DATE: December 7, 2006

In re:

SSN: ----------

Applicant for Security Clearance

CR Case No. 06-07573

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Emilio Jaksetic, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was convicted in military court for his role in an insurance-fraud scheme in 2000. He was sentenced to a bad-conduct discharge and confinement for six months. Although he presented a good case in mitigation, it is not strong enough to overcome the negative security implications of his dishonest and deceitful criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

Applicant is challenging the Defense Department's preliminary decision to deny or revoke his eligibility for a security clearance. Acting under the relevant Executive Order and DoD Directive,[(1)] on June 16, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) detailing the basis for its decision. The SOR--which is in essence the administrative complaint--alleges security concerns under Guideline J for criminal conduct and Guideline E for personal conduct (falsification). On July 28, 2005, Applicant replied to the SOR and requested a hearing.

The case was assigned to me on September 19, 2006, and a notice of hearing was issued scheduling the case for October 19, 2006. Applicant appeared without counsel and the hearing took place as scheduled. At Applicant's request, I left the record open until November 17, 2006, to allow him to submit additional documentary evidence. Without objections by department counsel, the following post-hearing matters are admitted: (1) Exhibit B-a letter from Applicant's facility security officer; and (2) Exhibit C-seven monthly evaluations from Applicant's employer. DOHA received the hearing transcript November 13, 2006.

RULINGS ON PROCEDURE

Department Counsel moved to amend the SOR in light of dropping or withdrawing one of the two falsification allegations under Guideline E. Without objections, the motion to amend was granted. Accordingly, the SOR, as

amended, reads as follows:

- SOR ¶ 1 alleging criminal conduct under Guideline J now consists of the following two subparagraphs:

  a. On February 28, 2000, you were charged with (1) making a false report; (2) conspiracy to commit larceny; and (3) attempt to commit larceny by the United States Navy. You were confined until your general court-martial on July 11, 2000, when you pled guilty to making a false report. You were sentenced to six months of imprisonment and to receive a bad-conduct discharge.

  b. You falsified your May 21, 2004, security-clearance application, in violation of 18 U.S.C. § 1001, a federal felony, as set forth in subparagraph 2.b, below.

  - SOR ¶ 2 alleging personal conduct under Guideline E now consists of the following two subparagraphs:

    a. You engaged in conduct as set forth in subparagraphs 1.a and 1.b, above.[(2)]

    b. You falsified material facts on a security-clearance application, Standard Form 86, executed by you under date May 21, 2004, in response to "Question 33. Your Financial Record - Bankruptcy In the last 7 years have you filed a petition under any chapter of the bankruptcy code (to include Chapter 13)?" You deliberately failed to disclose that you had filed a voluntary petition for Chapter 7 on April 30, 2004, in the United States Bankruptcy Court for the Eastern District of Virginia, Norfolk Division.

    As a result, my findings of fact and conclusions are limited to the amended SOR.

FINDINGS OF FACT

In reply to the SOR, Applicant admitted the criminal conduct in SOR ¶ 1.a, but he explained that he is now a different person compared with when the incident happened six years ago when he was young and used poor judgment. Concerning SOR ¶ 2.b, he admitted not listing his Chapter 7 bankruptcy case in response to Question 33 of his security-clearance application, but he explained that when he completed his application he had not yet filed for bankruptcy. He further explained that his application was done in June 2003, but his company misplaced it and he was unaware that it was found and resubmitted. In addition, I make the following findings of fact.

1. Applicant is a 28-year-old man who is employed as an electrician technician. He is seeking to obtain a security clearance for his employment with a federal contractor.

2. Applicant married in May 2000. He and his wife have three children, to include a stepson whom Applicant has parented since the child was about three years old. His stepson is now ten, his son is four, and his daughter is six months old.

3. In February 2000, while serving as a sailor on active military duty, Applicant was charged by Navy authorities for his role in an insurance-fraud scheme involving his automobile. A few months later in July 2000, Applicant pleaded guilty to attempted larceny, conspiracy to commit larceny, and making a false official statement (Exhibit 3). Based on his guilty pleas, a military judge sitting as a general court-martial convicted Applicant and sentenced him to confinement for six months and a bad-conduct discharge. The convening authority approved the sentence as adjudged. Nearly five years later in March 2005, a military court of criminal appeals affirmed the convictions for the three offenses and the sentence. Further legal review was denied, and Applicant received his discharge certificate (DD Form 214) reflecting a bad-conduct discharge in about August 2005. Since his release from confinement, Applicant has had no further criminal activity (e.g., arrests, charges, or convictions).

4. In affirming Applicant's general court-martial case, the court of criminal appeals described some of the facts developed during the guilty-plea hearing (Exhibit 3). The court noted Applicant provided the location of his vehicle and his keys so that his co-conspirator could dispose of the vehicle. After that, Applicant

made a false report to the Naval Criminal Investigative Service and his insurance company that his vehicle had been stolen. His actions were all part of a scheme to collect the insured value of his vehicle from the insurance company. The co-conspirator got the vehicle and burned it. In doing so, a co-conspirator suffered burn injuries. The information about the manner in which the co-conspirator disposed of the car and the injury suffered by a co-conspirator was admitted as aggravation evidence during the presentencing stage of the general court-martial.

5. On April 30, 2004, Applicant and his wife sought financial relief by filing a Chapter 7 bankruptcy petition. The summary of schedules reveals that Applicant was claiming total assets of about $17,181, consisting of personal property, and total liabilities of $47,878, consisting primarily of $31,368 in Schedule F unsecured debt (Exhibit 2). The case was processed during the next few months and the bankruptcy court granted Applicant and his wife a discharge on August 9, 2004 (Exhibits 2 and A).

6. To obtain a security clearance, Applicant was required to complete a security-clearance application (Exhibit 1). In signing it, he was required to certify that his statements were true, complete, and correct to the best of his knowledge and belief and made in good faith. Also, he acknowledged that a knowing and willful false statement on the application could be punished by a fine or imprisonment or both under federal law. Applicant did not mention the Chapter 7 bankruptcy case in the application. In particular, in response to Question 33, he denied filing a petition under any chapter of the bankruptcy code within the last seven years.

7. There is some confusion about when the paperwork was initiated to obtain a security clearance for Applicant. The application's first page is dated February 25, 2004, and it was signed by Applicant on May 21, 2004 (Exhibit 1). It shows that Applicant first started working for a federal contractor in June 2003.

8. According to a letter from his facility security officer (FSO) (Exhibit B), Applicant's next employer was the sister company of his present employer from July 29, 2004, through August 19, 2005. In this position, he did not require a security clearance. Then from August 22, 2005, until the present, Applicant has worked for his present employer. Subsequently, in February 2006, the FSO was notified that Applicant needed a security clearance to perform his job duties. The FSO checked the system and learned that Applicant had an investigation opened on July 26, 2004, three days before starting with the sister company.

9. Applicant testified about the circumstances surrounding his security-clearance application.

He explained that he first started working for a federal contractor on June 10, 2003, and was asked to complete a security-clearance application a few days later (R. 60). He did so using a software program designed for that purpose (R. 60-61). In early 2004, he inquired about the status of his application and was told to resubmit it because it could no longer be found (R. 61). He resubmitted another application in February 2004 by accessing the file saved on a disk (R. 61-61). He believes he resubmitted it on or about February 25th, the date on the security-clearance application at issue here (R. 62). A few months later in May 2005, he was asked to sign a hard copy version of his application (R. 62). Also, he explained that he thought a bankruptcy was required to be reported in response to Question 33 once the case had been completed as opposed to when the petition was filed (R. 52-53).

10. Concerning his court-martial conviction, Applicant explained that the incident was a mistake he made as a young man. He is moving forward with his life, trying to stay positive. He describes his conviction as a changing point in his life, and he does not intend to ever go back to such an ordeal.

11. Applicant considers himself hardworking, he's eager to learn and move up the ranks in his field. His monthly performance evaluations (Exhibit C) are uniformly good, rating his job performance in various areas as competent, commendable, or exceptional. The most recent evaluation, dated November 1, 2006, describes Applicant as a dependable, hardworking employee who can be counted on to get the job done.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.(3) 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 those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.(4) Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.(5) There is no presumption in favor of granting or continuing access to classified information.(6) The government has the burden of presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted.(7) An applicant is responsible for presenting witnesses and other evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.(8) In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.(9)

No one has a right to a security clearance.(10) And as noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."(11) Under *Egan,* Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

1. The Criminal Conduct Security Concern

Under Guideline J,(12) criminal conduct is a concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling sensitive information.

Here, based on the record evidence as a whole, a criminal conduct security concern is raised under Guideline J. The record evidence shows Applicant has a history of criminal conduct based on his general court-martial conviction in July 2000. He pleaded guilty to three offenses (attempted larceny, conspiracy to commit larceny, and making a false official statement) stemming from his role in an insurance-fraud scheme. He received serious punishment, as evidenced by a punitive separation from the Navy (the bad-conduct discharge) and confinement for six months. Indeed, a bad-conduct discharge, while less severe than a dishonorable discharge, is a severe punishment and carries with it a certain stigma recognized by our society.

I reviewed the MCs under the guideline and conclude that some apply in Applicant's favor. First, the insurance-fraud scheme and his court-martial conviction took place in 2000. Since his release from confinement, there has been no further criminal activity. Given the passage of time since then, his criminal conduct is not recent within the meaning of the guideline.(13) Second, although Applicant pleaded guilty and was convicted of three distinct offenses under military law, his offenses stemmed from a single course of conduct as opposed to multiple offenses over a period of months or years. Viewed in this light, Applicant's insurance-fraud scheme in 2000 was an isolated incident within the meaning of the guideline.

(14) Third, there is evidence of rehabilitation(15) based on the following: (1) the passage of time since his release from military confinement without further criminal activity; (2) his employment as an electrician technician with defense contractors since June 2003 and his good employment record (Exhibit C); and (3) his family involvement as a husband and father to three young children.

2. The Personal Conduct Security Concern

Personal conduct under Guideline E(16) is always a security concern because it asks the central question: Does a person's past conduct justify confidence the person can be trusted to properly safeguard classified information. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the government when applying for a security clearance or in other official matters is a security concern. It is deliberate if it is done knowingly and willfully.

An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported.

To prove the falsification allegation, the government relied on the security-clearance application, the bankruptcy records, and its cross-examination of Applicant. Although substantial evidence is a low standard, the evidence here is not sufficient to prove that Applicant gave a deliberately false answer when he responded "no" to Question 33 about bankruptcy. The state of the evidence is a muddle due to the circumstances surrounding the completion and submission of his application. It appears he initially submitted an electronic version of his application in June 2003. He submitted another on or about February 25, 2004. At both times, this was before the Chapter 7 bankruptcy petition was filed on April 30, 2004. He was then asked to sign a hard copy version of his previous electronic application. He signed it on May 21, 2005, which amounted to certifying that the answers he gave in February 2005 were true and correct. Muddling the situation further is his layman's misunderstanding of when a bankruptcy was considered filed for purposes of responding to Question 33. Taken together, these circumstances persuade me that Applicant was not trying to deliberately omit or conceal the Chapter 7 bankruptcy case from his security-clearance application. Accordingly, no DCs under Guideline E apply and it will be decided for Applicant.

3. The Whole-Person Concept

I have also considered the available information in light of the nine factors of the whole-person concept.(17) Each factor is discussed below.

First, the nature, extent, and seriousness of his conduct are noteworthy because his crimes show dishonesty and deceit. His offenses involved a plan where he agreed with at least one other person to engage in criminal conduct for financial gain. To carry out the plan, he made a false statement to military law-enforcement and his insurance carrier. As a result of the conspiracy, Applicant's vehicle was torched and an individual suffered burn injuries. Given these circumstances, I consider his offenses quite serious.

Second, the circumstances surrounding the conduct show that Applicant was a knowledgeable participant in the insurance-fraud scheme. It was his car and he stood to gain by making a false insurance claim.

Third, the frequency and recency of his conduct are noteworthy. This was essentially a one-time event that happened more than six years ago and has not recurred.

Fourth, he was a relatively young man, about 21 or 22, when he committed these crimes.

Fifth, his participation in the scheme was voluntary. There is no evidence suggesting he was pushed, forced, or coerced into committing these offenses.

Sixth, as discussed above, there is ample evidence of rehabilitation.

Seventh, the motivation for the conduct appears to be a lack of financial means to repair his car (R. 71), and the insurance-fraud scheme was the way Applicant chose to remedy the problem. In that regard, I note that Applicant went through Chapter 7 bankruptcy rather recently in August 2004.

Eighth, the potential for pressure, coercion, exploitation, or duress stemming from his conduct is unlikely. His court-martial conviction is a public record, and he has put the matter behind him, getting on with his life.

And ninth, the likelihood of continuation or recurrence of similar conduct is, as always, difficult to measure, but it appears to be low. Applicant is now six years older, a husband and father to three young children, and a hardworking, dependable employee.

Considering the record evidence as a whole, I conclude Applicant failed to present sufficient evidence to explain, extenuate, or mitigate the criminal conduct security concern arising under Guideline J. Although he presented a good case in mitigation, his crimes reeked of dishonesty and deceit, which cast doubt on his reliability, trustworthiness, and good judgment. After weighing the disqualifying and mitigating information and giving substantial weight to the seriousness of his crimes, I conclude his case in mitigation is not strong enough to overcome the negative security implications of his criminal conduct. In reaching this decision, I considered all the evidence, both favorable and unfavorable, including any evidence not specifically discussed. Applicant has not met his ultimate burden of persuasion to obtain a favorable clearance decision.

FORMAL FINDINGS

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

SOR ¶ 1-Guideline J: Against Applicant

Subparagraph a: Against Applicant

Subparagraph b: For Applicant

SOR ¶ 2-Guideline E: For Applicant

Subparagraph a: For Applicant

Subparagraph b: For Applicant

DECISION

In light of all 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.

Michael H. Leonard

Administrative Judge

1. Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).

2. Given that this allegation is nothing more than a cross-reference to matters alleged under Guideline J, the allegation is included in the discussion of Guideline J.

3. Directive, Enclosure 2, Item E2.2.1 (setting forth nine factors to consider under the whole-person concept).

4. Executive Order 10865, § 7.

5. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

6. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.

7. Directive, Enclosure 3, Item E3.1.14.

8. Directive, Enclosure 3, Item E3.1.15.

9. Directive, Enclosure 3, Item E3.1.15.

10. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) ("It is likewise plain that there is no 'right' to a security clearance, so that full-scale due process standards do not apply to cases such as Duane's.") (citations omitted).

11. 484 U.S. at 531.

12. Directive, Enclosure 2, Attachment 10 (setting forth the disqualifying and mitigating conditions).

13. Directive, Item E2.A10.1.3.1. The criminal behavior was not recent.

14. Directive, Item E2.A10.1.3.2. The crime was an isolated incident.

15. Directive, Item E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

16. Directive, Enclosure 2, Attachment 5 (setting forth the disqualifying and mitigating conditions).

17. Directive, Enclosure 2, Item E2.2.1.