

DATE: March 20, 2007

In re:

SSN: -----

Applicant for ADP I/II/III Position

P Case No. 06-13055

DECISION OF ADMINISTRATIVE JUDGE

MARY E. HENRY

APPEARANCES

FOR GOVERNMENT

Ray T. Blank, Jr., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has been arrested, charged and convicted twice for misdemeanor offenses. His first arrest occurred while a high school student in 1971, and his second arrest occurred more than 30 years later in 2002. He has no other criminal convictions. He has mitigated the government's concerns in allegations 1.a and 1.d of the SOR. The government failed to met its burden of proof as to allegations 1.b and 1.c of the SOR. Applicant's eligibility for a assignment to a sensitive position is granted.

STATEMENT OF CASE

On August 16, 2004, Applicant submitted an application for a position of public trust, an ADP I/II/III position. The Defense Office of Hearings and Appeals (DOHA) declined to grant the application under Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended (the "Directive"). [\(U\)](#) On August 29, 2006, DOHA issued Applicant a Statement of Reasons (SOR) detailing the basis for its decision. The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline J, Criminal Conduct.

In a sworn statement dated September 11, 2006, Applicant responded to the SOR allegations, submitted documentation, and requested a hearing. DOHA assigned this case to me on January 3, 2007, and issued a notice of hearing on January 26, 2007, scheduling the hearing for February 13, 2007. The hearing was conducted on that date. The government submitted Government Exhibits (GE) 1- 2, which were admitted into the record without objection. Applicant submitted one exhibit at the hearing, which was marked and admitted as Applicant Exhibit (App. Ex.) A. Applicant and one witness testified. DOHA received the hearing transcript (Tr.) on February 26, 2007. The record was held open until February 28, 2007 to allow Applicant to submit further documents, which he did. His additional evidence is marked as App. Ex. B through E. The government does not object to this evidence, which is admitted into the record.

FINDINGS OF FACT

Applicant admits to the Guideline J allegations in subparagraph 1. a and 1. d of the SOR. He, however, denies the remaining allegations under Guideline J. ⁽²⁾ Applicant's admissions are incorporated herein. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is a 54-year-old man employed as a programmer for a Department of Defense contractor, who is seeking a position of public trust. His combined employment with his employer totals more than 10 years, his last employment beginning more than 4 years ago. He has a Bachelor of Science degree. He has been married and divorced twice. He is currently single. He has one son, age 22, and a daughter, age 10. He sees his daughter regularly and maintains an amicable relationship with his former wife. All his adult life he has worked in community activities, such as the Boy Scouts of America. ⁽³⁾

While a high school student in 1971, Applicant and a friend decided to steal a sign, which looked like an outboard motor. They were caught stealing the sign. The police arrested and charged him with attempted grand larceny. The court convicted him of loafing and loitering, a misdemeanor offense. He paid a fine of \$210 and received a suspended sentence of 60 days. ⁽⁴⁾

In 2001, he and his wife of 18 years separated. Her boyfriend at the time filed charges of kidnapping and pointing a firearm against Applicant. The police arrested Applicant, but the charges were later dropped, when law enforcement learned that the boyfriend acknowledged lying to the police about the events leading to Applicant's arrest. Following this incident, his wife and others told him her boyfriend had stated he would shoot Applicant when he saw him. Applicant started keeping a firearm near him. He notified police about the threat. The police told him to stay away from the boyfriend. During this period of time, Applicant sought and received treatment from a therapist for anxiety and depression. ⁽⁵⁾

In February 2002, Applicant walked into a local nightclub and bar with a gun, a 9 mm Baretta, stuck in the lower back waistband of his pants. The owner of the establishment, a former police officer, saw the gun and asked Applicant to give him the gun, which Applicant did. Because it was illegal to carry a firearm in a bar, the owner called the police, who arrested and charged Applicant with unlawful carrying of a weapon, a misdemeanor. He pled guilty. The court sentenced him to one year in jail, which it suspended, and directed he include anger management in his therapy, which he did. He no longer goes to bars and does not carry a gun. His guns are locked at home, unless he is using them to hunt or target shoot. ⁽⁶⁾

Applicant works at home. His performance evaluations are above average. His employer describes him as a man of good character, who is honest, trustworthy, compassionate, and sincere. A friend of more than 30 years testified on his behalf. He also describes Applicant as trustworthy. During visits to Applicant's home, he has never seen documents related to Applicant's duties, as Applicant does not keep his work visible for others to see. Applicant was a different person when he was going through his divorce in 2001 and 2002, than now. The witness knew that it was against the law to carry a gun into an establishment which serves alcohol. ⁽⁷⁾

The SOR alleges that Applicant was arrested for shoplifting in 1988 and 1989. Applicant denied these allegations. The government acknowledged at the hearing that it did not submit evidence in support of allegations 1.b. and 1.c, but did not withdraw these allegations. Applicant presented documentary evidence, which reflects that another individual with his first and last name was arrested and charged with shoplifting in 1988. This evidence describes the arrestee as a 5'10", black male, weighing 175 pounds with black hair and brown eyes. The court records show a social security number for the arrestee which is different from Applicant's social security number. Applicant is a 6'5", white male, weighing 350 pounds with white hair and green eyes. ⁽⁸⁾

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." ⁽⁹⁾ In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information and determining trustworthiness

within the executive branch.

To be eligible for a security clearance or access to sensitive information, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive 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 J - Criminal Conduct - A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness.

Conditions that could raise a trustworthiness 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 is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance.⁽¹⁰⁾ An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person.⁽¹¹⁾ An administrative judge should consider the following factors: (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 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 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.⁽¹²⁾

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information.⁽¹³⁾ Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts.⁽¹⁴⁾ An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."⁽¹⁵⁾ Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security.⁽¹⁶⁾ The same rules apply to trustworthiness determinations for access to sensitive positions.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established its case under Guideline J as to allegations 1.a. and 1.d. Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1. (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged*) and CC DC E2.A10.1.2.2. (*A single serious crime or multiple lesser offenses*) apply. As a teenager, Applicant was arrested for stealing a sign and was convicted of a misdemeanor offense. Five years ago, he was arrested and charged with a second misdemeanor offense of carrying a weapon into an establishment which served alcohol.

In light of Applicant's denial of allegations 1.b. and 1.c. in the SOR, the government has not established its case because it did not present any evidence in support of its burden of proof. The Applicant did provide documentary evidence which indicates that another individual most likely committed the shoplifting crimes identified in these allegations.

I considered all the Criminal Conduct Mitigating Conditions (CC MC). I conclude that CC MC E2.A10.1.3.1. (*The criminal behavior was not recent*) and CC MC E2.A10.1.3.2. (*The crime was an isolated incident*) apply. It has been almost 35 years since the police arrested Applicant for stealing a sign and 5 years since he was arrested a second time. Both crimes resulted in a conviction for a misdemeanor offense. Given the 30 years between his two arrests, there is no pattern of criminal conduct; rather each is an isolated incident. His arrest for stealing was the result of a high school prank and immaturity. His more recent arrest occurred at a time Applicant had been threatened with his life. He kept a gun close for protection because his former wife's boyfriend had threatened to shoot him. He no longer goes to bars or carries a gun.

CC MC E2.A10.1.3.4. (*The person did not voluntarily commit the act and/or the factors leading to the violation are not*

likely to recur) applies in part. While Applicant voluntarily walked into the bar with a gun, the threat of harm no longer exists because his wife no longer has a relationship with this boyfriend. He and his former wife have a good relationship at this time. There is little likelihood that this conduct will occur again, particularly since Applicant now understands that it is illegal to walk into an establishment which serves alcohol with a gun.

CC MC E2.A10.1.3.6. (*There is clear evidence of successful rehabilitation*) also applies. Since his arrest 5 years ago, Applicant has not been arrested for anything, nor has he been cited for any motor vehicle violation. He no longer carries or keeps a gun nearby for protection. His guns are locked at home and are used only for hunting and target shooting. Since he has not been arrested in 5 years, he has clearly stayed out of trouble. He credibly testified about his use of guns, including the reasons he carried a gun with him in 2002. Accordingly, I find in favor of Applicant under Guideline J.

In all adjudications, the protection of our national security is the paramount concern. The objective of the trustworthy determination process is the fair-minded, common sense assessment of a person's life to make an affirmative determination that the person is eligible for assignment to sensitive duties. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I have considered all the evidence and the "whole person" in evaluating Applicant's trustworthiness. Outside of his two arrests, 30 years apart, Applicant has led a law abiding life. He does not abuse alcohol or drugs. He pays his bills and does not have financial problems. He provides for his children, has been an active member of the community, and has developed an amicable relationship with his ex-wife. He regularly sees his young daughter. His work performance is above average and is praised by his superiors. He has worked for his company for about 10 years, and has demonstrated his stability.

His 2001 separation from his wife and subsequent divorce was a difficult period in his life. During this time, he experienced significant anxiety and depression, which negatively influenced his decision making. It was during this same time period that he feared harm from his former wife's boyfriend, who had threatened to shoot him. Although he reported the threat to the police, they took no action. This fear led to his decision to keep a gun close to him for protection, and to walk into a bar with the gun. He acknowledges this decision was wrong, and accepted full responsibility for his conduct. He no longer goes to bars and makes sure his guns are safely looked at home. With the help of his therapist and time, his anxiety and depression are no longer a problem, and his decision-making improved. In light of all the circumstances, he has demonstrated that he is trustworthy. There is little chance his arrests could be used to pressure, coerce, or exploit him, or subject him to duress or reoccur. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, ⁽¹⁷⁾ I conclude he has mitigated the trustworthiness concerns pertaining to his criminal conduct.

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:

SOR ¶ 1-Guideline J: FOR APPLICANT

Subparagraphs a-d: For Applicant

DECISION

In light of all of the evidence presented in this case, it is clearly consistent with the national interest to grant Applicant eligibility for assignment to sensitive duties. Eligibility is granted.

Mary E. Henry

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended; and Memorandum from the Deputy Under Secretary of Defense Counterintelligence and Security, titled "Adjudication of Trustworthiness Cases," dated November 19, 2004.
2. Applicant's response to the SOR, dated September 11, 2006, at 1-2; Tr. at 12, 20, 22.
3. GE 1 (Applicant's questionnaire for public trust position, dated August 16, 2004) at 1-3, 5; Tr. at 18, 24, 35.
4. GE 2 (Applicant's arrest record, United States Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, dated October 14, 2004) at 1; Tr. at 26-27.
5. GE 1, *supra* note 3, at 8; Tr. at 21-23, 28-29, 31. The kidnapping charges are not included in the SOR.
6. GE 2, *supra* note 4, at 1; Attachment to Applicant's response to SOR; Tr. at 22-23, 32-34, 36.
7. App. Ex. E (Performance evaluations for 2002, 2004, 2005, and 2006); App. Ex. D (Letter, dated February 16, 2007); Tr. at 37-39, 44-45.
8. App. Ex. A (Court records for 1988 arrest); Tr. at 15-16, 18, 27-28.
9. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).
10. Directive, ¶ E2.2.1.
11. *Id.*
12. *Id.*
13. Directive, ¶ E3.1.14.
14. Directive, ¶ E3.1.15.
15. ISCR Case No. 01-20700 at 3 (App. Bd. December 19, 2002).
16. Directive, ¶ E2.2.2.
17. *See* ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).