

DATE: June 12, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-13628

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

With his driver's license suspended because of several speeding tickets in the 1995/96 time frame, Applicant gave a false name to the police when he was stopped for motor vehicle violations in January 1997 and February 1997. Convicted of operating a motor vehicle after license suspended and false name violation following each incident, Applicant deliberately did not disclose either the January 1997 charges or the February 1997 false name violation on his security clearance application because he feared he would not be granted a security clearance. Not wanting to jeopardize all that he had worked for, Applicant initially denied during a February 2001 interview that he had ever given a false name to the police. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended by Executive Orders 10909, 11328 and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4), issued a Statement of Reasons (SOR), dated January 14, 2002, to the 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 the Applicant. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. The SOR was based on personal conduct (guideline E) because of Applicant's record of providing false names to law enforcement authorities when stopped for motor vehicle violations; his failure to list on his December 1999 SF 86 his arrest for operating after suspension in January 1997; and his denial during a Defense Security Service (DSS) interview in February 2001 of any use of a false name on the occasions of his arrests.

On February 13, 2002, Applicant responded to the allegations set forth in the SOR and requested a hearing before a DOHA Administrative Judge. The case was assigned to me on March 26, 2002. Pursuant to formal notice dated March 29, 2002, the hearing was scheduled for April 24, 2002. At the hearing held as scheduled, the Government submitted four exhibits, which were entered into the record without objection. Applicant tendered his own testimony and offered

two documentary exhibits, which were admitted. The Government also moved to amend subparagraph 1.a. of the SOR to reflect Applicant responded "Yes" on his SF 86 to inquiry into whether he had been arrested in the last 7 years, but he omitted any reference to a January 1997 arrest for operating after suspension and giving a false name. Applicant having no objection thereto, the motion was granted. With the receipt in this office on May 3, 2002, of the transcript of the hearing, this case is ripe for a decision.

FINDINGS OF FACT

After a thorough review of the evidence, and on due consideration of the same, I render the following findings of fact:

Applicant is a 37-year-old software engineer who has worked for a defense contractor (company A) from July 1997 on a contract basis and since late June 2000 as a direct employee. Applicant seeks a security clearance for his duties.

A native of Kenya, Applicant came to the United States in June 1988 to pursue his education. Applicant initially enrolled in a junior college. After three semesters, he continued his education at a local campus of the state university for two more semesters. In January 1994, he began studies at a school in the state university system approximately an hour's drive away from his home and work for a security services company.

Due to low income and school expenses, Applicant failed to pay his car insurance timely and his automobile insurance policy was cancelled. Without insurance, his registration was revoked and his vehicle plates invalidated. Needing to drive between his job and his school, Applicant continued to operate his unregistered, uninsured motor vehicle. Circa June 1994, Applicant was stopped by the state police and charged with operating a motor vehicle without a valid inspection sticker, operating an unregistered motor vehicle, and attaching plates to a motor vehicle. In district court, Applicant was adjudged responsible for operating without a valid inspection sticker and operating an unregistered motor vehicle, for which he was fined \$200.00.

Over the 1995/96 time frame, Applicant received several speeding tickets. Due to surchargeable events, Applicant's driver's license was suspended. Applicant's concern about getting to and from his classes and work took precedence over his adherence to motor vehicle laws and regulations, and he continued to operating a motor vehicle without a license thereafter.

In September 1996, Applicant was stopped by the police for a motor vehicle infraction. Charged with operating a motor vehicle without insurance, operating an unregistered motor vehicle, operating a motor vehicle after revocation of registration, and operating motor vehicle after license suspended, Applicant was found guilty and fined a total of \$625.00 on the operating unregistered motor vehicle and operating after revocation of registration charges. The remaining charges were filed and dismissed a year later.

In early January 1997, Applicant was stopped by the police for failure to display the front plate on his vehicle. ⁽¹⁾ A check of the rear plate number on the number revealed the registered owner's license to operate had been suspended. The officer approached the vehicle and asked Applicant to identify himself. Fearing further legal problems if he gave his own name since his license had been suspended, Applicant used as an alias the name of his younger brother, who had come to the United States from Kenya in 1995 and had a valid license to operate in the state. In response to the officer's request for his date of birth and license number, Applicant retrieved a handwritten note from which he read his brother's data. Observing this, the officer took the note from Applicant and requested he repeat his date of birth. Applicant gave the officer three different dates and he could not recite the social security number. Realizing Applicant was not the individual whose identifying data appeared on the note, the police officer issued Applicant a criminal complaint citation on charges of operating a motor vehicle after suspension, giving a false name to a police officer, improper display of plate number, and no license in possession. When the officer approached Applicant with the citation in hand, Applicant acknowledged his true name.

Prior to his appearance in court for the January 1997 incident, Applicant was stopped by the state police in February 1997, because of his failure to display a front plate on his vehicle. When asked for his license and registration, Applicant responded he had left his wallet at home. He again gave his brother's name when asked to identify himself. While he gave his real name with regard to who owned the car, he claimed the owner was his brother who was a student at a

nearby college. The officer issued Applicant a citation under his brother's name for no license in possession and allowed him to leave. The officer then ran a license status check on the owner of the vehicle. On learning that the owner's license had been suspended and that a description of the owner matched the individual he had just stopped, the officer obtained an arrest warrant on charges of operating after license suspended, giving a false name to the police, and improper display of license plate. Applicant was arrested on the charges at the college and his vehicle towed.

In mid-March 1997, Applicant appeared in court on the January 1997 charges. He was found guilty of the charges of operating after license suspended, for which he was fined \$660.00, and giving a false name to a police officer, for which he was fined \$35.00. He was also adjudged responsible of operating a motor vehicle without license in possession and failing to display plates, which charges were filed. In late September 1997, the charges of operating after license suspended and of giving a false name to a police officer were dismissed on the recommendation of the probation office.

Seven days after Applicant was sentenced on the January 1997 charges, he appeared in court to answer for the February 1997 offense. Applicant was found guilty of operating after license suspended and was sentenced to ten days in the house of correction, suspended in favor of one year inactive probation. He was also convicted of the giving a false name charge and fined \$135.00. The no number plate properly displayed charge was filed.

In May 1997, Applicant was awarded a bachelor of science degree. On completion of his studies he elected to make the United States his permanent home, and he secured contract employment in quality control for a local company. Applicant left the company after a short time as he considered the pay inadequate. In July 1997, Applicant started working at company A as a contractor.

In late July 1999, Applicant became a United States naturalized citizen. In December 1999, he executed a security clearance application (SF 86) on which he responded affirmatively to question 26. ["Your Police Record--Other Offenses In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.) For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607."]. Applicant disclosed a November 1996 compulsory insurance violation, for which he was fined \$625.00, and the February 1997 operating after license suspended. He did not report his arrest in January 1997 for motor vehicle infractions, including operating while license suspended, or the false name charges filed against him in January 1997 and February 1997 because he feared he might not be granted a security clearance if he reported them. (2)

In June 2000, Applicant became a direct employee of company A. Applicant was given a favorable performance evaluation by his employer in November 2000, as he had demonstrated compliance with company policies, regulations, and practices, ethical behavior, and significant improvement in the quality and quantity of his work over the previous year. Applicant's supervisor has found him to be a trustworthy employee of good character.

On February 15, 2001, Applicant was interviewed by a special agent of the Defense Security Service. Regarding his adverse involvement with law enforcement authorities, Applicant was asked by the agent about his use of a false name. Fearing he might not get the security clearance requested, Applicant denied any use of a name other than his own, and claimed he had told the police officer he was driving his brother's car and that the officer misunderstood him. During the course of the interview, Applicant eventually admitted to the agent that he had given a false name to the officer in an effort to avoid any further trouble for driving on a suspended license. Applicant acknowledged to the agent his concern over getting to his classes and to work took precedence over his adherence to motor vehicle laws and regulations. Citing his maturity since the February 1997 incident, he denied any further legal difficulties and expressed remorse over failing to be initially forthright with the agent during the interview.

POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully

considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the nature, extent, and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the motivation of the individual applicant and extent to which the conduct was negligent, willful, voluntary or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation and other pertinent behavioral changes; the potential for coercion, exploitation and duress; and the probability that the circumstances or conduct will continue or recur in the future. *See* Directive 5220.6, Section 6.3 and Enclosure 2, Section E2.2. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior. *See* Directive 5220.6, Enclosure 2, Section E2.2.4.

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

Personal Conduct

E2.A5.1.1. 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 also 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, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

E2.A5.1.2.3. 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.

E2.A5.1.2.5. A pattern of dishonesty

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

None.

Under the provisions of Executive Order 10865 as amended and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

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 its burden and establishes conduct cognizable as a security concern under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of criterion 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." Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. See Enclosure 2 to the Directive, Section E2.2.2.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility of the Applicant, I conclude the following with respect to guideline E:

Applicant presents a security significant history of false statements, all motivated by self-interest. When stopped by the police in January 1997 for a motor vehicle violation, Applicant gave the police the name of his brother when asked to identify himself, as he feared adverse legal consequences should it be discovered he was driving after his license had been suspended. Desperation does not excuse the criminal act of giving false information to a law enforcement official. Furthermore, Applicant's subsequent misrepresentations to the state police in February 1997 and to the Department of Defense in 1999 and 2001 are viewed as even more egregious. With legal charges pending against him for giving a false name to an officer, Applicant again used the name of his brother when stopped in February 1997. When Applicant completed his SF 86 in December 1999, he deliberately omitted his 1997 convictions on false name violations and under reported the extent of his driving after license suspended. More recently, when asked by a DSS special agent about his convictions for giving a false name, Applicant falsely denied any use of his brother's name and claimed the officer misunderstood what he had said. Disqualifying conditions E2.A5.1.2.2. (the deliberate omission, concealment or falsification of relevant and material facts from any personnel security questionnaire), E2.A5.1.2.3. (deliberately providing false or misleading information concerning relevant and material matters to an investigator) and E2.A5.1.2.5. (a pattern of dishonesty) must be considered in evaluating Applicant's security suitability.

The concerns for Applicant's judgment, reliability and trustworthiness engendered by intentional false statements may be overcome if the falsification was isolated, not recent and corrected voluntarily (E2.A5.1.3.2.); the individual made prompt, good faith efforts to correct the falsification before being confronted (E2.A5.1.3.3.); or omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided (E2.A5.1.3.4.). None of the mitigating conditions apply to Applicant's benefit. While his false statements to the police officers and his SF 86 omissions were in 1997 and 1999, respectively, Applicant was not candid initially when he was interviewed by the DSS agent in February 2001. Moreover, although Applicant eventually revealed the details of his offenses to the agent, the disclosures came only after some prompting. Asked at the hearing whether it was true that he had revealed his arrests only after they had been pointed out to him by the agent, Applicant responded, "As he kept on mentioning and remind (sic) me of them, I kept on telling him as much as I could remember." (*See Transcript p. 35*).

To his credit, Applicant expresses remorse for the "mistakes" he made. However, I am unable to conclude his representations can be relied on. Having admitted on cross examination that he had given the police his brother's name when he was arrested in January 1997 because his license had been suspended, he later claimed he first learned of the license suspension at the time of his arrest in January 1997. Nor has he exhibited any meaningful understanding of his obligation to be completely forthright with the Government regardless of personal inconvenience or cost. At the hearing, he asked for favorable consideration because denial of his clearance could cost him his job and he questioned why the Government was seeking to punish him for conduct which occurred five years before. Legitimate concerns for Applicant's judgment, reliability and trustworthiness persist, in part, because of his omissions from his December 1999 SF 86 and his February 2001 misrepresentations to the DSS agent. Adverse findings are returned with respect to subparagraphs 1.a., 1.b., 1.c., and 1.d. of the SOR, his contributions to his employer notwithstanding.

FORMAL FINDINGS

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

Paragraph 1. Guideline E: 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

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 Applicant.

Elizabeth M. Matchinski

Administrative Judge

1. Applicant testified he was stopped for speeding on this occasion. (Transcript p. 39). There is no evidence Applicant was cited for speeding. In his report, the arresting officer indicated his attention was drawn to the car because there was no front plate. (*See Ex. 3*). On cross examination, Applicant admitted he provided a false name to the officer when he was arrested because he knew his license had been suspended. (Transcript p. 37). Yet, in response to my questions as to when his license was first suspended, Applicant responded he learned of the suspension when he had been told by the officer in January 1997. (Transcript p. 41). Applicant's claim that he was surprised to learn from the arresting officer his license had been suspended only serves to further undermine his credibility.

2. In his direct testimony, Applicant testified to lack of recall being one of the reasons why he provide a full accounting of his criminal record on his SF 86. (*See Transcript p. 27*). Given the recency of the 1997 incidents and Applicant's initial lack of candor about whether he had ever used a false name, he is found to have deliberately failed to disclose his arrest in January 1997, in part for giving a false name, and the false name charge in February 1997.