DATE: November 10, 2004

In re:

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

Applicant for Security Clearance

ISCR Case No. 02-30330

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Nichole L. Noel, Esq., Department Counsel

James B. Norman, Esq., Department Counsel

FOR APPLICANT

Gary A. Rubard, Esq.

SYNOPSIS

Applicant is unable to successfully mitigate his history of criminal activity, which includes making deliberately false answers on his February 2002 security-clearance application. Clearance is denied.

STATEMENT OF THE CASE

On March 12, 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.[(1)] The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline J for criminal conduct and Guideline E for personal conduct. The criminal conduct concern is based on Applicant's arrest for battery in 1984, his arrest for drunk driving and a related offense in 1999, and his arrest for first-degree assault and use of a handgun in the commission of a felony in 2001. The personal conduct concern is based on allegations that Applicant falsified his security-clearance application by failing to disclose his August 2001 arrest in response to two questions about his police record. Applicant responded to the SOR in writing, dated March 31, 2004, and he admitted his three arrests, but he denied the falsification allegations, because he "hastily read through" the security-clearance application and thought he only had to report convictions.

The case was assigned to me June 28, 2004. A notice of hearing was issued July 13, 2004, scheduling the hearing for August 3, 2004. Applicant appeared with counsel and the hearing took place as scheduled. I received the transcript August 18, 2004.

RULINGS ON PROCEDURE

Department Counsel moved to amend SOR subparagraph 1.a, which alleges the August 2001 arrest, to conform with the evidence admitted as follows:

You were arrested on August 19, 2001, in Charles County, Maryland, and charged with (1) assault, first degree, (2) use of a handgun in the commission of a felony, and (3) assault, second degree. You were found not guilty of charge (3) and charges (1) and (2) were nolle prossed.[(2)]

Applicant had no objections, and the SOR was amended accordingly.

FINDINGS OF FACT

Applicant's admissions are incorporated into my findings, and after a thorough review of the record, I make the following essential findings of fact:

Applicant is a 45-year-old man who is employed as an account manager. He is seeking a security clearance in conjunction with his employment. He is a college graduate with a B.S. degree in information systems awarded in June 1999. He has also earned a graduate certificate in management.

Applicant has been married three times. He married the first time in September 1983 and divorced in March 1986. He married the second time in March 1993 and divorced in December 1997. He married his current spouse in August 2000, and this spouse was involved in the incident that led to Applicant's arrest in August 2001. Applicant describes the state of his current marriage as "trying to work through things."[(3)]

In June 1984, Applicant was arrested for and charged with the offense of battery stemming from an incident with his first wife (Exhibit 7). The battery charge against him was nolle prossed in August 1984.

In January 1999, Applicant was arrested for and charged with the offenses of driving while intoxicated (DWI), exceeding the speed limit, and willfully disobeying the lawful order and direction of a police officer (Exhibit 6). The charges were resolved in September 1999 when Applicant pleaded guilty to the DWI offense; the remaining charges were nolle prossed. Applicant received probation before judgment for one year based on his guilty plea. Under state law,[(4)] when a defendant pleads guilty or nolo contendere or is found guilty of a crime, a court may 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. Indeed, Applicant testified his guilty plea to the DWI offense did not result in a conviction.[(5)]

On August 19, 2001, Applicant was arrested for and charged with (1) assault, first degree, (2) use of a handgun in the commission of a felony, and (3) assault, second degree stemming from an incident with his third wife (Exhibit 5). According to the statement of probable cause (Exhibit 4), which was admitted without objections, a police officer went to Applicant's home at 6:15 a.m. and made contact with Applicant's wife. She told the police officer she and Applicant had just returned from a gambling-city destination. She reported Applicant was angry about losing money, and she was upset about the loss of money too. She walked into a bedroom and found Applicant standing in the room holding a handgun. She told the police officer Applicant said he would shoot her if she caused him any grief, or words to that effect. In fear, she called the police. When the police responded, they found a handgun with ammunition in the bedroom. Applicant was placed under arrest and taken to a county detention center. Upon arrival, Applicant was fingerprinted, paperwork was processed, his photograph was taken, and he spent about six hours in jail until a $1,000 bond was posted. According to Applicant, his wife calmed down and bailed him out of jail.

On September 7, 2001, the prosecutor's office requested the clerk's office to set for a disposition on counts (1) and (2), and a trial on the remaining counts (Exhibit A); counts (1) and (2), the most serious offenses, were nolle prossed. On January 4, 2002, Applicant pleaded not guilty to count (3) and was found not guilty. Applicant's wife did not testify in this case.

On or about February 8, 2002, Applicant completed a security-clearance application. The application contained six questions (21 - 26) about Applicant's police record. In response to Question 22 (*Have you ever been charged with or convicted of a firearms or explosives offense?*), Applicant answered no. In response to Question 24 (*Have you ever been*

charged with or convicted of any offense(s) related to alcohol or drugs?), Applicant answered yes disclosing the 1999 DWI offense. In response to Question 26 concerning other offenses, Applicant answered no, thereby denying *being arrested for, charged with, or convicted of any offenses within the last seven years* not listed in Questions 21 - 25.

In his answer to the SOR, Applicant explained his no answer to Question 22 by saying he "hastily read through" the security-clearance application and thought he only had to report convictions. During his hearing testimony, Applicant expanded on this by explaining he did not read the form thoroughly, because he was on business travel and was under pressure from his supervisor to complete it within a 24-hour period. He also said that during his background investigation his arrests were brought up, and he explained each individual charge to the investigator.

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.[(6)] There is no presumption in favor of granting or continuing access to classified information.[(7)] The government has the burden of proving controverted facts.[(8)] The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.[(9)] The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.[(10)] "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."[(11)] Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against them.[(12)] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[(13)]

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."[(14)] 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

Personal conduct under Guideline E[(15)] 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 has established its case under Guideline E. In response to Questions 22 and 26, Applicant answered in the negative. He should have responded by disclosing the offenses he was arrested for and charged with stemming from the August 2001 domestic-violence incident. The firearms offense should have been reported in response to Question 22. The two assault offenses should have been reported in response to Question 26. In short, the issue is whether Applicant's negative answers are deliberately false or the result of a misunderstanding.

Applicant's explanation--that he hastily read the questions and mistakenly thought it was necessary to report only convictions--is not credible. First, it is implausible to believe Applicant thought he only had to report convictions. Both Questions 22 and 26 are clear and unambiguous. Neither limits the scope of the inquiry to only convictions. Second, Question 24 concerning alcohol and drug offenses has the same language as Question 22. Yet Applicant answered yes to Question 24 revealing his 1999 DWI offense despite the lack of conviction, because of the probation before judgment disposition. In other words, to believe Applicant's story requires me to accept he understood Question 24 and misunderstood Question 22, although the questions use the same phrase (e.g., *ever been charged with or convicted of* . . .). This inconsistency is too much for me to accept Applicant's explanation as credible and plausible. Finally, it is implausible to believe Applicant thought it was okay for him to omit information about a fairly serious domestic-violence incident resulting in his arrest, charges being filed, and a trial on one count, considering he appeared in state court for trial about one month before completing his security-clearance application.

Given these circumstances, DC 1[(16)] applies against Applicant. I have reviewed the relevant mitigating conditions under the guideline and conclude none apply. Accordingly, Guideline E is decided against Applicant.

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

Here, based on the record evidence as a whole, the government has established its case under Guideline J. Applicant's police record includes arrests and charges stemming from two domestic-violence incidents in 1984 and 2001, as well as an arrest and charges for DWI offense and related offenses in 1999. All the charges against Applicant were nolle prossed, except for the DWI offense, to which he pleaded guilty and received probation before judgment. In addition, Applicant's deliberately false answers to two questions on his security-clearance application violates 18 U.S.C. § 1001, which is a felony-level offense. Given these facts and circumstances, both DC 1[(17)] and DC 2[(18)] apply. And these facts and circumstances are evidence of a history or pattern of illegal behavior that creates doubt about his judgment, reliability, and trustworthiness.

I have reviewed the mitigating conditions under Guideline J and conclude one of the six apply in Applicant's favor. MC 5[(19)] applies because Applicant was found not guilty of the one offense he stood trial for stemming from his August 2001 domestic-violence incident. The remaining MC do not apply given the facts and circumstances here. In particular, neither MC 1[(20)] nor MC 6[(21)] apply due to Applicant's falsification of his February 2002 security-clearance application coupled with his implausible explanation for the falsification allegations. Accordingly, Guideline J is decided against Applicant.

In reaching my decision, I have considered the record evidence as a whole, the whole-person concept, the clearly-consistent standard, and other appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

As required by ¶ E3.1.25 of Enclosure 3 to the Directive, below are my conclusions as to the allegations in the SOR:

SOR ¶ 1-Guideline J: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Subparagraph d: Against the Applicant

SOR ¶ 2-Guideline E: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

DECISION

In light of all the circumstances presented by the record, 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. According to a comprehensive guide to legal style and usage, "[t]he phrase nolle prosequi (lit., 'not to wish to prosecute') denotes either (1) the legal notice of abandonment of suit, or (2) a docket entry showing that the plaintiff or the prosecution has relinquished the action." In addition, "[n]olle prosequi is only a noun in England, but has two verb forms in the U.S., nol-pros and nolle pros. The term means 'to abandon a suit or have it dismissed by a nolle prosequi.' E.g., 'That plaintiff was arrested but never tried, and the charges against him were nolle prossed.'" Bryan A. Garner, *A Dictionary of Modern Legal Usage* 591 (2nd ed., Oxford University Press 1995).

3. Transcript at p. 48.

4. As requested by Applicant, I took administrative notice of the state law concerning probation before judgment (Exhibit B).

5. Transcript at pp. 19-20.

6. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

7. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.

8. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

9. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

10. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

11. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

12. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

13. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

14. *Egan*, 484 U.S. at 528, 531.

15. Directive, Enclosure 2, Attachment 5.

16. E2A5.1.2.2. 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.

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

charged.

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

19. E2.A10.1.3.5. Acquittal.

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

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