

DATE: August 22, 2006

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-10921

DECISION OF ADMINISTRATIVE JUDGE

THOMAS M. CREAN

APPEARANCES

FOR GOVERNMENT

Nichole Noel, Esquire, Department Counsel

FOR APPLICANT

Andrea H. Brisbane, Esquire

SYNOPSIS

Applicant was terminated for cause from his employment with a hotel for violation of company policy and failure to take responsibility for his actions. Applicant did not list the termination in response to a question concerning being fired from a job on his security clearance application. Clearance is denied.

STATEMENT OF THE CASE

On December 15, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to deny a security clearance for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive). Applicant acknowledged receipt of the SOR on December 27, 2005. The SOR alleges security concerns under Guideline E (Personal Conduct) of the Directive.

Applicant answered the SOR in writing through counsel on February 9, 2006. He admits one allegation with explanation, but denies the other allegation under Guidelines E. His request for a hearing before an administrative judge was received by DOHA on February 13, 2006. Department Counsel was prepared to proceed with the case on May 24, 2006, and the case was assigned to me on May 31, 2006. A notice of hearing was issued on June 1, 2006, and the hearing convened on June 9, 2006, in Charleston, South Carolina. The Applicant waived the 15 day notice requirement for a hearing. ⁽¹⁾ Three government exhibits, marked Government Exhibits 1-3 were received without objection. Two Applicant exhibits, marked Applicant exhibits A and B, were received without objection. The Applicant testified in his own behalf during the hearing. The transcript (Tr.) was received by DOHA on June 22, 2006.

FINDINGS OF FACT

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact.

Applicant is a single 28-year-old high school graduate who is employed in a position with a defense contractor that does not require a security clearance. He is taking college courses in network administration. He previously worked for another defense contractor and submitted his security clearance application.⁽²⁾ Since the granting of his clearance took some time and he was denied access to classified information, the first defense contractor released him after a few months of employment. He secured employment with the second contractor in April 2006, in the position not requiring a security clearance. If he is granted access to classified information, he will be placed in a higher paying position by his employer. He also has the potential of being rehired by the former defense contractor.⁽³⁾

Prior to his employment with the first defense contractor, Applicant was employed at a local hotel in various positions. After four years, he was promoted to bell captain. One of his bell captain duties was to make room keys for members of the hotel staff to enter guest rooms to place amenities in the room. He was not authorized to make keys for hotel employees to stay overnight in hotel rooms. Over the Thanksgiving holidays of 2003, Applicant made a room key at the request of a hotel kitchen employee to place amenities in the room. Applicant stated he made the key for the employee because she informed him it was needed to deliver amenities to a guest's room. She did not inform him she intended to stay in the room overnight. The employee stayed overnight in the room, but was not authorized to stay by hotel management.⁽⁴⁾ Hotel managers asked Applicant about making the key.

He was first asked about the key two days after the employee requested the key. Applicant denied making the key. He testified that when asked about the key, he was busy and forgot that he made the key. After this first conversation with the manager, another employee informed him that the employee had used the key to stay overnight in the hotel. He was questioned later that same day by the manager, and asked if he "made a key for (the employee) to stay overnight in the hotel." Since he made the key for her to deliver amenities, he responded in the negative. The manager stated that in response to the question the second time, Applicant stated that someone else made the key for the employee. Applicant did not inform the manager he made a key for the employee to deliver amenities. Later in the day, he informed the manager that he made a key for her to deliver amenities to the room. The manager informed Applicant there was a video tape of him making the key and his key code was recorded in the room lock from the key used by the employee.⁽⁵⁾

The hotel terminated his employment for violation of company policy and not taking responsibility for his actions.⁽⁶⁾ Applicant was surprised by this action since prior to this incident he had a good record with the company. He understood he was being fired.⁽⁷⁾ He hired an attorney to represent his interest against the hotel company. The attorney wrote a letter to the hotel's parent company. The company informed Applicant there was a company policy they would not respond to external requests for information on former employees. The company stated their managers are instructed not to comment or respond to questions about any employee's performance. The only exception are requests from federal, state, or local authorities. The company stated it did not seek to interfere with Applicant's ability to obtain other employment nor to discredit his character and prevent him from moving forward with his life.⁽⁸⁾ Applicant perceived the tenor of the company's response to be "that the company would not say any negative comments about me, about anything about the situation because there were too many holes in the other side's story."

After leaving employment with the hotel, Applicant worked several jobs before working for a defense contractor. He completed a security clearance application on September 15, 2004. He responded "NO" to question 20 on the application asking "Has any of the following happened to you in the last 7 years? - Fired from job; - Quit a job after being told you would be fired; - Left a job by mutual agreement following allegations of misconduct; - Left a job by mutual agreement following allegations of unsatisfactory performance; - Left a job for other reasons under unfavorable circumstances."⁽⁹⁾ He did not respond "YES" because he contested the firing through his attorney and the company letter informed him they would say nothing negative about his employment with them. It was also his understanding that if an individual was fired from a job, the individual could not collect unemployment. He at the time was not collecting unemployment, but he was in the process of applying for it. He did not think the hotel considered him fired any longer. He believed the hotel "...was just going to let it go, sweep it under the rug, no big deal."⁽¹⁰⁾

Applicant told a security investigator that if asked the hotel management would provide the investigator with negative information concerning him. He informed the investigator that he was terminated from his job with the hotel.⁽¹¹⁾

Applicant presented two letters of recommendation. One letter was from his supervisor from his present defense contractor who attest to Applicant's excellent work habits and positive work attitude.⁽¹²⁾ The second letter was from a friend and co-worker. This individual worked with Applicant at the hotel. He stated Applicant is professional and responsible. It was his opinion Applicant was wrongly fired by the hotel.⁽¹³⁾

POLICIES

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."⁽¹⁴⁾ Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.⁽¹⁵⁾

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions and mitigating conditions for each guideline. Each clearance decision must be fair, impartial, and a commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶ 6.3.1 through ¶ 6.3.6.

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. An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person.⁽¹⁶⁾ An administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant'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 of recurrence.⁽¹⁷⁾

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant.⁽¹⁸⁾ 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 present evidence to establish controverted facts in the SOR that disqualify or may disqualify the Applicant from being eligible for access to classified information.⁽¹⁹⁾ Thereafter, Applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate facts.⁽²⁰⁾ An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."⁽²¹⁾ The government is under no duty to present evidence to disprove any Adjudicative Guideline mitigating condition, and an Administrative Judge cannot assume or infer that any particular mitigating condition is applicable merely because the government does not present evidence to disprove that particular mitigating condition.⁽²²⁾ "[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."⁽²³⁾ "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security."⁽²⁴⁾

Based upon a consideration of the evidence, I find the following adjudicative guideline most pertinent to the evaluation of the facts in this case:

Guideline E - Personal Conduct: A security concern exists for conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Any of these characteristics in a person could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security

concerns, pertaining to the adjudicative guideline are set forth and discussed in the conclusions section below.

CONCLUSIONS

I carefully considered all of the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

The government has established its case under Guideline E. Applicant's termination from his job as a bell captain for violating company policy and not taking responsibility for his actions, and his failure to note the firing on his security clearance application brings the matter under Personal Conduct Disqualifying Conditions E2.A5.1.2.1 (*Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances*); and E2.A5.1.2.2 (*Th 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 responsibility*). It is unfavorable information to be fired from a job for cause. It is a security concern when an applicant does not include negative job related information on a security clearance application.

I considered all of the Personal Conduct Mitigating Conditions and determine none apply. Applicant did not deny he was fired from his job. His view was he was fired unfairly. He admitted he did not list the firing on his security clearance application because he did not believe the hotel would present negative information about him to investigators. Applicant's statement and his interpretation of the hotel's action do not establish that the firing was unfair or that the hotel did not have justifiable cause to fire him. His termination for cause is pertinent to a determination of judgement, trustworthiness, reliability, and security worthiness particularly since it involves failure to follow company policy and to take responsibility for his actions. Hence, Personal Conduct Mitigating Condition (PC MC) E2.A5.1.3.1 (*the information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability*) does not apply.

Applicant knew and understood he was fired from his job by the hotel. He signed the Notice of Termination which stated he was terminated for cause. He did not list the termination in response to question 20 because he did not think the hotel would tell the government that they fired him. He was willing to keep the information from the government for fear it would negatively affect his security clearance. His action in concealing the information was deliberate with an intent to deceive the investigator. Applicant did not acknowledge he was fired until he was confronted by the investigator. PC MC E2.A5.1.3.3 (*the individual made a prompt, good-faith efforts to correct the falsification before being confronted with the facts.*) does not apply.

I have considered Applicant's conduct under the "whole person" concept. I considered (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation, (3) the frequency and recency of the conduct, (4) the Applicant's age and maturity at the time of the conduct, (5) the voluntariness of participation, (6) the presence or absence of rehabilitation or 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. I have considered the letter of recommendation from his present supervisor, and the letter of recommendation from his friend. Taking all of the factors into consideration, I conclude Applicant is not eligible for access to classified information. Applicant's failure to provide correct information and his violation of company policy shows questionable judgment, untrustworthiness, unreliability, and an unwillingness to comply with rules and regulations. It indicates he would not follow security procedures and properly safeguard 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 AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

DECISION

In light of all of the circumstances in 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.

Thomas M. Crean

Administrative Judge

1. Tr. 6; *See*, Court Exhibit 1 (Waiver of Notice Requirement, dated May 24, 2006).
2. Government Exhibit 1 (Security Clearance Application, dated Sep. 15, 2004).
3. Tr. 16-20.
4. Tr. 9-14.
5. Tr. 14-15, 25-31; Government Exhibit 3 (Manager's statement, dated Dec. 5, 2003)..
6. Tr. 12-20; Government Exhibit 2 (Notice of Termination, dated Dec. 15, 2003).
7. Tr. 31-32.
8. Case file, Applicant's response to SOR (Letter from Company, dated Jun. 1, 2004).
9. Government Exhibit 1 (Security Clearance Application, dated Sep. 15, 2004).
10. Tr. 38-42.
11. Tr. 17-18; 42.
12. Applicant Exhibit A (Letter of Recommendation, dated Jun. 9, 2006).
13. Applicant Exhibit B (Letter, dated Jun 9, 2006).
14. *Department of the Navy v. Egan*, 484 U.S. 518 (1988).
15. Directive ¶ E2.2.1.
16. *Id.*
17. Directive ¶¶ E2.2.1.1 through E2.2.1.9.
18. *See* Exec. Or. 10865 § 7.
19. Directive ¶ E3.1.14.
20. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15.
21. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).
22. ISCR Case No. 99-0597 (App. Bd. Dec 13, 2000).
23. ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

24. *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.