

DATE: July 17, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-12153

DECISION OF ADMINISTRATIVE JUDGE

SHARI DAM

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 30 years old and applied for a position with a federal contractor that requires a security clearance. He has a history of minor criminal conduct, drug use, and employment problems that span a ten-year period. When he completed his 2005 security clearance application, he did not disclose all of his criminal offenses, previous drug usage, or employment terminations. He failed to mitigate the security concerns raised by his criminal and personal conduct. Clearance is denied.

STATEMENT OF THE CASE

On July 21, 2005, Applicant filed a security clearance application (SCA). On February 9, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant under Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended. The SOR detailed reasons under Guidelines J (Criminal Conduct) and E (Personal Conduct) why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant a security clearance to the Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted.

On March 1, 2006, Applicant filed his answer to the SOR and requested a hearing. On May 12, 2006, the case was assigned to me. A Notice of Hearing was issued on May 24, 2006, setting the case for hearing on June 13, 2006. At the hearing the Government introduced exhibits (GX) 1-4 into evidence without objection. Applicant testified in his case-in-chief. DOHA received the hearing transcript (Tr.) on June 22, 2006.

FINDINGS OF FACT

Based on the entire record, including Applicant's admissions in his Answer to the SOR, I make the following additional findings of fact:

Applicant is 30 years old and applied for a position as a construction assistant with a federal contractor for which he needs a security clearance.

From July 1995 to the present, Applicant was charged and found guilty of eight minor criminal offenses. In January 1995, Applicant was arrested and charged with Assault, Causing Bodily Injury. After pleading guilty, he was given a deferred sentence and placed on probation for one year. In August 1996, a judgment of Unsatisfactory Termination of probation was entered after Applicant tested positive for drugs. He was 18 years old at the time and in high school.

In July 1998, Applicant was arrested and charged with Possession of Less than 2 oz. of Marijuana. He pled guilty. In addition to being fined and ordered to serve three days of confinement, his driver's license was suspended until February 1999. In October 1998, he was arrested and charged with Driving While License Suspended after he was caught driving to work. He pled guilty, and was fined and sentenced to five days of confinement. In March 1999, he was again charged with Driving While License Suspended. He pled guilty, was confined for five days, and ordered to pay a fine.

In June 2000, Applicant was cited and charged with No Seat Belt. He was found guilty and fined \$75. In October 2002, he was arrested and charged with three criminal offenses: Count 1- Speeding; Count 2 - No Valid Drivers License; and Count 3 - Failure To Maintain Financial Responsibility. He was found guilty on Counts 1 and 3, and fined; Count 2 was dismissed. In July 2003, he was arrested and charged with an expired Inspection and No Seat Belt for a passenger, his two-year old child. He spent one night in jail. In August 2005, he turned himself into the police after learning an arrest warrant had been issued for his failure to wear a seat belt. (Tr. 17).

During that ten-year period of time Applicant has held approximately 23 different jobs. (GX at 2-7). Presently, he works for a fuel company. (Tr. 29). He was terminated from some of the jobs for various reasons, as noted by his former employers. (GX 2).

From September to October 2000, Applicant worked for a temporary agency. He stated he left the position in October because the employer no longer needed his assistance. He denied that he was terminated for failing to show up for work. (Tr. 19).

From January until April 2001, Applicant worked for a warehouse company. In April 2001, he was terminated because he failed a random drug screen. He admitted that he started using marijuana while he was a senior in high school, but stopped sometime in early 2003 or 2004 because he knew he needed to "grow up." (Tr. 33)

From November 2001 until February 2002, Applicant worked for a security firm. He left the position because he found another job. He stated that when he told the employer he was leaving, the employer terminated him for abandoning his job. (Tr. 20). After working for his new employer for approximately one month in March 2002, his new employer told him that the job was not working out for them. He admitted that he was terminated in April 2002, but was unaware that it was because of poor work habits. (Tr. 21).

In February 2003, Applicant was terminated from a job while on probation. He denied that he was not abiding by company policies, but stated that he hurt his back in a car accident and had difficulty working. (Tr. 23). After working for another employer from April until June 2003, he was asked to leave his employment due to a less than satisfactory performance during his probation period. In July 2003, he was discharged by a subsequent employer for excessive absences. He admitted that he was late for work on many occasions. (Tr. 24). From February to May 2004, Applicant was employed at a major department store. He is not eligible for rehire because of an argument he had with another employee. (Tr. 24.).

From September 2004 until March 2005, Applicant worked for a federal contractor in Afghanistan. In March 2005, he was terminated for violating company rules by falsifying his time sheets. He admitted that he was terminated for falsifying his time sheet, but denied that he falsified the time sheet.

When Applicant signed his July 2005 security clearance application, he swore his answers were "true, complete and correct." In response to Question 20. Your Employment Record (*Has any of the following happened to you in the last 7 years? Fired from job - Quit a job after being told you'd 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 reason under unfavorable circumstances), he answered "No." He did not list any of the allegations contained in SOR ¶¶ 2.a through 2.i related to his job terminations. He did not disclose the incidents because he did not want to jeopardize his opportunity to obtain a construction job overseas. (Tr. 27)

In response to Question 26. Your Police Record -Other Offenses (*In the last 7 years, have you been arrested for, charged with, or convicted of any offense (s) not listed in modules 21, 22, 23, 24, or 25? (Leave out traffic fines or less than \$150 unless the violation was alcohol or drug related.) For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substance Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 13 U.S.C.), he answered "Yes," but failed to disclose the arrests in October 2002 and July 2003. He denied that he deliberately attempted to omit information about his police record. He forgot those two incidents. (Tr. 28)*

In response to Question 27. Your Use of Illegal Drugs and Drug Activity -Illegal Use of Drugs (*Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.) amphetamines, depressants, (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenic (LSD, PCP, etc.), or prescription drugs), Applicant answered "No." He did not disclose that he used marijuana from approximately 1998 to April 2001 because he wanted the new job. (Tr. 29)*

POLICIES

Enclosure 2 of the Directive, *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, sets forth the criteria that must be evaluated when determining security clearance eligibility. Within those guidelines are factors to consider in denying or revoking an individual's request for access to classified information (Disqualifying Conditions), and factors to consider in granting an individual's request for access to classified information (Mitigating Conditions). By recognizing that individual circumstances of each case are different, the guidelines provide substantive standards to assist an administrative judge in weighing the evidence to reach a fair, impartial and common sense decision.

The adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at a balanced decision. Section E.2. of Enclosure of the Directive mandates that security clearance decisions include a review of the whole person. In evaluating the disqualifying and mitigating conduct of the applicant, an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (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 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.

Granting an applicant's clearance for access to classified information is based on a high degree of trust and confidence in the individual. Accordingly, decisions under the Directive must include consideration of not just the *actual* risk of disclosure of classified information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information. Directive, Enclosure 2, ¶ E2.2.2. The decision to deny an individual a security clearance request is not necessarily a determination of the applicant's loyalty. Executive Order 10865, § 7. Instead, it is a determination that the applicant has not met the strict guidelines established by the Department of Defense 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. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Directive presumes a rational connection between past proven conduct under any disqualifying condition and an applicant's present security suitability. ISCR Case No. 95-0611 at 3 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the corresponding burden of rebuttal shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the position of the government. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *See Directive ¶ E3.1.15*. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his clearance." *Id.*

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

Guideline J - Criminal Conduct: A security concern may arise when an individual's history or pattern of criminal activity creates doubt about his judgment, reliability and trustworthiness.

Guideline E - Personal Conduct: A security concern arises when 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.

The disqualifying and mitigating conditions, either raising security concerns or mitigating security concerns applicable to this case, are set forth and discussed in the Conclusions section below.

CONCLUSIONS

I considered all of the facts in evidence and appropriate legal standards, including the "whole person" concept, and concluded the following with respect to the allegations set forth in the SOR:

Guideline J - Criminal Conduct

Based on the evidence, the Government established a potential disqualifying condition under Guideline J, specifically, Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*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*). Applicant admitted the eight allegations of criminal conduct contained in the SOR, which consisted of multiple minor offenses.

He also acknowledged that he knowingly falsified his SCA by omitting information about his employment history and drug use, which constituted a crime under Title 18, United States Code, Section 1001.

The Government having established its case, the burden shifted to Applicant to mitigate or rebut the allegations. After considering all of the mitigating conditions under this guideline, in particular, two of them, I concluded neither applies. (1) As there are eight incidents of criminal conduct, CC MC E2.A10.1.3.2 (*The crime was an isolated incident*), is not applicable. (2) In addition to those eight incidents, in July 2005, he deliberately falsified his security clearance application in order to obtain a job. That conduct demonstrated a lack of rehabilitation, and prohibited the application of CC MC E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*).

In addition to the enumerated disqualifying and mitigating conditions, I considered the significant number of criminal offenses and job related problems over the ten-year period of time. While I considered his young age at the time of the initial criminal offense, I also noted the ongoing nature of criminal problems despite his aging. Although he appears to have matured in terms of abstaining from the use of marijuana, he exhibited little understanding of his employment problems or the seriousness of the falsification of his SCA.

After weighing the disqualifying and mitigating factors and evaluating the evidence in the context of the whole person, I concluded Applicant has not mitigated the security concerns based on criminal conduct. Accordingly, the allegations contained in SOR ¶¶ 1.a through 1.i under Guideline J are decided against him.

Guideline E: Personal Conduct

Based on the evidence, the Government established a potential disqualifying condition under Guideline E, in particular,

Personal Conduct Disqualifying Condition (PC DC) 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, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities*). Applicant admitted that he deliberately falsified his answers to Questions 20 and 27 in order to obtain a position, as alleged in SOR ¶¶ 2.j and 2.l. He denied that he intentionally concealed information about his police record in Question 26, and asserted that he forgot about the October 2002 and July 2003 offenses, as alleged in SOR ¶ 2.k. I find that explanation credible, given his disclosure of other criminal incidents, and hence, ¶ 2.k is found in his favor.

The Government also established a potential disqualifying condition under PC DC E2.A5.1.2.1 (*Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances*). The allegations contained in SOR ¶¶ 2.b, 2.d, 2.f, 2.g, 2.h, and 2.i relating to Applicant's employment problems, are supported by information provided to the Government from his former employers and his own admissions. However, Applicant denied the allegations contained in SOR ¶¶ 2.a, 2.c. and 2.e, and there is insufficient evidence in the record to contradict his denials. Thus, those allegations are found in his favor.

I reviewed all of the mitigating conditions under this guideline, in particular, Personal Conduct Disqualifying Condition (PC MC) E2.A5.1.3.2 (*The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*), and concluded it does not apply to SOR ¶¶ 2.j and 2.l. Applicant falsified answers in his July 2005 SCA regarding his employment problems and drug use. At the hearing he testified that he withheld the information in order to obtain a job. There is no evidence in the record indicating that he provided correct information voluntarily. None of the other mitigating conditions are applicable to the falsification issues or employment problems.

After weighing the disqualifying and mitigating factors and considering all of the evidence in the context of the whole person, including the number and frequency of employment terminations that indicate a lack of reliability, I concluded Applicant did not mitigate the remaining allegations contained in Paragraph 2 of the SOR. Accordingly, Guideline E is decided against Applicant.

For the reasons stated, I conclude Applicant is not eligible for 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 as follows:

Paragraph 1: Guideline J (Criminal Conduct) AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: Against Applicant

Subparagraph 1.f: Against Applicant

Subparagraph 1.g: Against Applicant

Subparagraph 1.h: Against Applicant

Subparagraph 1.i: Against Applicant

Paragraph 2: Guideline E (Personal Conduct) AGAINST APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: For Applicant

Subparagraph 2.d: Against Applicant

Subparagraph 2.e: For Applicant

Subparagraph 2.f: Against Applicant

Subparagraph 2.g: Against Applicant

Subparagraph 2.h: Against Applicant

Subparagraph 2.i: Against Applicant

Subparagraph 2.j: Against Applicant

Subparagraph 2.k: For Applicant

Subparagraph 2.l: Against Applicant

DECISION

In light of all of 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 is denied.

Shari Dam

Administrative Judge