

DATE: November 30, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 06-03268

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

In September 1974, Applicant was convicted of receiving and concealing stolen property and possessing marijuana for resale. He served 16 months in confinement, thereby triggering the disqualification from eligibility for a security clearance under 10 U.S.C. § 936(c)(1). He also has three convictions for driving under the influence (DUI) and a conviction for domestic violence. He has not mitigated the security concern based on criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

On May 31, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. This action was taken under Executive Order 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). The SOR alleged security concerns raised under Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on June 27, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on October 11, 2006. The case was heard on November 2, 2006, as scheduled. DOHA received the hearing transcript (Tr.) on November 16, 2006.

PROCEDURAL RULINGS

After both sides had presented their evidence, Department Counsel moved to amend the SOR to add security concerns under Guideline G (Alcohol Consumption), alleging the same conduct as alleged under Guideline J in SOR ¶¶ 1.b, 1.c, and 1.d. I denied the motion on the ground it was unfair to add a new security guideline during the hearing, without prior notice to Applicant, when the information on which the motion was based was well known to the government before the hearing (Tr. 45-47).

Department Counsel also moved to amend SOR ¶ 1.e to conform to the evidence by stating that Applicant was sentenced to "two to ten" years in prison instead of "one to five" as originally alleged. Applicant did not object, and I granted the motion (Tr. 48-49).

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is a 53-year-old electrical technician for a federal contractor. He has worked as an electrician for 28 years and has worked for his current employer since May 2004. He is a supervisor, interacts well with his colleagues, and is an officer in his local union (Tr. 24). In his answer to the SOR, he included written testimonials from three supervisors, all of whom commented favorably on his technical knowledge and skill, sense of responsibility, positive attitude, and strong work ethic. Applicant has an interim clearance but not a final clearance (Tr. 14).

Applicant was married in September 1980 and divorced in December 1990. He remarried in July 2003, but he is now separated. He has two sons born of his first marriage, both of whom are serving on active duty in the U.S. Marine Corps (Applicant Exhibit (AX) A).

In September 1974, Applicant was convicted of receiving and concealing stolen property and possession of marijuana for resale. Three separate incidents were involved. The first occurred when he threw a marijuana cigarette on the ground when a police officer approached him. The second occurred when his girl friend stashed two or three bags of marijuana in a restaurant, and they were arrested when they returned to the restaurant to retrieve it. The third occurred when he stored a stolen bicycle for a friend. He was convicted of all three offenses and sentenced to confinement for two to ten years. He actually served 16 months in confinement (Government Exhibit (GX) 2 at 2-4; GX 3 at 3).

In an interview with a security investigator, Applicant admitted using marijuana on weekends during in the 70's. He tested positive on a pre-employment urinalysis in 1984 (Tr. 43-44). He stopped using marijuana in 2000 (Tr. 44). None of this marijuana use was alleged in the SOR.

In November 1994, Applicant was convicted of driving under the influence (DUI). He was sentenced to a fine and two days in jail, and his driver's license was suspended (GX 1 at 17).

In August 1996, he was again convicted of DUI. He was sentenced to 45 days in jail and his driver's license was revoked for two years (GX 1 at 17).

In February 1998, he was convicted of DUI, possession or use of marijuana, and driving while his license was revoked. The marijuana was found in the glove box of his car. According to Applicant, it belonged to another person who rode to work with him (Tr. 31). The record does not reflect the sentence imposed for these offenses, but he states he served some jail time. In February 1998, after being released from jail, he successfully completed a four-month alcohol rehabilitation program (Tr. 22). He maintains that he no longer has an alcohol problem. (Answer to SOR at 2.) He consumes only beer, not wine or hard liquor. He usually consumes a six-pack of beer on weekends, three or four beers at a time while watching a televised ball game or a race (Tr. 36).

Applicant attributes his multiple DUI offenses to the stress of his divorce in 1990 and losing custody of his two sons. He was under financial pressure because of child support payments. He was moving around from job to job, living out of motel rooms, and unable to see his sons (Tr. 22-23). Now that his sons are adults and serving in the Marine Corps, he no longer is under financial pressure to support them. He now has a steady job and lives close to his job site (Tr. 24).

Applicant was arrested for domestic assault in February 2004, after he had been married for about seven months (Tr. 37). He and a friend were listening to Applicant's new stereo at about 9:30 a.m., when Applicant's wife became upset because the stereo had awakened her. He responded to her verbal abuse by shoving her onto the bed. Shortly thereafter, his wife's daughter jumped onto his back. He left the house and returned a few hours later when he was attacked by his wife's daughter's boy friend. The police arrived and arrested Applicant. He was ordered to attend domestic violence classes. After he completed the classes, the charges were dismissed and the record expunged (GX 2 at 2). His wife

moved out after the incident and they have remained separated (Tr. 39).

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 with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified. 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 (App. Bd. Dec. 19, 2002).

The Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and 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 and ¶¶ E2.2.1.1 through E2.2.1.9.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in persons with access to classified information. However, 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 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 which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). "[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." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3; *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 security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

Guideline J (Criminal Conduct)

A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1. Disqualifying conditions may be based on allegations or an applicant's admission of criminal conduct, whether or not charged (DC 1). Directive ¶ E2.A10.1.2.1. A single serious crime or multiple lesser offenses may also be disqualifying (DC 2). Directive ¶ E2.A10.1.2.2. Applicant's admissions and documented criminal record reflect multiple offenses, including one felony conviction. I conclude DC 1 and DC 2 are raised by the evidence.

Since the government produced substantial evidence to establish DC 1 and DC 2, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. Applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). Criminal conduct can be mitigated by showing it was not recent (MC 1), an isolated incident (MC 2), or there is clear evidence of successful rehabilitation (MC 6). Directive ¶¶ E2.A10.1.3.1.,

E2.A10.1.3.2., E2.A10.1.3.6.

Applicant has multiple criminal convictions spanning a 30-year period, including three DUI convictions within four years of each other. I conclude MC 2 is not established.

The issues under both MC 1 and MC 6 are whether there has been a significant period of time without any evidence of misconduct, and whether the evidence shows changed circumstances or conduct. The Directive is silent on what constitutes a sufficient period of reform and rehabilitation. The sufficiency of an applicant's period of conduct without recurrence of past misconduct does not turn on any bright-line rules concerning the length of time needed to demonstrate reform and rehabilitation, but rather on a reasoned analysis of the facts and circumstances of an applicant's case based on a careful evaluation of the record. If the evidence shows that a significant period of time has passed without evidence of misconduct by an applicant, then an administrative judge must articulate a rational basis for concluding why that significant period of time does not demonstrate changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation. ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

Applicant's first conviction in September 1974 occurred when he was 21 years old. More than twenty years passed before his first DUI conviction in November 1994. However, Applicant's involvement with marijuana continued. He had a positive urinalysis in 1984, admitting using marijuana regularly on weekends until 2000, and was convicted of possessing marijuana in 1998. While his repeated marijuana involvement from 1974 to 2000 was not alleged in the SOR and may not be used as an independent basis for an adverse clearance decision, it is a legitimate consideration in determining whether a mitigating condition applies. *See* ISCR Case No. 01-26479, 2003 WL 22706194 at *4 (App. Bd. Sep. 16, 2003) (adverse security clearance decision may not be based on uncharged misconduct). His domestic violence conviction in February 2004 is minor in itself, but it is significant in the context of a 30-year span of continuing criminal conduct. I conclude MC 1 and MC 6 are not established.

Whole Person Analysis

In addition to considering the specific disqualifying and mitigating conditions under each guideline, I have also 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 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 ¶¶ E2.2.1.1 through E2.2.1.9.

Applicant moderated his alcohol consumption after completing a rehabilitation program in 1998, and he finally stopped using marijuana in 2000. The emotional and financial pressures that contributed to his alcohol and drug abuse appear to have been removed. However, his domestic violence conviction, although a relatively minor offense, indicates his continued inability to conform his conduct to the law. Insufficient time has passed to conclude he is rehabilitated to the point that recurrence of criminal conduct is unlikely. "Only with the passage of time will there be a track record that shows whether a person, through actions and conduct, is willing and able to adhere to a stated intention to refrain from acting in a way that the person has acted in the past." ISCR Case No. 97-0727, 1998 DOHA LEXIS 302 at *7 (App. Bd. Aug. 3, 1998).

After weighing the disqualifying and mitigating conditions under Guideline J, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on based on his criminal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the interests of national interest to grant him a security clearance.

Applicability of 10 U.S.C. § 986

Absent a waiver from the Secretary of Defense, the Department of Defense may not grant or continue a security clearance for any applicant who "has been sentenced by a U.S. court to confinement for more than one year, and was incarcerated as a result of that sentence for not less than one year." 10 U.S.C. § 986(c)(1) as amended. Because Applicant served more than 16 months in confinement as a result of his conviction in 1974, 10 U.S.C. § 986(c)(1) applies.

I have concluded that Applicant has not mitigated the security concerns based on his criminal conduct. Thus, my decision to deny a clearance is not based solely on 10 U.S.C. 986(c)(1), and I would deny a clearance even if it were not applicable.

FORMAL FINDINGS

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

Paragraph 1. Guideline J: 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

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

LeRoy F. Foreman

Administrative Judge