

DATE: July 18, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-17260

DECISION OF ADMINISTRATIVE JUDGE

SHARI DAM

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 36 years old and applied for a position with a federal contractor for which he needs a security clearance. From September 1990 until May 2004, he was on active military duty. In arch 2004, he received a special court-martial for using abusive language and destroying property while training his flight students. He pled guilty and was sentenced, and subsequently honorably discharged in May 2004. He mitigated the security concerns raised by his criminal history. Clearance is granted.

STATEMENT OF THE CASE

On July 14, 2004, Applicant completed a security clearance application. (SCA) On March 9, 2006, the Defense Office of Hearings and Appeals (DOHA) 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, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons under Guideline J (Criminal 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 Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted.

In a sworn statement, dated March 20, 2006, Applicant responded to the SOR and requested a hearing. The case was assigned to me on May 12, 2006. A Notice of Hearing was mailed on May 22, 2006, setting the case for hearing on June 15, 2006. At the hearing, the Government entered exhibits (GX) 1-2 into evidence without objection. Applicant entered exhibits (AX) A-B into evidence without objection and testified in his case-in-chief. The record was left open until June 26, 2002, to give Applicant an opportunity to submit additional documents. On June 22, 2006, Applicant submitted AX C, which was admitted without objection by Department Counsel. DOHA received the hearing transcript (Tr.) on June 26, 2006.

FINDINGS OF FACT

Based on the entire record, including Applicant's admissions in his response to the SOR and at the hearing, I make the following findings of fact:

Applicant is 35 years old and divorced. He enlisted in the U.S. Air Force in September 1990 and served on active duty and until May 2004, when he separated from the military service with an honorable discharge. Since leaving, he has worked for private companies, during which time he spent a year in Iraq installing heating and cooling systems. In July 2004, he applied for a position with a federal contractor that requires a security clearance.

After graduating military training instructor school in 2003, Applicant began training flights of recruits. In November 2003, he was assigned his tenth flight, which consisted of several female students. During three of the instruction sessions, he used profane and abusive language with the trainees, and also grabbed a couple of them by their shirt collars. On three other occasions he damaged military property by pushing a desk into the wall and throwing two drawers on the floor. As a consequence of his behavior, he received a Special Court Martial on March 10, 2004, for (Count 1) cruelty and maltreatment, (Count 2) dereliction of duty, and (Count 3) damaging military property, \$500 or less on. He pled guilty to all three offenses, and was sentenced to a reduction in grade from E-5 to E-4, ordered to forfeit \$900 of his pay per month for three months, restricted to the base for 60 days, and given a written reprimand.

At the time of these incidents, Applicant was in the process of receiving a promotion from his new wing commander. In an attempt to impress his immediate supervisor and train the "best" flight, he changed his previous teaching style, and engaged in harsh techniques that were not within the training guidelines. (Tr. 19 and 23) He repeatedly acknowledged throughout the hearing, and in the written record that he made a terrible mistake, which cost him a 14-year career that he loved. (GX 2) He stated, "I learned . . . that when you are given power, you can't abuse it, especially when it's people you don't know or you've never met. They trusted in me and I let them down. I let the Government down. I let the Air Force down." (Tr. 33.)

Prior to this incident, Applicant's service record was unblemished. Many of his yearly performance evaluations documented his exceptional abilities and highly motivated performance. (GX 2)

Applicant submitted seven letters from his colleagues who have known him for a number of years and served with him in the air force. All of them are aware of the events that led to his discharge. Any of the letters reference his remorse for the problems he created and attest to his loyalty and otherwise outstanding service. (AX C)

POLICIES

Enclosure 2 of the Directive, *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, sets forth criteria which must be evaluated when determining security clearance eligibility. Within those adjudicative 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 in order 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 E2.2. of Enclosure 2 of the Directive describes the essence of scrutinizing all appropriate variables in a case as the "whole person concept." In evaluating the disqualifying and mitigating conduct 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 only 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 is not necessarily a judgment about an applicant's loyalty. Executive Order 10865, § 7. Instead, it is a determination that an 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, 531 (1988). The Directive presumes a rational connection between past proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. ISCR Case No. 95-0611 at 2 (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 in refutation, extenuation, or mitigation sufficient to overcome the position of the government. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); Directive, Enclosure 3, ¶ 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 the allegations contained in the SOR and a consideration of the evidence as a whole, the following adjudicative guideline is pertinent to an evaluation of the facts of this case:

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

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

CONCLUSIONS

After consideration of all the facts in evidence, an assessment of credibility, and the application of the appropriate legal standards, I conclude the following with respect to the allegations set forth in the SOR:

Guideline J: Criminal Conduct

The Governments established a case for potential disqualification under Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.*) In 2004, Applicant was convicted of three offenses involving criminal behavior while in military service.

The Government having established its case, the burden shifted to Applicant to mitigate or rebut the allegations. After reviewing all of the mitigating conditions under this guideline, I conclude that two of them apply. (1) Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3 (*The criminal behavior was not recent*). The underlying misconduct occurred in November 2003, more than two and a half years ago. Hence, the criminal behavior is not recent. (2) CC MC E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*). From his guilty pleas to the charges and throughout the hearing, Applicant fully accepted responsibility for his misconduct, and repeatedly and convincingly expressed his regret. The letters of support written by his colleagues and friends, who have known him for many years, corroborate his remorse and commend him for his hard work and loyalty. Such evidence is documentation of successful rehabilitation.

I considered Applicant's credibility, appearance and demeanor while testifying. I considered all of the evidence provided, including, his age, the numerous letters and memos in the file that address his previous good work and performance, the impact this incident had on his career, and his appreciation for his misconduct, and the maturity he has gained from incident. After doing so, I find Applicant has sufficiently mitigated the security concerns raised by the Government in SOR ¶ 1.a. Accordingly, Guideline J is concluded in Applicant's favor.

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) FOR APPLICANT

Subparagraph 1.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 Applicant a security clearance. Clearance is granted.

Shari Dam

Administrative Judge