

DATE: March 26, 2002

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-08559

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Department Counsel

FOR APPLICANT

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SYNOPSIS

Applicant who omitted two prior charges in his SF-86, neither of which resulted in convictions or probative evidence of any criminal conduct on Applicant's part, mitigates and refutes the falsification allegations covered in the SOR. Because his only probative criminal conduct (a 1996 DuI and driving on a suspended license) are mitigated by time, isolation and demonstrated overall maturity and responsibility, Applicant's covered criminal conduct is mitigated. Clearance is granted.

STATEMENT OF THE CASE

On September 20, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which 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, and recommended referral to an administrative judge to determine whether clearance should be granted or continued.

Applicant responded to the SOR on September 26, 2001, and requested a hearing. The case was assigned to this Administrative Judge on December 18, 2001, and on January 25, 2002 was scheduled for hearing. A hearing was convened on February 12, 2002, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny or revoke Applicant's security clearance. At hearing, the Government's case consisted of six exhibits; Applicant relied on four witnesses (including himself) and two exhibits. The transcript (R.T.) of the proceedings was received on February 20, 2002.

STATEMENT OF FACTS

Applicant is a 26-year old computer programmer for his defense contractor who seeks to a security clearance.

Summary of Allegations and Responses

Applicant is alleged to have falsified his security clearance application (SF-86) by omitting two charges: one in October 1995 for permitting an intoxicated driver to operate his vehicle, which became involved in an accident (charge dismissed), and another in June 1999 for assault and battery of a family household member (subsequently *nolle prosequi*), subject to a court order of no contact with the victim). Additionally, Applicant is alleged to have omitted his 1995 and 1999 charges in a subsequently arranged DSS interview of August 2000, while disclosing his 1996 DuI arrest.

So, too, Applicant is alleged to have committed criminal conduct by virtue of his 1995 and 1999 charges and his October 1996 arrest for DuI and driving on a suspended license, for which he was found guilty of DuI and sentenced to 60 days in jail (suspended).

For his response to the SOR, Applicant admitted his 1995/1999 charges and 1996 arrest/conviction, but denied any attempt to falsify his SF-86. He claimed to have misread the covered question in the SF-86.

Relevant and Material Factual Findings

Following high school graduation (where he was president of his senior class) in 1993, Applicant enlisted in the US Army. As a 19-year old enlistee, he and his platoon sergeant had consumed several beers after work in October 1995, and were readying to embark for home in Applicant's car. Applicant's sergeant, concerned about Applicant's broken leg and possibly excessive alcohol consumption, insisted on driving the car. Applicant acquiesced, believing the sergeant was fit to drive the vehicle. Later that evening, Applicant was wakened to find his car had overturned. Investigating police cited Applicant for permitting an intoxicated driver to operate his motor vehicle. Finding insufficient evidence to impute any knowledge to Applicant that his sergeant was in no condition to drive, the charges against Applicant were dismissed.

In October 1996, Applicant was arrested and charged with DuI and driving on a suspended license. He was found guilty of the DuI offense; the driving on a suspended license charge was dismissed. Applicant was sentenced to 60 days in jail on the DuI charge (suspended).

Applicant was again charged with an offense, in June 1999: this was a charge for assault and battery on a family household member, whose mother, and girlfriend of Applicant, turned Applicant in after he reportedly yelled at her and struck her son. The charges were later *nolle prosequi*, and the competing stories of Applicant and his girlfriend are insufficiently probative of any criminal assault or battery to impute any criminal conduct to Applicant.

When asked to complete an SF-86 in October 1999, Applicant omitted his 1995 and 1999 charges when responding to question 26 concerning prior offenses within the previous seven years: He listed only his 1996 DuI arrest and conviction. He attributes his omission to misreading the question in its conjunctive sense (*viz.*, its calling for charges as well as convictions, disjunctively). Hasty in his looking at the question, he claims to have understood it to call for charges leading to convictions: this in the conjunctive sense (*see* R.T., at 57-58; 70-71, 79). Resolution of this raised issue of intent requires a look at the probative evidence and demeanor of the Applicant to gauge the sincerity of his claimed misunderstanding.

To a reasonable person, question 26 might appear to be straightforward and unambiguous: Both charges and convictions are inquired about to enable government investigators of clearance eligibility to determine possible misdemeanor criminal conduct irrespective of determined outcomes of preferred charges. The rationale is that charges are sometimes dismissed or *nolle prosequi* not for lack of merit but for technical reasons. It is not implausible, though, for a person unfamiliar with the form and hurried to mistake the question as one calling for charges leading to convictions, and not the converse. Motive and overall reputation for honesty and trustworthiness do become important considerations to weigh when gauging the sincerity of Applicant's claimed interpretation of question 26 of his SF-86.

Both by his high school and military training and demonstrated leadership skills, Applicant is to be credited with some important early displays of team-oriented trust and reliability (*see ex. A*). Since joining his current employer, he has impressed government managers familiar with his work ethics and his explanations of his omissions on a government form to be reliable and trustworthy in his acceptance and implementation of established team missions (*see ex. B*; R.T., 29-38; 44-49). Nothing furnished by his family (*see* R.T., at 21-25), landlord (*see ex. B*) or government program

managers (*see* R.T., *supra*) who regularly interface with him provide any hints of disposition for dishonesty or government deception when challenged with choices over the prioritizing of his own over the Government's interests.

With this much known about Applicant, it is fair to draw inferences of overall Applicant honesty and trustworthiness apart from what is alleged relative to his filling out his SF-86. Accepting his explanations for omitting his 1995 and 1999 charges when responding to question 26 of his SF-86, Applicant is entitled to be believed in his claims that his omissions of his prior 1995 and 1999 charges were the result of a sincere mistake in reading the question, and not derivative of any deliberate intent to conceal the charges.

With no clear imputed motive for concealing charges that were either dismissed or *nolle prosequi*, it would take an overly cynical reaction to both Applicant's explanations and the corroborating support he engenders from his mother and government managers familiar with his work and demonstrated honesty to find him not credible and basically impute knowing and intentional omission of these 1995 and 1999 charges. Favorable inferences are warranted under the strength of Applicant's personal denials and all of the surrounding circumstances of the developed record that Applicant inadvertently omitted his 1995 and 1999 misdemeanor charges out of a misreading of the scope of question 26 of his SF-86, and not out of any knowing and intentional design to conceal the facts.

Applicant was first interviewed by a DSS agent (Agent A) in August 2000 (*see* ex. 6; R.T., at 75-76). Applicant could not remember being asked about his 1995 and 1999 charges by Agent A in this first interview (*see* R.T., at 76-77; 83). Nor could he recall discussing the charges with the agent. He remembers specifically only his discussion with the agent about his 1996 charges and conviction in this first interview.

Several months later (in January 2001), a different DSS agent (Agent B) returned to re-interview Applicant. Agent B confronted Applicant with his 1995 and 1999 charges and asked him why he failed to list them in his June 1999 SF-86. Applicant's response to the agent was essentially unchanged: He misunderstood the security form question and didn't know he had to list discarded charges (*see* ex. 6). His explanations are accepted for the same reasons recited earlier.

Applicant is highly regarded by his family, landlord, and government managers familiar with his work and character.

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) lists "binding" policy considerations to be made by Judges in the decision making process covering DOHA cases. The term "binding," as interpreted by the DOHA Appeal Board, requires the Judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the Judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E2.2 of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Personal Conduct

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.

Disqualifying Conditions:

DC 2 The deliberate omission, concealment, falsification or misrepresentation 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.

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

Mitigating conditions:

MC 1 The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability.

MC 5 The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress.

Criminal Conduct

Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness

Disqualifying Conditions

DC 2 A single serious crime or multiple lesser offenses.

Mitigating Conditions:

MC 1 The criminal behavior was not recent.

MC 2 The crime was an isolated incident.

MC 6 There is clear evidence of successful rehabilitation.

Burden of Proof

By dint of the precepts framed by the Directive, a decision to grant or continue an Applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a nexus to the applicant's eligibility to obtain or maintain a security clearance. The required showing of nexus, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of accessible risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of proof shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

CONCLUSIONS

Applicant comes to these proceedings with raised security-significant omissions in the security clearance application he completed in October 1999, in addition to raised concerns about several claimed alcohol-related charges (only one resulting in a conviction).

In his October 1999 SF-86, Applicant omitted any references to his prior alcohol-related charges in 1995 and 1999,

respectively. By his claims of misreading question 26, Applicant places his intent and credibility squarely in issue.

Motivation is key here and provides the all too critical backdrop by which Applicant's omission explanations re: his 1999 SF-86 must be assessed. Both reason, motivation and whole person reliability converge here to demonstrate that Applicant's explanation is both sincere, reasonable and free of any credibility doubts about the quality of his falsification denials.

Even obvious omissions of material facts (to include non-traffic-related misdemeanor charges and convictions occurring within the previous seven years) may be extenuated where circumstances indicate the declarant was under some mistaken impression or understanding when he executed a government form (such as an SF-86) or signed off on a deficient signed, sworn statement. *Cf. Raybourne v. Gulf Atlantic Towing Corp.*, 276 F.2d 90, 92 (4th Cir. 1960). Both the E.2.2 factors of the Directive's Change 3 amendments and relevant case authorities underscore the importance of motive and subjective intent considerations in gauging knowing and wilful behavior. *Cf. United States v. Chapin*, 515 F.2d 1274, 1283-84 (DC Cir. 1975); *United States Steinhilber*, 484 F.2d 386, 389-90 (8th Cir. 1973); *United States v. Diogo*, 320 F.2d 898, 905 (2d Cir. 1963). Applicant's omissions reveal mistaken impressions, but not deliberate falsification.

Having listed his only known conviction (his 1996 offense), Applicant's credible-based misreading of the question may be attributed to his omissions of his 1995 and 1999 charges (which never resulted in convictions). His leadership training and skills and the trust he has engendered with his family, colleagues, supervisors and interfacing government managers all conduce to provide him reasonable cover for his claiming misunderstandings about the scope of question 26 of his SF-86. Mitigation is fully available to Applicant under the facts determined in this record. He may take protective sanctuary in both MC 1 (information of falsity unsubstantiated) and MC 5 (individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress).

Taking into account all of the evidence produced in this record and the available guidelines in the Directive (inclusive of the E.2.2 factors), favorable conclusions warrant with respect to sub-paras. 1.a through 1.b of Guideline E.

Because neither of Applicant's 1995 and 1999 charges were pursued to conviction or are otherwise supported by credible evidence of criminal conduct, these offenses cannot be fairly imputed to Applicant as criminal activity to be considered as a part of any pattern conduct. Nor can his SF-86 omissions be characterized as criminal in nature, given the favorable inferences drawn on the issue of whether his omissions were made knowingly and wilfully.

Only Applicant's 1996 DuI offense stands as adjudicated conduct that may be rightfully characterized as both criminal and alcohol-related. To the extent the incident covers both DuI and driving on a suspended license charges, it may be considered a multiple offense (even absent a conviction on the suspended license charge) and subject to DC 2 (single serious or multiple lesser offenses) of the Adjudicative Guidelines, for criminal conduct. But the incident remains an isolated one and clearly mitigated by Applicant's exhibited maturity and responsibility since its occurrence over five years ago. On the strength of the evidence presented, Applicant may claim the full mitigation benefits of MC 1 (not recent), MC 2 (isolated) and MC 6 (clear evidence of successful rehabilitation). Favorable conclusions warrant with respect to sub-paragraphs 2.a through 2.c of Guideline J.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the factors and conditions enumerated in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR in the context of the FINDINGS OF FACT, CONCLUSIONS and the FACTORS and CONDITIONS listed above, this Administrative Judge makes the following separate FORMAL FINDINGS with respect to Appellant's eligibility for a security clearance.

GUIDELINE E (PERSONAL CONDUCT): FOR APPLICANT

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: FOR APPLICANT

GUIDELINE J (CRIMINAL CONDUCT): FOR APPLICANT

Sub-para. 2.a: FOR APPLICANT

Sub-para. 2.b: FOR APPLICANT

Sub-para. 2.c: FOR APPLICANT

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's security clearance.

Roger C. Wesley

Administrative Judge