

DATE: May 29, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-20700

DECISION OF ADMINISTRATIVE JUDGE

BURT SMITH

APPEARANCES

FOR GOVERNMENT

Kathryn MacKinnon, Esq., Department Counsel

FOR APPLICANT

Barry P. Steinberg, Esq.

SYNOPSIS

When he completed a security clearance questionnaire, Applicant intentionally failed to admit his previous arrest for solicitation of prostitution, and he signed the questionnaire under a certification of truth, thereby demonstrating dishonesty and unreliability. Clearance is denied.

STATEMENT OF THE CASE

On November 30, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6 (Directive) dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons why DOD adjudicators could not make a 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 and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied or revoked.

The Applicant responded to the SOR in a written answer notarized on January 3, 2002, in which he requested a hearing. The case was originally assigned to another Administrative Judge, and it was transferred to the undersigned on March 19, 2002. On March 25, 2002, a Notice of Hearing was issued scheduling the hearing on April 23, 2002. Both parties joined in a Stipulation of Agreed Facts and Admissible Documents, numbered 1 through 13n. The Stipulated Facts are identified as numbers 1 through 12. The Government's Admissible Documents are identified as Gov. Exs. 13a through 13f(2)). Applicant's Admissible Documents are identified as App. Exs. 13g through 13n. Applicant exhibits were supplemented by three additional documents identified as App. Exs. A through C. The Applicant presented his testimony and testimony from four witnesses. The Government presented testimony from one rebuttal witness. The official transcript (hereafter Tr.) was received by DOHA on May 1, 2002.

FINDINGS OF FACT

The Applicant is forty-nine years old and married, and he owns a software consulting company which has defense-

related contracts with DoD. Applicant seeks a DoD security clearance in connection with his firm's consulting business.

In its SOR, the Government alleges Applicant is ineligible for clearance because during the clearance screening process he intentionally furnished false material information about his personal background (Guideline E) and because he has been secretive about a previous arrest for sexual misconduct, putting him at risk for coercion. (Guideline D). The following findings of fact are entered as to the Government's allegations.

Paragraph 1 (Guideline E - Personal Conduct). The Government alleges Applicant made false material statements concerning his 1982 arrest for DUI and his 1996 arrest for solicitation of prostitution.

On June 21, 1999, Applicant completed a DoD Security Clearance Application (Gov. Ex. 13a) generally known as a form SF86. Question 24 of the SF86 asks Applicant "Have you even been charged with or convicted of any offense(s) related to alcohol or drugs?" In its instructions below the question, and in plain view, the SF86 advises applicants they are required to furnish responsive information "regardless of whether the record in your case has been 'sealed' or otherwise stricken from the record", subject to a single exception not relevant in this case.

Applicant answered "No" to Question 24 even though he was arrested on a DUI charge in about June 1982. ⁽¹⁾ In April 1983, in connection with an earlier clearance request, Applicant had furnished DoD a signed sworn statement in which he acknowledged the DUI arrest and he provided all pertinent details. ⁽²⁾ (Gov. Ex. 13c.) When asked why he did not provide this information on his SF86 of June 21, 1999, Applicant testified at the hearing that he did not remember the 1982 arrest. (Tr. 91.) In Applicant's signed sworn statement of June 12, 2001, provided to a DoD investigator, Applicant explained his omission with a different reason, claiming he misunderstood the question. (Gov. Ex. 13b.)

Despite the differences in Applicant's two explanations, the existence of his 1983 sworn statement casts strong doubt on the possibility that Applicant was motivated to deceive when he omitted the DUI from the 1999 questionnaire. Given the fact of his earlier full disclosure, it is unlikely Applicant would risk the penalties associated with an intentional false statement regarding facts already known to the Government. Taking all evidence into consideration, it is found that Applicant's negative response to Question 24 of the PSQ, although incorrect, was likely not a willful falsification as alleged.

However, the same finding can not be reached with regard to Applicant's negative response to Question 26. Here the Applicant was asked whether in the last 7 years he had been "arrested for, charged with, or convicted of any offense(s)" not previously listed by Applicant but excluding certain traffic offenses. (Gov. Ex. 13a.) As in Question 24, Applicant was instructed to provide factual information even though the case was sealed or otherwise stricken from the record. Applicant answered "No" to the question, and upon completing the SF86 he signed it under a certification of truth. However, Applicant's answer to Question 26 was false.

On February 27, 1996, while visiting a major city away from home, Applicant was arrested by an undercover vice squad officer and charged with Solicitation of Prostitution. Applicant returned to his home and by correspondence entered into arrangements with prosecutors which permitted him to complete a First Offenders counseling program in exchange for a discharge of the complaint. Applicant returned to the city where the offense occurred, and he satisfactorily completed the required program. ⁽³⁾

In a signed sworn statement furnished to DoD on June 12, 2001, Applicant states that at the counseling program "I was informed at this class that everything would be dropped. Nothing would be kept except my name on a department head's personal computer." (Gov. Ex. 13b.) After completing the program, Applicant's case was discharged without entry of a conviction. (App. Exs. 13g and 13k.)

During the next five years Applicant did not reveal to anyone, including his wife, that he had been arrested on a charge of soliciting prostitution. (Tr. 127.) As noted above, when he completed the SF86 during his clearance processing in June 1999 Applicant denied that he had been arrested for any offenses in the last seven years. After completing the SF86 he was interviewed by a DoD investigative agent who had learned of Applicant's arrest from a search of law enforcement records. During the interview Applicant admitted to his 1996 arrest and he furnished a sworn statement in which he provided details of the incident. (Gov. Ex. 13b.)

The essence of Applicant's defense to SOR subparagraph 1.a. (falsification) is his claim of a genuine belief that the solicitation charges were dropped and therefore his 1996 arrest did not exist for purposes of reporting it to DoD when he completed the 1999 questionnaire. Thus a factual issue arises as to whether Applicant had good reason to support this belief or whether it was a convenient rationale to avoid an unfavorable admission.

Applicant presented testimony from witnesses who stated their belief that Applicant is an open and honest person not likely to withhold information about his personal background. The witnesses also testified that Applicant is the kind of person who would never act in a manner that would harm national security. Applicant's evidence of good character included testimony from his brother, a graduate of the United States Military Academy, a counsel of the US Senate, and a candidate for a federal judgeship. Applicant's family has close ties to the American military tradition. (Tr. 23-25.)

However, the totality of the evidence does not support Applicant's claim that he failed to list the solicitation arrest because of a belief he was not required to do so. Instructions on the SF86 make it abundantly clear that adverse information must be provided even if charges were sealed, dropped or otherwise stricken from the record. It is unreasonable to believe that Applicant, a seasoned businessman, failed to grasp the meaning of this uncomplicated instruction.

Finally, Applicant had an incentive to conceal his arrest from the Government because it might have a negative impact on his request for a security clearance. For these reasons it is found that Applicant knowingly and willfully provided a false negative answer to Question 26 of the Government's security questionnaire, as alleged.

Paragraph 2 (Guideline D - Sexual Behavior). The Government alleges in this paragraph that Applicant is ineligible for clearance because he told no one of his arrest for solicitation of prostitution. to include his spouse, family members, and/or work associates. Relevant factual findings entered with respect to allegations under Paragraph 1 of the SOR are incorporated by reference under Paragraph 2.

After Applicant's 1996 arrest for solicitation he chose to remain wholly silent about this event, a strong indication that Applicant thought disclosure would be harmful to his interests. According to the Government's allegations under Guideline D, this behavior may indicate a personality or emotional disorder, susceptibility to undue influence or coercion, and/or a lack of judgment and discretion.

Applicant's silence indicates a hope that his arrest would not become known to others. However, this is not persuasive evidence, on a commonsense basis, that Applicant would submit to blackmail or coercion in order to prevent this from happening. Having due regard for Applicant's evidence of overall good character, coupled with considerations of commonsense, it is found that Applicant's one-time arrest, though worrisome to him, was not so grave or threatening to his interests as to render him susceptible to coercion, blackmail, or wrongful pressure.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. The guidelines are divided into those that may be considered in deciding whether to deny or revoke an Applicant's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's request for access to classified information (Mitigating Conditions).

Based upon a consideration of the entire record, I find the following adjudicative guidelines have application in 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.

Conditions that could raise a security concern and may be disqualifying 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;

4. Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation, or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail;

Conditions that could mitigate security concerns include:

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

Guideline D - Sexual Behavior. *The concern:* Sexual behavior is a security concern if it involves a criminal offense, indicates a personality or emotional disorder, may subject the individual to coercion, exploitation, or duress or reflects lack of judgment or discretion.

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

1. Sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

4. Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.

Conditions that could mitigate security concerns include:

2. The behavior was not recent and there is no evidence of subsequent conduct of a similar nature;

3. The behavior no longer serves as a basis for coercion, exploitation or duress..

The whole person concept. In addition to these guidelines the Directive provides in Para. E2.2.1. that under the "whole person concept" the Administrative Judge shall also consider (1) the nature, extent and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (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 pertinent 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.

CONCLUSIONS

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where reliable information indicates an Applicant for clearance may be dishonest in serious matters or may have engaged in illegal sexual conduct which places him in jeopardy of blackmail. In a reasonable and commonsense view, these types of misconduct could lead to a compromise or loss of classified defense secrets.

In DOHA cases the Government must first prove all controverted facts that tend to demonstrate Applicant is ineligible for clearance. Once this burden is met, the Applicant must overcome the Government's case by persuasive evidence in refutation, mitigation, or changed circumstances. However, the Applicant always bears the ultimate burden of proving that it is clearly consistent with the national interest to grant him or her a security clearance The Directive provides that "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." (Directive, Para. E2.2.2.) Thus, the Applicant's burden is a heavy one.

In this case, the Applicant was arrested for DUI in 1982, but the charge was ultimately reduced to three misdemeanor traffic violations. In 1983 Applicant furnished the Government a full accounting of the DUI arrest in a signed sworn statement, and the record contains no indication that Applicant ever repeated this misconduct. The Government alleges that Applicant falsely denied the 1982 arrest sixteen years later when he completed his SF86 application for a security clearance. However, this allegation is strongly controverted by Applicant's sworn statement of 1983 which fully

describes the DUI charge.

With reliance upon the disqualifying and mitigating conditions set forth in the Directive, and the whole person concept, it is concluded that Applicant knowingly omitted the DUI charge from the SF86, but this did not expose him to coercion because the Government was fully informed of the matter. Also, it is not likely Applicant dishonestly withheld the information because, having already made it known, he had no reason to hide it. Based upon persuasive evidence that Applicant had little or no motivation to deceive the Government in 1999, Subparagraph 1.a. of the SOR is concluded in Applicant's favor.

However, with regard to allegations of dishonest conduct at Subparagraph 1.b. of the SOR, the facts support a conclusion that the Applicant knowingly attempted to deceive the Government about material information he wanted to conceal. His apprehension and charge in 1996 was well within the seven-year scope of information requested under Question 26, and plain instructions made it clear this offense should have been identified, regardless of its prosecutorial outcome.

Notwithstanding Applicant's claim of a misunderstanding, his previous long silence about this event (not disclosing it to anyone including his wife) is evidence of his desire to keep the arrest a secret from the Government so it would not jeopardize his request for a clearance. This deceptive behavior is clearly within the concern of Guideline E (lack of candor and dishonesty) and Disqualifying Condition No. 2. Applicant's evidence of good character and trustworthiness has been considered as part of the whole person concept, but it does not outweigh the negative effects of his intentional dishonesty presented with a signed certification of truth. Subparagraph 1.b. of the SOR is concluded against the Applicant.

The Government alleges under Paragraph 2 that Applicant's lengthy silence about his 1996 arrest, amply discussed above, is evidence he was vulnerable to undue influence or coercion. (Other elements of the allegation, to include a psychological disorder or lack of discretion are not proved by Applicant's silence.) ore likely than not, Applicant considered the arrest an impediment to clearance, and he withheld this information from the Government. Applicant's misconduct in this regard is cause to doubt his honesty.

However, upon applying evidence of Applicant's long silence to Guideline D, it can not reasonably be concluded that Applicant was susceptible to blackmail or coercion. Though Applicant was not frank and honest about his arrest for solicitation, this is insufficiently persuasive as evidence that Applicant willingly would compromise the nation's defense secrets to protect himself. Applicant's testimonial evidence of overall responsible behavior, especially the testimony of his brother, supports a conclusion that Applicant would not allow the 1996 arrest to be used against him in a coercive manner. Paragraph 2 of the SOR is concluded in Applicant's favor.

On balance, after considering the entire record, it is concluded that Applicant has failed to satisfy his ultimate burden of proving that it is clearly consistent with the national interest to grant him a DoD security clearance. However, should Applicant be afforded a future opportunity to re-apply for a security clearance he may then demonstrate reform and rehabilitation sufficient to justify the award of a security clearance.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive are:

Paragraph 1. Guideline E: AGAINST THE APPLICANT.

Subparagraph 1.a.: For the Applicant.

Subparagraph 1.b.: Against the Applicant.

Paragraph 2. Guideline D: FOR THE APPLICANT.

Subparagraph. 2.a.: For 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 Applicant's request for a security clearance.

Burt Smith

Administrative Judge

1. A plea bargain reduced the DUI charge to three non-DUI traffic violations. Applicant pleaded guilty to them and paid a fine.
2. It is not known from the record whether Applicant identified his 1982 DUI arrest on the background questionnaire associated with his earlier request for a clearance.
3. After completion of the counseling program Applicant did not appear in court as required by the original citation, and a warrant was issued for his arrest. The warrant was recalled by the court upon being informed that Applicant completed the counseling program. There is no persuasive evidence that Applicant wrongly refused to appear at his scheduled court date.