

DATE: February 13, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-07124

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Between August 1993 and March 1997, the Applicant was arrested or charged six times. When the Applicant completed a Questionnaire for National Security Positions in March 2000, he failed to indicate he had been arrested or charged. Because of the falsifications, clearance is denied.

STATEMENT OF THE CASE

On September 27, 2001, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding [\(1\)](#) it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On October 21, 2001, the Applicant answered the SOR and elected to have his case decided on the written record, in lieu of a hearing.

On December 17, 2001, the Applicant received a complete copy of the file of relevant material (FORM) dated December 11, 2001, and was given the opportunity to file objections and submit material in extenuation, mitigation, or refutation. The Applicant's response to the FORM was due on January 16, 2002. No response has been received. I was assigned the case on January 30, 2002, on which date the record in this case was closed. The Department Counsel presented seven exhibits (Items).

FINDINGS OF FACT

The SOR alleges personal conduct (Guideline E) and criminal conduct (Guideline J). The Applicant agrees with all the allegations except for SOR subparagraph 3. b., which the Applicant neither admitted nor denied.

The Applicant is 30 years old, has worked for a defense contractor since August 1996, and is seeking a security clearance.

In August 1993, the Applicant was at the beach with friends. When stopped for having an open container of beer, he

was searched and a marijuana "joint" was found. He was charged with possession of marijuana which resulted in his driver's license being suspended and him paying court costs. In January 1995, the Applicant stopped using marijuana because he met a girl who disapproved of its use. He has not used it since that time and does not intend to use it in the future.

In October 1995, the Applicant was stopped for a defective tail light and a marijuana joint was found under the floor mat of his vehicle. The Applicant denies the marijuana was his. He was charged with possession of marijuana. The charge was dismissed.

In early February 1996, when the Applicant was stopped for speeding, he was charged with "Driving on a Suspended or Revoked Driver's License." He was sentenced to 60 days in jail (suspended) and fined \$250.00. In mid February 1996, he was charged with "Failure to Appear in Traffic Court." The Applicant was confused as to his court date. When he arrived in court the following day, he discovered his court date had been the previous day. After turning himself in and explaining his confusion over his court date, the charge was dismissed.

In March 1996, the Applicant was again charged with "Driving on a Suspended or Revoked Driver's License." The Applicant's driver's license had been suspended for failure to pay traffic tickets. This charge was dismissed.

In March 1997, the Applicant was stopped for speeding and arrested for "Driving Under the Influence" (DUI). His blood alcohol content was .09%. The charge was reduced to reckless driving and the Applicant was fined \$500.00 plus court costs.

In March 2000, the Applicant completed a Questionnaire for National Security Positions, Standard (Std) Form 86 (Item 4). In Question 24, "Your Police Record - Alcohol/Drug Offenses," he was asked if he had ever been charged with, or convicted of any offense(s) related to alcohol or drugs regardless of whether the record had been sealed or otherwise stricken from the record. He answered "no" even though he had been arrested for DUI in March 1997 and for possession of marijuana in October 1995 and August 1993.

In Question 26, "Your Police Record - Other Offenses," he was asked if during the prior seven years he had been charged with, or convicted of any offense(s) not listed in previous questions on the form. He answered "no" even though he had been arrested or charged twice in 1996 for driving on a suspended or revoked driver's license and also charged in 1996 with failing to appear in traffic court.

In Question 27, "Your Use of Illegal Drugs and Drug Activity - Illegal Use of Drugs," the Applicant was asked if during the prior seven years, or since age 16, whichever was shorter, had he illegally used a controlled substance including marijuana. He answered "no" even though he had used marijuana, with varying frequency, from 1990 until January 1995.

In December 2000, the Applicant made a sworn statement (Item 6) to a Special Agent of the Defense Security Service (DSS). In that statement he said he did not include his arrests on his questionnaire (Std Form 86) because he "did not fully read the questions." (Item 6, page 3) In January 2001, the Applicant made a second sworn statement (Item 7) in which he said, "I did not include my past arrests, alcohol related arrests and drug usage because I was ashamed. I did not want my employer to know." (Items 7, page 1)

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, Administrative Judges must consider, access, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in "whole person" section the Directive as well. In that vein, the government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate the facts proven have a nexus to an Applicant's lack of security worthiness.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past

and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

Guideline E Personal Conduct: The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

Conditions that could raise a security concern and may be disqualifying also include:

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, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination.

5. A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency.

Conditions that could mitigate security concerns include:

None Apply.

Guideline J Criminal Conduct: The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Conditions that could raise a security concern and may be disqualifying include:

a. Allegations or admission of criminal conduct, regardless of whether the person was formally charged.

b. A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

a. The criminal behavior was not recent.

e. Acquittal.

BURDEN OF PROOF

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the Applicant who must remove that doubt and establish his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless

security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against the applicant.

CONCLUSIONS

The Government has satisfied its initial burden of proof under guideline E, (Personal Conduct). Under Guideline E, the security eligibility of an applicant is placed into question when that applicant is shown to have been involved in personal conduct which creates doubt about the person's judgment, reliability, and trustworthiness.

The Applicant was twice charged -- 1993 and 1995--with possession of marijuana. In 1993, his driver's license was suspended and he paid \$176.00. The 1995 charge was dismissed. He was also arrested twice in 1996 for driving on a suspended or revoked driver's license. In February 1996, he was given a suspended jail sentence and was fined \$250.00 plus court costs. The March 1996 arrest was dismissed. Also in February 1996, he was charged with failing to appear in traffic court when he showed up for court on the wrong day. This charge was dismissed when he explained he thought his court date was the day he showed up for court. In 1997, he was arrested for DUI, which was reduced to reckless driving. These incidents form a pattern of dishonesty or rule violations which is Disqualifying Condition (DC) 5. [\(2\)](#)

None of the Mitigating Conditions (MC) apply, I find against the Applicant as to SOR subparagraphs 1.a., 1.b., 1.c., 1.d., 1.e., and 1.f.

Complete honesty and candor on the part of applicants for access to classified information is essential to make an accurate and meaningful security clearance determination. Without all the relevant and material facts, a clearance decision is susceptible to error, thus jeopardizing the nation's security. The nature of Applicant's actions and activities, in providing false answers on his Std Form 86, poses a serious potential risk to the nation's security precautions which go to the very heart of the nation's security system.

In March 2000, the Applicant completed his Std Form 86. Question 24, of that form asked him about his police record. He answered "no" when asked if he had ever been charged with or convicted of any alcohol or drug related offenses. This answer was false because he had a 1997 DUI arrest and two arrests for possession of marijuana 1993 and 1995. Even though the DUI was later reduced to a reckless driving charge and the 1995 possession charge was dismissed, the Applicant was required to list these arrests in response to question 24, which he failed to do.

When asked in Question 26 about "other offenses," the Applicant answered "no" even though in 1996 he had been both arrested and charged on two separate occasions with driving on a suspended or revoked driver's license and also charged in 1996 on a different occasion with failing to appear in traffic court. Even though the failure to appear charge and one of the charges for driving on a suspended or revoked license were dismissed, the Applicant was required to list these arrests. When asked in Question 27 if he had ever used illegal drugs to include marijuana he said "no" even though he had used marijuana from 1990 until January 1995.

None of the mitigating conditions apply. MC 2 [\(3\)](#) does not apply to the falsifications because, although all the falsifications appeared on a single questionnaire, the falsifications were recent-- March 2000-- and the Applicant provided correct information only when questioned by DSS. In fact, at his first interview with the DSS special agent in December 2000 (Item 6), the Applicant blamed his failure to list his arrests because he failed to fully read the questions. It was only at his second interview, two weeks later, that he fully disclosed his arrests and prior illegal drug usage. His failure to disclose his arrests and drug usage was because he was "ashamed" and did not want his employer to know of these things. Because there was no showing of a prompt, good-faith effort to correct the falsifications before being confronted with the facts, MC 3 [\(4\)](#) does not apply.

I find against the Applicant as to SOR subparagraphs 1.g., 1.h., 1.i., and 1.j.

The Government has satisfied its initial burden of proof under Guideline J, (Criminal Conduct). Under Guideline J, the security eligibility of an applicant is placed into question when that applicant is shown to have a history or pattern of

criminal activity creating doubt about his judgment, reliability, and trustworthiness.

Between August 1993 and March 1997, the Applicant was arrested or charged six times. Although these incidents show questionable judgment, they are not recent. The most current incident occurred almost five years ago and the oldest incident occurred more than eight and a half years ago. MC A. ⁽⁵⁾ applies to these six incidents. Mitigating Condition (MC) E ⁽⁶⁾ applies to three of the arrests which were dismissed. I find for the Applicant as to SOR subparagraph 3.a.

The Applicant gave false answers on his Std. Form 86. and in a sworn statement to the DSS. By certifying falsely that his responses were true, complete and correct to the best of his knowledge and belief, and made in good faith, the Applicant violated Title 18, Section 1001 ⁽⁷⁾ of the United States Code. His false answers are felonious conduct under the laws of the United States. Because of this serious misconduct, there should be compelling reasons before a clearance is granted or continued. Candor is important, and the Applicant was unable or unwilling to be candid about his background. The period of time from the most recent falsification--March 2000--to the closing of the record, less than two years, is insufficient to mitigate the Government's case. Accordingly, subparagraph 3.b. is resolved against the Applicant.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

FORMAL FINDINGS

Formal Findings as required by Section 3., Paragraph 7., of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 ⁽⁸⁾ Guideline E (Personal Conduct): AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

Subparagraph 1.d.: Against the Applicant

Subparagraph 1.e.: Against the Applicant

Subparagraph 1.f.: Against the Applicant

Subparagraph 1.g.: Against the Applicant

Subparagraph 1.h.: Against the Applicant

Subparagraph 1.i.: Against the Applicant

Subparagraph 1.j.: Against the Applicant

Paragraph 3 ⁽⁸⁾ Guideline J (Criminal Conduct): AGAINST THE APPLICANT

Subparagraph 3.a.: For the Applicant

Subparagraph 3.b.: Against the 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 the Applicant.

Claude R. Heiny

Administrative Judge

1. Required by Executive Order 10865, as amended and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 as amended.
2. DC 5. A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency.
3. MC 2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily.
4. MC 2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily.
5. MC A. The criminal behavior was not recent.
6. MC E. Acquittal.
7. Title 18, Section 1001 of the United States Code provides: (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--
 - (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
 - (2) makes any materially false, fictitious, or fraudulent statement or representation; or
 - (3) makes or uses any false writing or document knowing the same to contain any materially false; fictitious or fraudulent statement or entry; shall be fined under this title or imprisoned or both.
8. The SOR does not contain a Subparagraph 2.