

DATE: September 29, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 06-11682

DECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, an officer in the United States Marine Corps, received a General Court-Martial in August 2002, and was sentenced to confinement, forfeiture of all pay and allowances, and dismissal from the Marine Corps. On appeal, the U.S. Navy-Marine Corps Court of Criminal Appeals affirmed the sentence. Applicant remains on appellate leave pending appeal to the U.S. Court of Appeals for the Armed Services. Applicant failed to mitigate security concerns under the Criminal Conduct and Personal Conduct guidelines of the Directive. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On June 26, 2006, under the applicable Executive Order ⁽¹⁾ and Department of Defense Directive, ⁽²⁾ DOHA issued a Statement of Reasons (SOR), detailing the basis for its decision-security concerns raised under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of the Directive. On July 6, 2006, Applicant answered the SOR in writing and elected to have a hearing before an administrative judge. On July 25, 2006, the case was assigned to me.

Applicant requested an expedited hearing and waived the 15-day rule specified at E3.1.8 of Enclosure 3 of the Directive. On August 23, 2005, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government called no witnesses and offered three exhibits for admission to the record (Ex. 1 through 3). The Government's exhibits were admitted to the record without objection.

Applicant called one witness and offered 32 exhibits for admission to the record. Applicant's exhibits (Ex.) were identified as Ex. A through Z and Ex. A-1, B-1, C-1, D-1, E-1, and F-1. Applicant's exhibits were admitted to the record without objection. At the conclusion of the hearing, I left the record open so that Applicant could submit, if he wished, evidence of his voluntary and involuntary appellate leave status. Applicant submitted two memoranda addressed to him by his superiors addressing those issues. The additional exhibits, marked as Applicant's Ex. G-1 and H-1, were admitted to the record without objection. On August 30, 2006, DOHA received the transcript (Tr.) of the proceeding.

FINDINGS OF FACT

The SOR contains two allegations of disqualifying conduct under Guideline J, Criminal Conduct and one allegation of disqualifying conduct under Guideline E, Personal Conduct. Applicant admitted all allegations in the SOR. (Tr. 7-10.) Applicant's admissions are incorporated as findings of fact.

Applicant is 42 years old and, since April 2003, he has been employed as a program analyst by a government contractor. (Ex. 1.) He has been married for approximately 21 years. He and his wife are the parents of two adult children. (Answer to SOR at 2; Tr. 21.) He has held a security clearance since approximately 1994. (Ex. 2.)

In December 1985, Applicant enlisted in the U.S. Marine Corps, where he served for approximately eleven years, attaining the rank of sergeant. In 1993, Applicant was awarded a bachelor of science degree in aviation management. In 1997, he was selected to attend Officer Candidate School, and upon completion, attained the rank of second lieutenant. Applicant's command praised his work ethic, reliability, and strong sense of duty. He quickly rose to first lieutenant and was selected to the rank of captain in 2000. (Answer to SOR at 2; Ex. D, E, F, G.)

In about June or July 2001 Applicant was charged under the Uniform Code of Military Justice (UCMJ) with (1) Fraternalization; (2) Conduct Unbecoming of an Officer; (3) Sodomy; and (4) Adultery. He entered into a conditional pre-trial plea agreement and received a General Court-Martial on the charges in August 2002. He was sentenced to 165 days confinement, forfeiture of all pay and allowances, and dismissal from the United States Marine Corps. (Ex. 1; Tr. 28; 51.)

Applicant was confined and served 139 of the 165 days of his sentence. (Ex. 1; Answer to SOR at 1.) He appealed his conviction to the U.S. Navy-Marine Corps Court of Criminal Appeals, asserting three assignments of error. The appellate court found merit in one of Applicant's assignments of error and took corrective action. The appellate court then set aside findings of guilty to three of the named charges, but affirmed charges and specifications reflecting two separate instances of conduct unbecoming an officer, specifically a quid pro quo offer by Applicant of time off from work in return for sex from a subordinate female Marine. Additionally, the appellate court affirmed the sentence approved by the convening authority. (Ex. A.) Applicant subsequently appealed the military appellate court decision to the U.S. Court of Appeals for the Armed Forces. At his hearing, citing advice from his attorney, he declined to discuss the conduct that resulted in his General Court-Martial. (Tr. 22.)

Applicant asserted he had not been dismissed from the Marine Corps, and he produced memoranda addressed to him defining his military status under voluntary and involuntary appellate leave. (Tr. 79-80; Ex. G-1; H-1.) Applicant has been on appellate leave since March 2003. He receives no military pay, but retains an active duty identification card and health benefits. (Tr. 80-81.) By memorandum dated September 7, 2004, Applicant's commanding officer notified him of his assignment to involuntary appellate leave and stated: "You remain subject to the UCMJ and orders of competent authority until discharged or dismissed, as appropriate." (Ex. H-1 at 2.)

Applicant argued that the military offenses he was charged with under the UCMJ were insufficient to be identified as criminal conduct. He acknowledged the conduct reflected poor judgment, but asserted the conduct did not reflect his whole character. (Tr. 72.)

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 restricted eligibility for access to classified information 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." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in

the Directive.

In addition to the guidelines in the Directive, official DoD policy guidance must also be considered. Of particular relevance to this case is 10 U.S. C. § 986, also known as the Smith Amendment. Section 986(c)(4) of the statute provides that an individual who has been discharged or dismissed from the Armed Forces under dishonorable conditions is prohibited from holding a security clearance. The statute provides for a waiver of the prohibition in meritorious circumstances.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. 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. 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. *See Egan*, 484 U.S. at 531. 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).

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 (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." ISCR Case No. 01-20700 at 3.

CONCLUSIONS

Guideline J - Criminal Conduct

In the SOR, DOHA alleged Applicant received a General Court-Martial on about August 2, 2002 on charges of (1) Fraternalization; (2) Conduct Unbecoming an Officer; (3) Sodomy; and (4) Adultery; that he entered into a conditional pre-trial guilty plea agreement; that he was sentenced to 165 days confinement, forfeiture of all pay and allowances, and dismissal from the United States Marine Corps (1.a.). The SOR also alleged in subparagraph 1.b. that Applicant's sentence of dismissal from the Marine Corps disqualified him from being granted a security clearance or from having a security clearance renewed, pursuant to 10 U.S.C. § 986(c)(4).

Applicant admitted both Guideline J allegations, and he provided evidence that three of the charges against him had been set aside by the appellate court and two charges of conduct unbecoming an officer had been affirmed. While Applicant argued the charges did not rise to the level of criminal conduct, the appellate court found the sentence imposed on him to be appropriate.

Applicant's admitted criminal conduct raises security concerns under Disqualifying Conditions (DC) E2.A10.1.2.1. and E2.A10.1.2.2. (3) of Guideline J and raises doubts about his judgment, reliability and trustworthiness. Directive E2.A10.1.1. A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. Where the facts proven by the Government or admitted by the applicant raise doubts about the applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nevertheless security worthy.

Applicant's criminal conduct included two separate instances of conduct unbecoming an officer and was described by the appellate court as a quid pro quo offer by Applicant of time off from work for sex from a subordinate female Marine.

We turn to an examination of mitigating conditions that might be applicable to Applicant's disqualifying conduct under Guideline J. Applicant's criminal conduct occurred in 2001, and thus is not recent, making Mitigating Condition (MC)

E2.A10.1.3.1.⁽⁴⁾ applicable to his case. However, Applicant's criminal actions were multiple and not isolated events and demonstrated a pattern of criminal conduct. At his hearing, Applicant minimized the seriousness of his conduct and opined it should not be considered criminal, leading to the conclusion that at this time there is no clear evidence of successful rehabilitation. Thus, neither MC E2.A10.1.3.2. nor MC E2.A10.1.3.6.⁽⁵⁾ of Guideline J applies to Applicant's Guideline J conduct. No other mitigating conditions under Guideline J are applicable to the facts of Applicant's case. Accordingly, allegation 1.a. of the SOR is concluded against the Applicant.

As a Marine Corps officer, Applicant received a sentence of dismissal from military service. The dismissal of an officer from military service is equivalent to a dishonorable discharge of an enlisted person. Thus, an officer dismissed from military service would be disqualified from being granted a security clearance, pursuant to 10 U.S.C. § 986(c)(4). (*See* ISCR Case No. 03-11112 at 2 (App. Bd. Jun. 8, 2006).)

At the time of his hearing, Applicant's appeal of his sentence of dismissal was before a military appellate court, and he was on involuntary appellate leave. Because Applicant's sentence of dismissal has not been executed while his case is on appeal, it is premature to consider whether the prohibition of 10 U.S.C. § 986(c)(4) applies to his case. Accordingly, the allegation at 1.b. of the SOR is concluded for Applicant.

Guideline E - Personal Conduct

In the SOR, DOHA alleged Applicant's General Court-Martial on the charges recited in allegation 1.a. raised concerns under Guideline E, Personal Conduct, about Applicant's judgment, reliability, and ability to comply with rules and regulations. (¶ 2.a.).

Guideline E conduct, which involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, could indicate an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.⁽⁶⁾ Additionally, Applicant's refusal at his security clearance hearing to provide full, frank, and truthful answers to lawful questions surrounding the charges brought at his Court-Martial raises concerns under Disqualifying Condition (DC) E2.A5.1.1.2.⁽⁷⁾

With respect to the Guideline E conduct alleged in the SOR, the Government has established its case. The criminal conduct which led to Applicant's General Court-Martial was reliable, unfavorable information provided by Applicant's employer, the United States Marine Corps, thus raising a security concern about Applicant's unreliability and poor judgment under D.C. E2.A5.1.2.1. Applicant's conduct unbecoming an officer raised concerns that this information, if known, increased his vulnerability to coercion and blackmail. DC E2.A5.1.2.4. His conduct raises additional concerns under DC E2.A5.1.2.5. because it suggests a pattern of dishonesty or rule violation, including his violation of his commitment, as a Marine Corps officer, to adhere to the Uniform Code of Military Justice. Applicant's conduct suggests that, under some circumstances, he may put his interests before those of the Government.

Mitigating condition (MC) E2.A5.1.3.1. does not apply to the facts of this case: the information supplied by Applicant's Marine Corps leadership regarding his Court-Martial is pertinent to a determination of his judgment, trustworthiness, and reliability. Additionally, MC E2.A5.1.3.5. does not apply, since Applicant tended to minimize the seriousness of his conduct and failed to provide persuasive evidence that since his General Court Martial he has taken positive steps to eliminate vulnerability to coercion, exploitation or duress. At his hearing, Applicant asserted his attorney advised him to refuse to provide information on the facts that led to his Court-Martial, but he provided no credible evidence he was not required to comply with security processing requirements. Thus, MC E2.A5.1.3.6. does not apply. None of the other Guideline E mitigating conditions are applicable to Applicant's case. Accordingly, the Guideline E allegation in the SOR is concluded against the Applicant.

In all adjudications, the protection of our national security is the paramount concern. Security clearance decisions are not intended to assign guilt or to impose further punishment for past transgressions. Rather, the objective of the security clearance process is the fair-minded, common sense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of his or her acts and omissions, including all disqualifying and mitigating conduct. Having done so, I conclude Applicant should not be entrusted with a security clearance. In reaching my decision, I have considered the evidence as a whole, including

the appropriate factors and guidelines in Department of Defense Directive, 5220.6., as amended.

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.: For Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: Against 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 or continue a security clearance for Applicant. Clearance is denied.

Joan Caton Anthony

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
3. DC E2.A10.1.2.1. reads: Allegations or admissions of criminal conduct, regardless of whether the person was formally charged. DC E2.A10.1.2.2 reads: A single serious crime or multiple lesser offenses.
4. MC E2.A10.1.3.1. reads: The criminal behavior was not recent.
5. MC E2. A10.1.3.2. reads: The crime was an isolated incident. MC E2.A10.1.3.6. reads: There is clear evidence of successful rehabilitation.
6. The Directive identifies the Guideline E security concern as: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. This conduct could indicate that an individual may not properly safeguard classified information.
7. DC E2.A5.1.1.2. reads: Refusal to complete required security forms, releases, or provide full, frank and truthful answers to lawful questions of investigators, security officials or other official representatives in connection with a personal security or trustworthiness determination.