DATE: July 31, 2002

In Re:

SSN: ----------

Applicant for Security Clearance

CR Case No. 01-09406

DECISION OF ADMINISTRATIVE JUDGE

JOHN G. METZ, JR.

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Esquire, Department Counsel

Pamela C. Benson, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's criminal conduct was mitigated where the conduct was not especially serious, the most serious conduct had occurred over twenty years ago when Applicant was a teenager, and no criminal conduct has occurred since November 1989. Evidence did not support allegations that Applicant had deliberately falsified his clearance application or his sworn statement. Clearance granted.

STATEMENT OF THE CASE

On 3 December 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)] that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On 18 December 2001, Applicant answered the SOR and requested a hearing. The case was assigned to me on 20 February 2002. I set the case on 26 February 2002, and on 1 March 2002, I issued a notice of hearing for 13 March 2002.

At the hearing, the Government presented nine exhibits--eight admitted without objection, one excluded on my own motion for irrelevance--and one witness; Applicant presented six exhibits--admitted without objection--and the testimony of two witnesses, including himself. DOHA received the transcript on 21 arch 2002.

RULINGS ON PROCEDURE

At the hearing, I advised Applicant that scheduling problems had caused him to receive less than the 15 days notice of hearing required by the Directive, entitling him to a continuance if he was not prepared to proceed to hearing. Applicant was prepared to go to hearing and waive the notice defect (Tr. 6-7). Also at the hearing, Department Counsel moved to amend the SOR to correct some typographical errors and to conform the pleadings to the evidenced adduced at hearing. Applicant posed no objection and I granted the motion (Tr. 13-14).

FINDINGS OF FACT

Applicant admitted the allegations of paragraphs 1. and 2.a. of the SOR. Accordingly, I incorporate those admissions as findings of fact.

Applicant--a 39-year old employee of a defense contractor--seeks access to classified information.

On 23 July 1980--when he was 18 years old--Applicant was arrested and charged with breaking and entering into an ice cream store in his home town, a felony offense under his state's criminal code.(2) Applicant, through counsel, applied for admission into the state's diversion program, was accepted into the program for 12 months,(3) and had the charges against him dismissed in October 1981 after successful completion of the diversion program.

On 4 February 1982--when he was nineteen years old--Applicant stopped at a drive-in teller to cash a check for a co-worker.(4) Applicant was given $818.00 by the teller instead of $45.00, the amount of the check. Over the next couple of weeks, Applicant denied (informally with the bank and formally with the police) receiving more than $45.00; the truth emerged when the coworker told the police what actually happened. On 16 February 1982, Applicant made a statement to the police admitting he had taken the money,(5) and Applicant's father made restitution by check at the end of the interview (G.E. 8). On 19 February 1982, Applicant was arrested and charged with unauthorized use of property. On 9 March 1982, Applicant pleaded guilty to the charge, and paid $73.00 in fines and court costs.

On 5 February 1982--still nineteen years old--Applicant was stopped for running a red light, found to exhibit signs of intoxication, and charged with running a red light and operating a motor vehicle while intoxicated. On 9 March 1982--the same court appearance as his appearance for the bank teller incident--Applicant pleaded guilty to a reduced charge of reckless operation of a motor vehicle and paid $123.00 in fines and court costs (G.E. 9).

After the bank teller incident, Applicant's dad suggested that Applicant move out of the family home and grow up. Applicant took that advice and has had no adverse contact with law enforcement since 1982 (Tr. 63-64).

In approximately November 1989, Applicant was employed as a unit manager for a catering company which ran cafeterias. He was fired for pocketing a $34.00 cash payment for catered coffee and donuts. Applicant described the incident in his 19 December 2000 statement to the Defense Security Service (DSS)(G.E. 3):

I was employed by the [named] Company from April 1985 to November 1989. I was a unit manager assigned to the [vocational school] cafeteria. On one occasion, we had to deliver an order of coffee and donuts to a conference room. The bill came to $34.00. The money was paid directly to me. I put the money in my pocket, instead of locking it in the safe, and proceeded with the business of the day. On the way home from work I stopped at the store, probably a pharmacy, to pick up something that my wife needed. It was at that time I made a bad decision to use the money from the [company] instead of writing a check. I told myself that I would return the money when I got paid a few days later. Within the next day or so, my area manager came to my unit and announced that she was going to do an audit. It was at that time the money was discovered missing. I denied knowing the whereabouts of the money. The next day I met with [named person](area manager) and [named person](regional manager). It was at that time that they asked for my keys and told me to gather my things from the desk. What I did was wrong and embarrassing. On my security questionnaire I was not very factual in the whole truth. For this I apologize. The whole situation was sheer stupidity and irresponsibility for making a bad decision not only for me but my family. I am very regretful as to my actions at [named] Company and the fact that I was not truthful with my employers when they confronted me with the whereabouts of the money. I have never been fired from any other job, nor have I been accused of dishonestly [sic] by any of my former employers.

On 19 January 1999, Applicant executed a Security Clearance Application (SCA)(SF 86) on which he answered "yes" to a question about adverse employment actions (question 20) and disclosed that in approximately November 1989 he had left the catering company "by mutual agreement following allegations of unsatisfactory performance." On the same questionnaire, he answered "no" to two questions designed to elicit his history of felony arrests (question 21) and drug- or alcohol-related arrests (question 24).

On 19 December 2000, Applicant executed a sworn statement covering his criminal involvement and firing from the catering job, and omitting his 1982 felony arrest from his SCA:[(6)]

Pertaining to unlisted arrest, shortly after my eighteenth birthday, I made a very poor and immature decision to break in a local ice cream store. I entered the ice cream parlor by removing a piece of pressed particle board from a section in the garage door. Once inside, I looked around for approximately 15 minutes. I don't know what motivated me to do this. It was not to steal money, although if there had been money in plain view, I probably would have taken it. At that point, officers from the [local] Police Department responded. . . I was charged with breaking and entering. . .

I appeared in [named] County Court, but I don't recall when. I don't recall how I plead to this offense, but I probably did plead guilty because I got caught red-handed. I was allowed to enter the [named] County Prosecuting Attorney's Program. As part of this program, I had to make restitution to the owner of the ice cream parlor and probably had to do some community service. The case against me was dismissed once the requirements had been met. I did not list this arrest on my security questionnaire because I thought there would be no record since I had satisfied the requirements of the court. It was explained to me by Special Agent [named] that regardless of what I thought, the arrest had to be reported because I had been charged with a felony offense. To be totally honest, I can't say that I did not think about this arrest when I filled out the security questionnaire.[(7)] I did not remember, nor did I want to remember. I have continued to erase this event from my mind. . .

In response to further questioning from the agent, Appellant disclosed the 1982 bank teller incident--which was not required to be disclosed on the SCA, and which was not known to the agent at the time she asked Applicant about other law enforcement contacts (Tr. 45). Applicant disclosed the details of this incident as best he recalled them at the time (G.E. 4; Tr. 62-63, 76, 78). He also disclosed being questioned for fighting in a distant city in 1982 and having his license suspended for a year for passing a school bus in 1979. He did not disclose his alcohol related arrest on 5 February 1982.

As Applicant was driving home from one of the initial interview sessions, Applicant recalled additional details of his 1989 firing that he had apparently not disclosed, and contacted the agent to arrange a meeting to provide the additional details.[(8)] It appears that an additional meeting occurred and the result incorporated into the December 2000 sworn statement.

After the first statement, the DSS agent obtained police records of the bank teller incident which contained vastly different details than Applicant had disclosed during the first interviews, as well as evidence of the 1982 alcohol-arrest. She contacted Applicant to arrange another interview (Tr. 40-43). After being contacted by the agent, but before going to the new interview, Applicant contacted his father (G.E. 4; Tr. 83-84) and learned for the first time that his recollection of the bank teller incident was incorrect, and that he had gone to court and been fined.

On 19 January 2001, Applicant met with the DSS agent to address her discoveries and executed a new sworn statement (G.E. 4) covering his perceived omissions:

[Referring to the 1982 bank teller incident]. . . I tried to recall as much as I could at the time of the [December 2000] interview. I did remember going to the police station to pay the money back. I didn't recall being charged with anything. At the time of my first statement I admitted about the incident at the bank but all the details were not clear. I told Special Agent [named] what I could remember. When I heard from her again and she advised that she needed to talk to me some more, I asked my dad how the matter was handled he said that he notified the attorney and that we did pay the money back at the police station but we did have to appear in mayors court because I in fact was charged with a crime. This happened long ago and details were not real clear but I did admit to the incident. I did not purposely omit details pertaining to his incident in fear that I would not get a security clearance. The details were hard for me to remember.

Pertaining to my February 82 OMVI, I don't recall anything about this charge. According to [named] Police report, it occurred the night after the bank theft. My memory was not refreshed, even when Special Agent [named] went over this information with me. I did not purposely exclude this offense from my security questionnaire. I truly did not recall that it happened.

At the hearing, the DSS agent who interviewed Applicant for both sworn statements testified credibly that she found Applicant pleasant to deal with, but could not say that he had been totally cooperative because of her impression that all the details of the incidents had not come out at first, but required multiple interviews (Tr. 44). However, she acknowledged that Applicant disclosed the existence of the 1982 bank teller incident at a time when she had no information on that incident (Tr. 45). She also indicated he contacted her to provide additional details on the 1989 firing (Tr. 35-36). Finally, she confirmed Applicant's statement and testimony that Applicant stated he omitted his 1980 breaking and entering offense from his SCA because he thought the diversion program meant there would be no record and he should not have to report it (Tr. 30). She also described him as having a hard time recalling the details of the offense (Tr. 31).

Applicant testified credibly and consistently with his previous statements that at the time he filled out the SCA, he recalled only the 1982 breaking and entering incident (Tr. 70-71), but that after thinking it over and talking to his mother about the incident (Tr. 68) concluded that the diversion program and ultimate dismissal of the charges meant he did not have to report the offense (Tr. 62). He was credible when he described being comfortable with the answers he put on his SCA Tr. 69). He testified credibly that he did not recall the alcohol-related arrest (Tr. 62, 76) and credibly described why he could remember being questioned about fighting in a distant city, but not the alcohol-related arrest (Tr. 72). Finally, he testified credibly about remembering and disclosing the bank teller incident (Tr. 62, 76) and disclosing his best recollection at the time (Tr. 78) only to find out from his dad--after being recontacted by the DSS agent--that he had not recalled all the details correctly (Tr. 82-84). Applicant also testified how he has tried to put his past behind him and be a positive example to his two children, ages 12 and 14.

Applicant's character witness (Tr. 52-59) has known Applicant over 30 years, and has employed him part time in a collectibles business he runs on the side for three years. He has found him a trustworthy employee. Aside from the bank teller incident which he was involved in at the time, has never known Applicant to be involved in criminal activity, although Applicant reminded him of the breaking and entering charge, bank teller incident, and alcohol-related arrest before coming to the hearing to testify. He believes 20-year old incidents should not play much part in making a security decision (Tr. 58), and does not believe Applicant would be deliberately misleading in his answers (Tr. 59).

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Each adjudicative decision must also assess the factors listed in Section F.3. and in Enclosure (2) of the Directive. 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, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc*.

Considering the evidence as a whole, the following adjudication policy factors are most pertinent to this case:

PERSONAL CONDUCT (GUIDELINE E)

E2A5.1.1. 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. . .

E2. A5.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A5.1.2.2. 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, . . . [or] determine security clearance eligibility or trustworthiness. . .;

E2.A5.1.2.3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, . . . in connection with a personnel security or trustworthiness determination;

E2.A5.1.3. Conditions that could mitigate security concerns include:

E2.A5.1.3.1. The information was. . . not pertinent to a determination of judgment, trustworthiness, or reliability.

CRIMINAL CONDUCT (GUIDELINE J)

E2.A10.1.1. A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

E2.A10.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;

E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

E2.A10.1.3. Conditions that could mitigate security concerns include:

E2.A10.1.3.1. The criminal behavior was not recent;

E2.A10.1.3.3. . . . the factors leading to the violation are not likely to recur;

E2.A10.1.3.6. There is clear evidence of rehabilitation.

Burden of Proof

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where 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 or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the 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."

CONCLUSIONS

The Government did not establish its case under Guideline E. Although the Government established the fact of the omissions alleged, Applicant's evidence demonstrates that he did not intend to mislead the Government. At the time Applicant completed the SCA, he recalled only the breaking and entering offense. Applicant's belief that the diversion program and subsequent dismissal of the charge meant he did not have to report the offense was mistaken, but under the circumstance of this case understandable; consequently Applicant lacked the intent to mislead the Government required under Guideline E. Further, even if I concluded that Applicant had deliberately falsified his answer to the felony question, I would find the conduct mitigated because of my conclusion that the 1980 breaking and entering was not pertinent to a security decision at the time Applicant completed the SCA. The felony question is open-ended as to time (as is the drug/alcohol arrest question) which creates the presumption that any conduct, however old, is relevant and material to a clearance determination simply because it falls within the scope of the question. However, even conduct which is within the scope of the question must still be examined to determine whether it is in fact pertinent to a clearance determination. Here, Applicant's contemporaneous statement casts some doubt on whether he actually did the "breaking" or only "entered."[(9)] Nevertheless, the investigation revealed no theft, the victim consented to Applicant's admission into the diversion program, and the ultimate resolution of the case suggests that the conduct was viewed by the authorities as little more than an immature prank.

I conclude that Applicant did not falsify the answer to the alcohol arrest question on the SCA or falsify his December 2000 sworn statement by omitting the alcohol offense because I accept Applicant's repeated statements that he did not recall this incident, even after seeing documentary evidence from the DSS agent. I conclude that Applicant did not falsify his December 2000 sworn statement by reporting the wrong details of the bank teller incident for several reasons. First, the bank teller incident was beyond the scope of any of the questions on the SCA, and thus not required to be disclosed by Applicant. Consequently, by Government definition the bank teller incident was irrelevant and immaterial to a clearance determination. When the agent inquired about other involvement with law enforcement (a reasonable question) Applicant's answers about the bank teller incident, even if false, were about an incident which was irrelevant and immaterial and therefore outside the ambit of Guideline E. Second, the record reveals that Applicant responded to the agent's query with information Applicant believed to be true based on his recollection of events at the time. Only when Applicant talked to his dad about the incident before going to the second interview did Applicant realize that there were significant details which he did not recall.[(10)] Applicant lacked the necessary intent to mislead the Government.

There is no record evidence to suggest that Applicant's 1989 firing is anything other than what it appears to be: an instance of carelessness compounded by poor judgment rather than an intent to steal from his employer. While it was reasonable for the company to fire Applicant under the circumstances, the incident was clearly isolated and occurred over 12 years ago. I conclude that it has no security significance. Accordingly, I find guideline E. for Applicant.

The Government established its case under guideline J., but I find the conduct to be mitigated. Applicant having demonstrated that he did not deliberately falsify his SCA, no criminal conduct has occurred under 18 U.S.C. §1001. Of the established criminal conduct, the most recent incident--which did not result in charges--occurred in November 1989, over 12 years ago. The remaining incidents are over 20 years old. Thus, the conduct is not recent. None of the misconduct is particularly serious or indicative of a pattern of misconduct. Further, the most serious of the conduct, in terms of criminal charges filed, occurred when Applicant was a teenager, and by his own admission, somewhat immature. In addition, the circumstance of the breaking and entering and its final disposition suggest the offense was considered less serious than actually charged. I conclude the factors which contributed to the conduct are unlikely to recur now that Applicant has settled down. Finally, the record demonstrates Applicant's rehabilitation, both by the evidence of the example Applicant is trying to set for his children and by the fact that Applicant has engaged in no further misconduct since 1989. I find guideline J. for Applicant.

FORMAL FINDINGS

Paragraph 1. Guideline E: FOR THE APPLICANT

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Subparagraph d: For the Applicant

Subparagraph e: For the Applicant

Paragraph 2. Guideline J: FOR THE APPLICANT

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the 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 a security clearance for Applicant.

John G. Metz, Jr.

Administrative Judge

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992--and amended by Change 3 dated 16 February 1996, and by Change 4 dated 20 April 1999 (Directive).

2. Police records (G.E. 5) reflect that the police found Applicant in the store at approximately 0230. Applicant's statement recorded at the time of arrest reveals that he got off work (at a different store) at about 0034 that morning, stopped at a convenience store for some beer (which he drank, but was not intoxicated at the time of the incident), and on his way home noticed the ice cream store's overhead door window was broken. He returned to the store a short time later and climbed in to "look around," at which point passing police noticed and arrested him. Police investigation revealed no latent prints in the store, and the store owner later confirmed that nothing had been taken from the store.

3. Both the investigation officer and the store owner agreed with Applicant's acceptance into the diversion program.

4. The coworker, a passenger in Applicant's car, apparently had no car of her own and Applicant routinely gave her a ride to work.

5. Applicant also stated that although he had intended to return the money the next day, he had been arrested that day (5 February 1982) for running a stoplight and operating a motor vehicle while intoxicated and had used some of the money to post bond for those offenses; after that he was scared to admit he had the money because he did not have the full amount to return.

6. Both Applicant and the DSS agent who testified at the hearing indicated that the subject interview occurred over at least two days, with the statement being executed on the last day.

7. Indeed, Applicant testified (Tr. 68) that he asked his mother if she remembered whether the records were sealed or dismissed, and concluded from the disposition of the offense that he did not have to report it.

8. Both the agent (Tr. 35-36) and Applicant (Tr. 73, 77) agree on this fact.

9. Although I recognize that Applicant's statement 20 years later acknowledges taking off a plywood cover.

10. Although given the minor nature of the charge and the small fine paid, it can be argued that Applicant's initial description of the incident does not vary significantly from the actual events.