported the alleged rape to local police, who referred the matter to military authorities. According to Applicant, the woman later apologized to him for falsely accusing him.

POLICIES AND BURDEN OF PROOF

The Directive, Enclosure 2 lists adjudicative guidelines to be considered in evaluating an Applicant's suitability for access to classified information. Administrative Judges must assess both disqualifying and mitigating conditions under each adjudicative issue fairly raised by the facts and circumstances presented. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3. of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative for or against Applicant. However, specific adjudicative guidelines should be followed whenever a case can be measured against them, as they represent policy guidance governing the grant or denial of access to classified information. Considering the SOR allegations and the evidence as a whole, the relevant, applicable, adjudicative guidelines are Guideline H (Drug Involvement), Guideline D (Sexual Behavior), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct).

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an Applicant's security clearance. The government must prove, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If it does so, it establishes a *prima facie* case against access to classified information. Applicant must then refute, extenuate, or mitigate the government's case. Because no one has a right to a security clearance, the Applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability, and trustworthiness of those who must protect national interests as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government. ⁽³⁾

CONCLUSIONS

The government failed to establish a Guideline H case. ⁽⁴⁾ The military police report submitted by the government constitutes an allegation only--and an allegation is not proof. The police report contains insufficient evidence that had used marijuana or had tested positive for marijuana use. Further, the government's own evidence documents that the allegation was never adjudicated by the Army. Indeed, the government cannot prove that Applicant was even aware of the urinalysis results until it provided discovery to him in preparation for this case. I resolve Guideline H for Applicant.

The government failed to establish a case for disqualification under Guideline D. As with the drug allegation, the CID investigation constitutes an allegation only. Without any of the evidence ostensibly gathered during that investigation, there is no reason to discredit Applicant's claim that the intercourse was consensual. The adjudication of this charge undercuts the investigative report and bolsters Applicant's claim. It is highly improbable a case of actual indecent assault and rape would be adjudicated at a company-grade non-judicial punishment. That these charges were so adjudicated, and the minor punishment awarded, suggests that the convening authority viewed the crux of the matter as something no

more egregious than having an unauthorized woman in the barracks. I resolve Guideline D for Applicant.

The government failed to establish a case for disqualification under Guideline J. The government did not prove that Applicant ever used marijuana or tested positive for such use, and the punishment awarded Applicant at non-judicial punishment for the alleged indecent assault and rape indicates that the conduct being punished was so minor as to not raise security concerns.

The government established a case for disqualification under Guideline E, and Applicant did not mitigate the security concerns. At the outset, since I concluded that the government did not prove that Applicant used marijuana or tested positive for marijuana use (or was even aware of the allegation), it follows that the government failed to prove that Applicant falsified his clearance application by failing to disclose his use of marijuana or his positive urinalysis. Accordingly, I find SOR 1.a. and 1.c. for Applicant.

However, notwithstanding the ultimate resolution of the alleged indecent assault and rape charges, I conclude that applicant deliberately concealed the charges and disposition from the government. (S) First, he started to report the charges on his clearance application (under the section for felony charges) but changed his mind. Second, in response to other questions asking about his criminal record, Applicant disclosed a 1999 non-judicial punishment for taking license plates off a vehicle while stationed overseas, and a 2004 speeding arrest. Finally, I do not find Applicant's claim that he did not remember receiving non-judicial punishment for the alleged sexual assault and rape credible. The key fact is that he knew he had faced allegations of indecent assault and rape and failed to disclose that to the government.

Applicant's conduct demonstrates a lack of candor required of cleared personnel. The government has an interest in examining all relevant and material adverse information about an Applicant before making a clearance decision. The government relies on applicants to truthfully disclose that adverse information. Further, an applicant's willingness to report adverse information about himself provides some indication of his willingness to report inadvertent security violations or other security concerns in the future, something the government relies on in order to perform damage assessments and limit the compromise of classified information. Applicant's conduct suggests he is willing to put his personal needs ahead of legitimate government interests. I resolve Guideline E against Applicant.

FORMAL FINDINGS

Paragraph 1. Guideline H: FOR APPLICANT

Subparagraph a: For Applicant

Paragraph 2. Guideline D: FOR APPLICANT

Subparagraph a: For Applicant

Paragraph 3. Guideline J: FOR APPLICANT

Subparagraph a: For Applicant

Paragraph 4. Guideline E: AGAINST APPLICANT

Subparagraph a: For Applicant

Subparagraph b: Against Applicant

Subparagraph c: For 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 denied.

John G. Metz, Jr.

Administrative Judge

1. Required by Executive Order 10865 and Department of Defense Directive 5220.6, as amended (Directive).
2. The military police report (DA Form 3975) is not clear on when this incident occurred. The report is dated 27 September 2001. The report reflects a complaint date of 21 August 2001 and an offense date of 13 September 2001. The report contains no evidence to support the allegation, including, but not limited to, lab reports and chain-of-custody documentation.
3. *See, Department of the Navy v. Egan*, 484 U.S. 518 (1988).
4. E2.A8.1.2.1. Any drug abuse. . . ; E2.A8.1.2.2. Illegal drug possession, including. . . purchase. . .
5. E2.A5.1.2.2. 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, . . . [or] determine security clearance eligibility or trustworthiness. . . ;