DATE: November 29, 2007

In re:	)	
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----------	)	ISCR Case No. 06-21133
SSN: ---------	)	
	)	
Applicant for Security Clearance	)	

DECISION OF ADMINISTRATIVE JUDGE
MARY E. HENRY

APPEARANCES

FOR GOVERNMENT
James F. Duffy, Esq., Department Counsel

FOR APPLICANT
Pro Se

SYNOPSIS

Applicant omitted material facts from his security clearance application. He, however, did not intentionally falsify his answers. His speeding tickets are minor violations of the rules which do not impact on his security worthiness. There are no applicable disqualifying factors under Guideline E, which is found in favor of Applicant. Guideline J is not established. Clearance is granted.

STATEMENT OF THE CASE

On April 3, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Specifically, the SOR sets forth security concerns arising under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) of the revised Adjudicative Guidelines (AG) issued on December 29, 2005 and implemented by the Department of Defense, effective September 1, 2006. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. On July 11, 2007, Applicant submitted a notarized response to the allegations. He requested a hearing.

This matter was assigned to another administrative judge on August 16, 2007. DOHA issued a notice of hearing on September 21, 2007. Due to a personal emergency, DOHA reassigned this case to me on October 10, 2007. I held a hearing on October 16, 2007. Eleven government exhibits (GE), 1 through 11, were marked and admitted into evidence. Applicant did not submit any documents into evidence, although he testified. The hearing transcript (Tr.) was received on October 24, 2007.

FINDINGS OF FACT

Applicant admitted the allegations under Guideline E, subparagraphs 1.a., 1.a(1), 1.a.(2), 1.a.(4), 1.b., 1.c.(1), and 1.e. of the SOR.[1] Those admissions are incorporated as findings of fact. He denied the remaining allegations, including intentional falsification of his answers to his security clearance application (SF-86).[2] After a complete review of the evidence in the record and upon due consideration, I make the following findings of fact.

Applicant is 29 years old. Although he is a listed employee of a defense contractor, that is sponsoring him for a security clearance, he currently does not perform any duties. He has worked as a security guard for this company, which does not offer him continuous full-time employment. He is not married.[3]

Applicant graduated high school in 1996 and joined the United States Army two months later. He served four years on active duty, receiving an honorable discharge in 2000. He then served in the Army Reserves from 2000 until 2004. The Army Reserves assigned him to units within a 50-mile radius of his residence. While on active duty, the Army withdrew his driving privileges on post after he had received several speeding tickets. Subsequent to the withdrawal of his driving privileges,

[1]Applicant's response to the SOR, dated July 11, 2007, at 1-2; Tr. at 53, 55. Although Applicant admitted to 1.a, in light of the record evidence as a whole, I find he denied intentionally falsifying his answer.

[2]*Id*.; In 1.c., Applicant admitted the conduct alleged, but denied he intentionally falsified his answer.

[3]GE 1 (Applicant's security clearance application, dated October 10, 2004) at 1, 3; Tr. at 25-26, 39.

the military police stopped him for driving on base. The Army instituted an Article 15 proceeding against Applicant for failure to obey an order. As punishment, the Army reduced him in rank, imposed forfeiture of pay and ordered him to perform 60 days of extra duty. He held a secret clearance while in the Army reserves. In 2003, the Army sent him a warning about possible future suspension of his security clearance if he continued with his criminal conduct, which the Army defined as multiple traffic offenses.[4] The Army sent this letter to a command 300 miles away, not his command. Thus, Applicant never received the letter. The Army never revoked his clearance.[5]

After his discharge from active duty, Applicant began work as a communications technician, installing cable lines. Two years later, in 2002, his employer terminated him for poor performance. He immediately began work at another communications company, as a disconnect technician. Nine months later, in May 2003, this company terminated him for low performance. For the next seven months, he worked as a computer salesman. In a company wide layoff, this company terminated him as he had low performance. He next worked for a temporary agency as a computer technician. In June 2004, he accepted a job to work in construction overseas. He worked in a foreign country for three months, then resigned from his position and returned to the United States. He began his next position in October 2004, but was laid off from the job in August 2005 because of a business downturn. He admitted being late to this job about once every other week and that he had been counseled about his tardiness. He is currently employed by a security company, but has not been assigned to a specific duty post recently.[6]

Applicant completed his SF-86 on October 20, 2004. Although he listed all his employment up to the date of his application, he answered "no" to the Question 20, which inquires about job terminations. During his interview with the investigator, Applicant explained that he read the questionnaire quickly and did not read the questions thoroughly, which he also explained at the hearing. When asked on cross-examination if he answered "no" to Question 20 because he thought the information would negatively impact his employability, he agreed. He also testified he didn't believe that he knowingly denied this information, rather he just skimmed the question.[7]

Applicant also answered "no" to Question 26, which asked if, in the last seven years, he had been arrested, charged or convicted of any offense not listed under other similar questions. He failed to list his December 13, 2000 speeding ticket for driving 93 m.p.h. in a 55m.p.h. speed limit, which resulted in a guilty finding, a fine of $500 and costs of $71. He did not list this four-year-old ticket as he did not remember the amount of his fine. Between December 2000 and January 2001, he received three additional speeding tickets for driving around 40 m.p.h. in a 25 m.p.h speed limit. The court fined him between $24 and $51 plus costs of $30 on each ticket.[8]

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[4]Most traffic offenses are violations of the motor vehicle laws, not criminal conduct.

[5]GE 2 (Interrogatory answer and attachment) at 6; GE 6 (Letter, dated August 23, 2003) at 1; Tr. at 32-35, 47-50.

[6]GE 1, *supra* note 3, at 2; GE 2, *supra* note 5, at 4-6; Tr. at 30-31, 39-41, 53.

[7]GE 1, *supra* note 3, at 2-4; GE 2, *supra* note 5, at 5-6; Tr. at 44, 45, 47.

[8]GE 1, *supra* note 3, at 5; GE 5 (Court information sheet); GE 7 (Court information sheet); GE 8 (Court information sheet); GE 9 (Court information sheet); Tr. at 57, 59.

The SOR does not allege falsification for his failure to list his Article 15 disciplinary action. At the hearing, Applicant indicated that he did not believe Question 25 pertained to the actions taken against him. When questioned, he could not explain the meaning of non-judicial punishment. Likewise, the SOR identifies the receipt of a speeding ticket for driving 94 m.p.h. in a 65 m.p.h. speed limit in the early morning hours in January 2005, which resulted in a guilty finding for driving 15-19 m.p.h. over the speed limit, a fine of $200 and costs of $61, as a conduct problem. Twelve days after receiving this ticket, he received a ticket for defective equipment, which resulted in a $200 fine and $81 in costs. This ticket is not listed in the SOR.[9]

The government submitted into evidence Applicant's response to one interrogatory propounded to him. The interrogatory instructions requested him to authenticate the attached document. Specifically, the interrogatory asked him: "Does the report of investigation reflect accurately the information you provided to the authorized investigator for the Department of Defense on the day you were interviewed?" [emphasis supplied] He answered "yes". The investigator wrote a summary of the information provided by Applicant. The document does not reflect that any information came from a source other than Applicant, nor does the record contain any documents from other sources. The summary documentation supports Applicant's testimony that he voluntarily provided the negative information concerning his employment, traffic offenses, and juvenile record to the investigator. Applicant also provided testimony regarding his actions in reporting a failure by a co-worker to properly use a cell phone when overseas to show his integrity.[10]

POLICIES

The revised Adjudicative Guidelines set forth disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. An administrative judge need not view the revised adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, are intended to assist the administrative judge in reaching fair and impartial common sense decisions. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the revised AG should be followed whenever a case can be measured against this policy guidance. In addition, each security clearance decision must be based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in the Directive. Specifically, these are: (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.[11]

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[9]GE 3 (Court docket sheet); GE 4 (Court information sheet); GE 10 (Court case information sheet); Tr. at 47-50, 52.

[10]GE 2, *supra* note 5; Tr. at 62-65.

[11]Directive, revised Adjudicative Guidelines (AG) ¶ 2(a)(1)-(9).

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.[12] The government has the burden of proving controverted facts.[13] The burden of proof is something less than a preponderance of the evidence.[14] Once the government has met its burden, the burden shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.[15] Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[16]

No one has a right to a security clearance,[17] and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."[18] Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.[19] Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." The decision to deny an individual a security clearance is not necessarily a determination as to the allegiance, loyalty, and patriotism of an applicant.[20] 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.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate adjudicative factors, I conclude the following with respect to the allegations set forth in the SOR:

Personal Conduct

Under Guideline E, conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other

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[12]ISCR Case No. 96-0277 at 2 (App. Bd., July 11, 1997).

[13]ISCR Case No. 97-0016 at 3 (App. Bd., Dec. 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.

[14]*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

[15]ISCR Case No. 94-1075 at 3-4 (App. Bd., Aug. 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.

[16]ISCR Case No. 93-1390 at 7-8 (App. Bd. Decision and Reversal Order, Jan. 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.

[17]*Egan*, 484 U.S. at 531.

[18]*Id*.

[19]*Id*.; Directive, revised AG ¶ 2(b).

[20]Executive Order No. 10865 § 7.

failure to cooperate with the security clearance process. (AG ¶ 15) Under DC ¶ 16 (a) "deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire . . .", the government established that Applicant omitted material facts from his SF-86 when he answered "no" to Questions 20 and 26. He denies, however, that he deliberately falsified his answer to these questions. When a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or 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 intent or state of mind at the time the omission occurred.[21] For DC ¶ 16 (a) to apply, the government must establish that Applicant's omission, concealment or falsification in his answer was deliberate.

Applicant credibly testified about his carelessness in preparing the answers to his SF-86. Because he listed all his jobs in the application, he had no intent to hide his past employment from the government. When he met with the investigator, he self reported the negative information about the termination of his employment at four jobs, which the investigator summarized in the report. Applicant could easily have avoided providing this unfavorable information, hoping that his former employers would not be contacted. He did not make this choice. His testimony is consistent with his statements to the investigator. Even though he conceded on cross-examination that his employability could be impacted by revealing the reasons for his terminations, I find his concession does not negate his explanation for answering "no" because the government suggested this reason to him through its question. Moreover, it is not clear what he was thinking at the time he completed his SF-86. I conclude that his testimony is credible, I find his account of his conduct credibly explains his erroneous answers. I find that Applicant did not intentionally falsify his answer to Questions 20 and 26 because he credibly testified about his careless and sloppy preparation of his security clearance application. Allegations 1.a. (1)-(4) and 1.c. under Guideline E are found in favor of Applicant.

A security concern may also arise under DC ¶ 16 (d), which states:

> Credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:
>
> > (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;

[21] *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)).

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rules violations;

(4) evidence of significant misuse of Government or other employer's time or resources. [emphasis supplied]

Applicant's numerous speeding tickets in the past may raise a question of rules violations. In looking at this conduct under a whole person analysis and from a commonsense approach, his conduct does not make him unreliable, untrustworthy or a person of questionable judgment. Since January of 2002, nearly six years ago, he received one ticket for excessive speed. People commonly drive the highways 10 to 15 miles above the posted speed limits. While his speed was very high on two occasions, people driving the posted speed limit can cause a traffic hazard if their speed is significantly lower than the flow of traffic. To find that Applicant's failure to drive the posted speed limit constitutes conduct so serious as to raise a security concern defies common sense, particularly in light of the common driving patterns of Americans. Applicant has modified his driving since 2002 most of the time. It has been almost three years since his last ticket. He continues to improve his compliance with the general rules for driving on the roads. He received three tickets for driving too fast in a 25 m.p.h. speed zone, the last in 2002, which is not an uncommon driving practice. His driving speed raises little concern about his security worthiness because he has changed is driving habits in the last six years. He is improving his driving skills and attitude towards speed. Although he drove at a high rate of speed on two occasions, his other driving offenses out not out of the norm. This disqualifying condition is not applicable because under the whole-person assessment, the issues of questionable judgment, untrustworthiness and unreliability are not supported by the record as a whole.

In reaching my final conclusion, I have considered the whole person concept in evaluating Appellant's risk and vulnerability in protecting our national interests. He graduated from high school then joined the Army. With the exception of his one Article 15, he performed his duties as expected. He developed some technical skills in installing or repairing communication equipment, which enabled him to obtain private sector employment. He lost several jobs because of low productivity, which can mean several things, including he worked too slowly, even if accurately, or he lacked the proper training to perform the duties quickly and accurately. The record contains no evidence he as to the reasons he lost his jobs. His slow work pace, which does not mean he is lazy, does not reflect on his security worthiness. The record contains no evidence that during the time he held a security clearance, he violated security procedures. In fact, he reported a co-worker for violating security procedures when using a cell phone. Despite negative information, Applicant has shown that he is trustworthy and reliable. Guideline E is found in favor of Applicant. In light of my Guideline E findings on falsification, Guideline J is found in favor of Applicant.

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 E:	FOR APPLICANT
Subparagraph a-e:	For Applicant
SOR ¶ 2-Guideline J:	FOR APPLICANT
Subparagraph 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 a security clearance for Applicant. Clearance is granted.

Mary E. Henry
Administrative Judge