

DATE: May 27, 2005

In re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-27346

**DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL H. LEONARD**

**APPEARANCES**

**FOR GOVERNMENT**

Eric H. Borgstrom, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant deliberately falsified his security-clearance application by omitting being charged with two felony offenses in response to a question requesting that specific information. Clearance is denied.

**STATEMENT OF THE CASE**

On February 9, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant.<sup>(1)</sup> The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline E for personal conduct and Guideline J for criminal conduct. Applicant responded to the SOR on February 20, 2004, and he requested a hearing. The case was assigned to another administrative judge on September 10, 2004. On or about November 29, 2004, Applicant indicated he no longer desired a hearing and wished to have his case decided on the written record.

On March 9, 2005, Department Counsel submitted his written case consisting of all relevant and material information that could be adduced at a hearing. This so-called File of Relevant Material (FORM) was mailed to Applicant and it was received by him on March 16, 2005. Applicant did not submit any information within the 30-day period after receiving the FORM. The case was assigned to me May 18, 2005.

**RULINGS ON PROCEDURE**

In the FORM, Department Counsel included Item 5, which is a three-page Defense Security Service (DSS) Report of Investigation (ROI). Under the Directive, an ROI is not ordinarily admissible, but may be received into the record evidence with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence.<sup>(2)</sup> No such authenticating witness-- via affidavit, certification, or some other written means--was submitted here. In addition, Department Counsel did not exercise the option under the Directive to request a hearing to offer testimony of an authenticating witness. Given these circumstances, Item 5 is not admissible into the record evidence, and I have not considered it in deciding this case.

## FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the record, I make the following findings of fact:

Applicant is a 59-year-old man who is a native-born U.S. citizen. He is currently employed as a maintenance mechanic for a company engaged in defense contracting.

On April 20, 1987, a criminal information containing two counts was filed against Applicant in state court. The information was based on Applicant's sexual abuse of his minor daughter. On July 9, 1987, Applicant pleaded guilty to the first count, child abuse, and the court accepted his plea and entered a finding of guilty. A pre-sentencing investigation followed. On October 16, 1987, the court granted Applicant's motion for disposition of the first count, resulting in probation before judgment.<sup>(3)</sup> In doing so, the court placed Applicant on three years of probation, the first two to be supervised. The state entered a *nolle pros* on the second count, third degree sexual offense.

In conjunction with his employment, Applicant completed a security-clearance application on April 30, 2001. In response to Question 21,<sup>(4)</sup> Applicant answered "no," thereby denying that he had ever been charged with or convicted of any felony offense.

Applicant was interviewed during the background investigation on June 25, 2002. The interview produced a three-page sworn statement (Item 6). In it, Applicant admitted that in 1987 he was arrested, charged, and found guilty of child sexual abuse of his minor daughter. Concerning his negative answer to Question 21, Applicant explained as follows:

I didn't list this on my [security-clearance application] because, I felt this was a family matter and no one else's business but our families.

Applicant also indicated that he and his family were successful in working through this matter, and that he has since won his family's love and trust.

In his February 2004 response to the SOR, Applicant admitted to the falsification allegations contained in subparagraphs 1.a and 1.b. Concerning subparagraph 1.a, however, Applicant backed away from his admission by stating "I was under the impression that it only had to be reported as a conviction of a felony if convicted, not if it was probation before judgement."

## POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1. through ¶ 6.3.6. of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

## BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>(5)</sup> There is no presumption in favor of granting or continuing access to classified information.<sup>(6)</sup> The government has the burden of proving controverted facts.<sup>(7)</sup> The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.<sup>(8)</sup> The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.<sup>(9)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(10)</sup> Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient

<sup>(11)</sup>

to overcome the case against him. In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision. [\(12\)](#)

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." [\(13\)](#) Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

## CONCLUSIONS

SOR paragraph 1 concerns Applicant's personal conduct in conjunction with disclosing truthful information about his background. Personal conduct under Guideline E is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government when applying for a security clearance or in other official matters is a security concern. It is deliberate if it is done knowingly and willfully. Omission of a past arrest or past drug use, for example, is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or thought the arrest had been expunged from the record and did not need to be reported.

Here, based on the record evidence as a whole, the government established its case under Guideline E. I conclude Applicant deliberately provided a false answer in response to Question 21 of the security-clearance application. Based solely on his admission, I reach the same conclusion concerning his interview with the DSS agent in June 2002, when he initially failed to reveal the child sexual abuse case. Applicant's explanations for his false answer to Question 21 do not rebut or mitigate the falsification. His initial explanation that he considered the matter family business he would rather not reveal, while understandable, is not legitimate justification. His explanation offered in response to the SOR that he thought only convictions had to be reported is not credible. Not only is it inconsistent with his initial explanation, it is also inconsistent with the plain language of Question 21. The question is clear--felony offenses resulting in charges *or* convictions are required to be reported. And so, Applicant was required to report both felony charges regardless of how the charges were resolved in court. Given these circumstances, both DC 2 [\(14\)](#) and DC 3 [\(15\)](#) apply against Applicant.

I have reviewed the mitigating conditions under the guideline and conclude none apply. Falsification of a security-clearance application and providing false information during a background interview are serious matters, not easily mitigated or explained away. Accordingly, Guideline E is decided against Applicant.

SOR paragraph 2 concerns Applicant's criminal conduct in conjunction with providing false information on his security-clearance application and during his June 2002 interview with the DSS agent. As described above, Applicant's conduct also violated Title 18 U.S.C. § 1001, which makes it a felony offense to make a false statement within the jurisdiction of a federal agency. This matter is resolved against Applicant for the reasons discussed above. Accordingly, Guideline J for criminal conduct is decided against Applicant.

To conclude, Applicant failed to meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching my decision, I considered the record evidence as a whole, the whole-person concept, the clearly-consistent standard, and the appropriate factors and guidelines in the Directive.

## FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

SOR ¶ 1-Guideline E: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

SOR ¶ 2-Guideline J: Against the Applicant

Subparagraph a: 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. Clearance is denied.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Directive, Enclosure 3, Item E3.1.20.
3. In this particular state, disposing of a charge by probation before judgment allows a court to stay entering of judgment, defer proceedings, and place the defendant on probation under certain circumstances. Once the probation has been fulfilled, the court discharges the defendant from probation, the discharge is the final disposition of the matter, and the discharge is without judgment of conviction and is not a conviction under state law.
4. In relevant part, Question 21 asks "Have you ever been charged with or convicted of any felony offense?"
5. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
6. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
7. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
8. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
9. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
10. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
11. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
12. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
13. *Egan*, 484 U.S. at 528, 531.
14. E2.A5.1.2.2. The deliberate omission, concealment, of 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.
15. 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.