

DATE: September 29, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-16163

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

Todd W. Reed, Esq.

SYNOPSIS

Applicant is 53 years old, married, and has two adult children. He works for a defense contractor. He did not disclose his former wife from whom he was divorced in 1978, his adult children, and a 1981 arrest for marijuana trafficking on his 2005 security clearance application. Applicant mitigated the personal conduct and criminal 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 January 24, 2006, DOHA issued a Statement of Reasons ⁽¹⁾ (SOR) detailing the basis for its decision-security concerns raised under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on February 10, 2006. However, he did not answer one allegation and failed to elect a hearing or administrative determination. He was given additional time to submit a complete answer. He answered the SOR completely on March 8, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on May 1, 2006.

On May 18, 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. Applicant submitted a motion to continue the hearing. I denied the motion (Tr. 9). The Government submitted exhibits that were admitted into evidence. Applicant had no exhibits at the hearing, though the record remained open to allow the submission of an affidavit or documents pertaining to any previous clearance processing, including what disclosures Applicant made on those applications. DOHA received the hearing transcript (Tr.) on May 30, 2006.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated 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 53 years old, married to his second wife and has two adult children. He has worked for a defense contractor since 1996. Applicant was previously married from 1973 until 1977. His adult son was incarcerated in a state prison when Applicant completed his current security clearance application (SCA) in May 2005. (Tr. 45-59; Exhibits 1)

Applicant was a civilian employee of the Air Force in April and May 1981 when he was arrested for trafficking in marijuana (12 grams of it) on April 15, 1981, at the age of 28.. Applicant was put into a criminal diversion program under state law with the condition he not commit any more crimes in the next ten years his record would be expunged. Applicant did not appear in court to effectuate this arrangement, but signed a plea agreement with the local prosecutor in 1981. Since then, Applicant has had background checks done by employers and nothing adverse appeared on his record to deny him employment. (Tr. 45-59; Exhibits 1-3, A)

Applicant's SCA did not disclose his first marriage, nor his two adult children in Sections 14 and 15 (Spouse and Relatives). The SCA did not disclose the 1981 arrest for marijuana trafficking in answer to Question 23.d (Have you ever been charged with or convicted of any offenses related to alcohol or drugs?). (Exhibit 1)

When questioned by the Government investigator in September 2005 about the 1981 arrest, Applicant said he had not been arrested, then recalled the arrest and discussed it with the investigator. Applicant did not initially recall committing any crime or having any conviction, but in the discussion with the investigator he remembered the 1981 arrest and diversion program. His lawyer at the time informed him of the expungement condition. Applicant has not committed any crime in the intervening 25 years. (Tr. 21-67; Exhibits 1-3)

Applicant also disclosed his former wife and two children in the interview with the Government investigator. He asserted that he merely forgot to list the two children in the midst of gathering information on his half-siblings, working on the SCA at home, and then making the data entries at work on the computer version over the course of a month. He also misread the SCA and did not see anywhere on the form where he was required to make the disclosure. He did not disclose his former wife because the marriage ended in 1978 and he mistakenly thought his present wife did not know about his first wife. Later, she reminded him he told her. He marked the SCA entry for a former spouse as "not applicable." He realizes he made a mistake. (Tr. 21-60; Exhibit 1)

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 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

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

CONCLUSIONS

The Government established a *prima facie* case by the evidence in the record. Applicant then has the burden of proof to show Mitigating Conditions (MC) apply to outweigh the Disqualifying Conditions (DC) the Government argues should apply.

Under the evidence presented, DC 2 (The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, or similar form used to determine security clearance eligibility or trustworthiness E2.A5.1.2.2), and DC 3 (Deliberately providing false or misleading information concerning relevant and material matters to an investigator or other official representative in connection with a personnel security or trustworthiness determination. E2.A5.1.2.3), might apply if Applicant deliberately omitted the information about his first wife, his two adult children, and a 25-year-old arrest.

After listening to his testimony and observing his demeanor, I find Applicant to be credible in his explanation that he neglected to list his children on the SCA during the several days of filling in the information and moving back and forth amongst the electronic pages of the SCA. Also, the obviousness of his children made him overlook them as he was seeking information on his half-siblings and concentrating on filling in their information. Additionally, his explanation of his recollection process during the discussion with the investigator is believable and persuasive because the incident was 25 years old, and Applicant never went to court on the charge. While he did not list his former wife, that

information is not pertinent to a determination of judgment because the marriage ended 28 years ago and she would not have any current relevant information about Applicant. Therefore, I conclude his omissions were not deliberate with the purpose to thwart the Government's investigation of his security clearance eligibility, but was due to forgetfulness, confusion, and an innocent mistake. With no deliberateness involved, no DCs apply, and no MC issues need be reached. I conclude the personal conduct security concern for Applicant.

Regarding the criminal conduct security concern, DC 1 (Allegations or admission 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) apply. Applicant has one 1981 arrest. If he knowingly and willingly failed to disclose his former wife, his two adult children, and that offense on his 2005 SCA, then 18 U.S.C. § 1001 would apply.

His 1981 arrest was 25 years ago, so it is not recent. It is an isolated incident. DC 1 (The criminal behavior was not recent. E2.A10.1.3.1) and DC 2 (The crime was an isolated incident. E2.A10.1.3.2) apply. Applicant has not had any further incidents since then, so he has rehabilitated himself. DC 6 (There is clear evidence of successful rehabilitation. E2.A10.1.3.6) applies.

In addition to the DC and MC, I have also considered the whole person concept, including his 10 year history of doing his job while having a security clearance with no security incidents. I also considered that he has not had any criminal incidents in 25 years. His candid explanations of his forgetfulness and mistakes I also considered. These events will not be repeated in the future because of the unique set of circumstances, and Applicant's present age.

Because I concluded there was no deliberate falsification, and now conclude there was no knowing and willful failure to disclose information to the Government, I conclude the criminal conduct security concern for Applicant.

FORMAL FINDINGS

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

Paragraph 1. Guideline E: 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 J: FOR APPLICANT

Subparagraph 2.a: 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).

