

DATE: October 23, 2006

In re:

SSN: -----

Applicant for a Security Clearance

P Case No. 06-07578

DECISION OF ADMINISTRATIVE JUDGE

SHARI DAM

APPEARANCES

FOR GOVERNMENT

Julie R. Edmonds, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 56 years old and works as a contract administrator for a company that administers government health care benefits. Since 1968 he has used marijuana with varying frequency. Over the last 20 years he has not managed his financial affairs, resulting in a Chapter 7 bankruptcy in 2005. When completing his SF-85P application, he failed to disclose some of his delinquent debts. He did not mitigate the trustworthiness concerns raised by his drug involvement and financial considerations. He did mitigate those raised by his personal and criminal conduct. His eligibility for assignment to a sensitive position is denied

STATEMENT OF THE CASE

On October 19, 2004, Applicant submitted a public trust position application (SF-85P). The Defense Office of Hearings and Appeals(DOHA) declined to grant the application under Department of Defense Regulation 5200.2-R, *Personnel Security Program*, (Jan. 1987), as amended and modified (Regulation), and Department of Defense Directive 5220.6, *Defense Industrial Security Personnel Review Program* (Jan. 2, 1992), as amended and modified, (Directive). On May 9, 2006, DOHA issued a Statement of Reasons (SOR), alleging trustworthiness concerns under Guideline H (drug involvement), Guideline F (financial considerations), Guideline E (personal conduct) and Guideline J (criminal conduct) of the Directive.

In a sworn statement, dated May 18, 2006, Applicant responded to the SOR allegations and requested a hearing. On August 2, 2006, this case was assigned to me. A Notice of Hearing was issued on August 3, 2006, setting the case for hearing on August 22, 2006. At the hearing Department Counsel introduced five exhibits into evidence without objections. Applicant testified in his case-in-chief. I received the hearing transcript (Tr.) on August 31, 2006.

PROCEDURAL ISSUES

At the conclusion of the hearing Department Counsel moved to amend the SOR and add the following allegation as ¶ 1.c under Guideline H: "Due to the facts alleged in ¶ 1.b and Applicant's testimony on drug use that 10 U.S.C. 986

disqualifies Applicant from having a security clearance." (Tr. 33) Applicant did not object to the amendment. The motion was granted.

FINDINGS OF FACT

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

Applicant is 56 years old. For the past 28 years, he has worked for a company that administers a government health insurance plan. Presently he is a contract administrator, but previously was a supervisor in the area of benefits coordination. During those years, he was promoted several times and has not encountered any problems with his employer. (Tr. 11; 21)

Applicant admitted from about June 1968 (while in college), to the present he has used marijuana with varying frequency for social purposes. (Tr. 13) Over the course of the last five years, he has used it three or four times a year, the most recent use was approximately six months ago. He intends to continue using it in the future because "it's something I enjoy doing on occasion." (Tr. 29-30) He realizes that his usage may have a negative impact on his employment.

In March 2005, Applicant petitioned for Chapter 7 bankruptcy and listed approximately \$141,000 of debt, \$120,000 relating to his mortgage. In June 2005, the court discharged \$21,000 of debt, consisting primarily of credit cards, and excluding the mortgage. Since the discharge, he has been paying his mortgage and will be current as of October 2006. (Tr. 16) His financial problems began about twenty years ago and are the result of "indiscriminate spending." (Tr. 20; GX 4) Presently, his monthly net income is \$2,700 and expenses are \$2,500, leaving \$200 for savings.

The SOR alleged in ¶¶ 3. a and 3.b outstanding delinquent debts totaling about \$12,000. However, those debts were discharged in the 2005 bankruptcy. (GX 5; Tr. 18-19; 23)

When Applicant completed his SF-85F in October 2004, he certified that his answers were true, complete and correct to the best of his knowledge. In response to Question 22. (a) Your Financial Record (*In the last seven years, have you, or a company which you exercised some control, filed for bankruptcy, been declared bankrupt, been subject to a tax lien, or had legal judgment rendered against you for a debt?*), he answered "No," and failed to list a judgement entered against him in January 2004 in the amount of \$7,264. In response to Question 22.(b) Your Financial Record (*Are you now over 180 days delinquent on any loan or financial obligation?*), he answered "No," and did not list five delinquent debts, totaling more than \$21,000. He denied that he intentionally failed to disclose the information and was slightly confused by the financial questions. At the time he completed it, he did not know of the judgment and intended to file a petition for bankruptcy to dispose of all debts, which he did two months later. He realizes he should have disclosed the information. His explanation is credible.

POLICIES

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." *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). In Executive Order 12968, *Access to Classified Information*, § 3.1(b) (Aug. 4, 1995), the President provided that eligibility for access to classified information shall be granted only to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information."

To be eligible for assignment to sensitive duties, an applicant must meet the security guideline contained in DoD 5200.2-R. "The standard that must be met for . . . assignment to sensitive duties is that, based on all available information, the person's loyalty, reliability, and trustworthiness are such that . . . assigning the person to sensitive duties is clearly consistent with the interests of national security." DoD 5200.2-R, ¶ C6.1.1.1. Appendix 8 of the Regulation sets forth personnel security guidelines as well as the disqualifying conditions and mitigating conditions under each

guideline. The adjudicative guidelines at issue in this case are:

Guideline H - Drug Involvement: Improper or illegal involvement with drugs raises trustworthiness concerns. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information.

Guideline E - Personal Conduct: A trustworthiness concern may arise when an individual's conduct involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that could indicate that the person may not properly safeguard classified information.

Guideline F - Financial Considerations: An individual who is overextended is at risk of having to engage in illegal acts to generate funds, and thus raises a trustworthiness concern.

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

In 2000, a federal statute was enacted that prohibited the Department of Defense from granting or continuing a security clearance for any applicant who is an unlawful user of, or is addicted to, a controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802). 10 U.S. C. § 986 (c)(2) (2004).

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to these adjudicative guidelines, are set forth and discussed in the conclusions below.

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 describes the essence of scrutinizing all appropriate variables in a case as the "whole person concept." 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 to an individual is not necessarily a judgment 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 security clearance." *Id.*

CONCLUSIONS

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

Guideline H: Drug Involvement

The Government established a potential case for disqualification under Drug Involvement Disqualifying Condition 1: *Any illegal drug use, which includes marijuana*. The Government having raised a trustworthiness concern, the burden shifted to Applicant to mitigate or rebut the allegations. After reviewing all of the mitigating conditions under the guideline, I conclude none applies, given Applicant's current use and intent to use in the future. Based on that and the absence of mitigation, 10 U.S.C. § 986 (a)(2) also applies, and there is no reason to recommend a waiver. All allegations contained in the SOR under Guideline H are decided against him.

Guideline E: Personal Conduct

The Government alleged that Applicant falsified his SF-85P by failing to disclose a judgment and five delinquent debts, which constituted a disqualification under Personal Conduct Disqualifying Condition (PC DC) 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 determines security clearance eligibility or trustworthiness, or award fiduciary responsibilities*. Applicant denied those allegations in his Answer and during his testimony.

When a falsification allegation is controverted or denied, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time the omission occurred. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

Applicant explained that he failed to disclose the judgment because he was unaware of it, and the five debts because he was about to file bankruptcy to discharge the debts. While those explanations were initially unconvincing, I found his testimony that he did not intend to mislead the government sufficiently credible, given his honest disclosure about his drug involvement and financial matters. Hence, the allegations contained in SOR ¶ 2.a and ¶ 2 b are concluded in his favor. Accordingly, Guideline E is decided for him.

Guideline F: Financial Considerations

The Government established a potential disqualification under Financial Considerations Disqualifying Conditions (FC DC) 1: *A history of not meeting financial obligations*, and FC DC 3: *Inability or unwillingness to satisfy debts*. Based on Applicant's admissions and credit reports, he has a twenty year history of not meeting his financial obligations as a result of his unwillingness to do so.

I reviewed all of the Financial Considerations Mitigating Conditions (FC MC) under the guideline and conclude none apply. His problems are ongoing and not isolated, such that FC MC 1: *The behavior was not recent*, and FC MC 2: *It was an isolated incident*, are not applicable. His problems are the result of indiscriminate spending and financial mismanagement over the years, excluding the application of FC MC 3: *The conditions that resulted in the behavior were largely beyond the person's control*. There is no evidence that he sought counseling for his problems and minimal evidence that his problems are being resolved or under control. Hence, FC MC 4: *The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or under control*, does not apply. Nor is there evidence that he attempted to resolve or pay the creditors before filing bankruptcy, as required under FC MC 6: *The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*. Hence, all allegations in the SOR are decided against Applicant.

Guideline J: Criminal Conduct

Based on the conclusion that Applicant did not deliberately falsify his SF-85 P, as required under 18 U.S.C. § 1001, the

Government did not establish a potential case for disqualification under Guideline J.

In addition to evaluating the disqualifying and mitigating conditions under each guideline, I considered the totality of the evidence in view of the "whole person" concept, including Applicant's age, his candid testimony, the length of time he has been using marijuana and the fact that he used it after he completed his SF-85P and was aware of the Government's concern about illegal drug usage. I also took into account his 20-year history of financial problems, as well as his 28-year employment history. After doing so, I am convinced that he does not warrant access to sensitive information. Applicant failed to mitigate the security concerns raised by his drug involvement and financial considerations. He mitigated those raised by his personal conduct, and the allegations related to criminal conduct are unfounded. Accordingly, Guidelines E and J are concluded for him, and Guidelines H and F are concluded against him.

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 F (Drug Involvement) AGAINST APPLICANT

Subparagraphs 1.a - 1.b: Against Applicant

Paragraph 2: Guideline E (Personal Conduct) FOR APPLICANT

Subparagraphs 2.a - 2.b: For Applicant

Paragraph 3: Guideline E (Financial Considerations) AGAINST APPLICANT

Subparagraphs 3.a - 3.c: Against Applicant

Paragraph 4: Guideline J (Criminal Conduct) FOR APPLICANT

Subparagraph 4. a: For 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 Applicant eligibility for assignment to sensitive duties. His application for eligibility is denied.

Shari Dam

Administrative Judge