

DATE: November 29, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-30913

ECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Department Counsel

FOR APPLICANT

James J. Ranson, II, Esq.

SYNOPSIS

Applicant has a history of arrests and charges (some resulting in convictions), over many years spanning 1969 through 1986, but no confrontations with law enforcement since his 1986 arrest. His earlier criminal conduct is mitigated by the passage of time. Applicant's arrest record that he repeatedly omitted when executing security clearance applications (SF-86s) in 1993, 1995 and 2002 is not mitigated under any of the pertinent mitigation guidelines, however, and raises continuing security concerns about his judgment and reliability. His disclosures in an ensuing DSS interview in 2002 cannot be characterized as either prompt or good faith disclosures (taking into account all of his opportunities to come forward since executing his initial security clearance application in 1993) Clearance is denied.

STATEMENT OF THE CASE

On March 5, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to 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 Applicant, and recommended referral to an administrative judge to determine whether clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on March 29, 2004, and requested a hearing. The case was assigned to me on July 19, 2004. Pursuant to notice of September 8, 2004, a hearing was rescheduled for September 22, 2004, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny or revoke Applicant's security clearance. A hearing was convened as rescheduled on September 22, 2004. At hearing, the Government's case consisted of nine exhibits; Applicant relied on two witnesses (including himself) and no exhibits. DOHA received the transcript (R.T.) on September 30, 2004.

SUMMARY OF PLEADINGS

Under Guideline J, Applicant is alleged to have a history of assorted criminal offenses: eight in all between 1969 and 1986, one of which involved a grand larceny arrest and conviction in January 1971 that resulted in a felony conviction and suspended two year sentence, for which the Smith amendment (10 U.S.C. Sec. 986) is alleged to be applicable. Alleged Applicant falsification of his security clearance application (SF-86) are incorporated under Guideline J as well.

Under Guideline E, Applicant is alleged to have falsified his SF-86 of February 2002 by omitting his (a) alleged felony charges and convictions in some cases (three in all) and (b) his alleged alcohol-drug offenses (two in all).

For his answer to the SOR, Applicant admitted most of the allegations pertaining to his past criminal offenses. He denied falsifying his SF-86 or that his 1971 felony conviction is covered by 10 U.S.C. Sec. 986.

FINDINGS OF FACT

Applicant is a 54-year old truck driver for a defense contractor who seeks to retain the security clearance he has held since 1994. The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference and adopted as relevant and material findings. Additional findings follow.

Applicant was first arrested in July 1969 (while he was still a minor), this on grounds of petty theft. He was found guilty of the offense as charged and fined \$28.50. He was arrested several months later (in December 1969) and charged with grand larceny and burglary (both felonies). The convening court reportedly dismissed the charges (R.T., at 36). Just two months after his December 1969 arrest, he was arrested again, this time for two counts of grand larceny of an automobile (a felony). Applicant's has no memory of this arrest, and his court records do not indicate any disposition.

Over a 15-year span between January 1971 and May 1986 Applicant was arrested on five separate occasions for offenses ranging from grand larceny, to theft, and DuI. In January 1971 he was arrested and charged with one count of grand larceny and three counts of burglary 2nd degree (all felonies) for an offense arising out of his breaking into several autos. After pleading guilty to the two felony counts, he was sentenced to two years of confinement (suspended) and was granted two years of probation in lieu of confinement. Just five months later (in May 1971) he was arrested for DuI. Because the arrest constituted a violation of the terms of his probation, he was ordered to serve the remainder of his two-year suspended sentence for the felon charges covered by his January 1971 arrest. He ultimately served nine months of his two-year sentence before being paroled (R.T., at 37).

Seven years following his 1971 arrests, Applicant was charged with fraud insufficient funds check. To this charge he pleaded guilty and was fined approximately \$50.00, plus \$17.00 in costs, in addition to being ordered to make restitution.

Applicant was arrested in March 1981 and charged with theft of property 2nd degree. The FBI's criminal history record (ex. 3) does not report what the disposition was of the theft charge. Applicant recalls only his helping a buddy remove some tires from his vehicle, which turned out not to be the friend's vehicle after all. Applicant's assurances he was later turned loose without any filed charges to face are not controverted and are accepted. Responding to his ay 1986 DuI arrest (his last arrest of any kind), Applicant pleaded guilty, was fined and had his license suspended for three months. Since his last arrest in 1986, Applicant has encountered no arrests or charges of any kind in any jurisdiction.

Asked to complete a SF-86 in February 2002, Applicant answered **no** to questions 21 and 24, which asked him to list his felony arrests/charges and his alcohol-drug related arrests/charges, respectfully. In doing so, he omitted the same arrest information he omitted from the security clearance applications he completed in 1993 and 1995 (*see* exs. 8 and 9). Applicant attributes his omissions to erroneous advice he received from his truck driver recruiter in 1993 preparatory to completing his initial clearance application (R.T., at 33-34): He was told not to list his prior arrests because "it probably never would anything come up about it" (*see* ex. 2; R.T., at 33). Pressed by Department Counsel for an explanation of what he meant by the quoted phrase, Applicant confirmed he chose not to list the arrests in the belief the Government "would not find out about it because it was old" (R.T., at 45). He was concerned that the disclosed arrests could hamper his ability to get the driving job and security clearance (R.T., at 48-49). While his claims appear credible, they do not indicate any confusion about the questions and demonstrate Applicant's willingness to knowingly and wilfully conceal his charges, and convictions in some cases, from the space provided in questions 21 and 24 of his SF-86 out of concern

disclosure might impair his chances for obtaining his job and clearance.

When interviewed by a DSS agent in May 2002 (less than four months after he executed his SF-86), Applicant fully disclosed his previous arrests when asked about his arrest history by the interviewing agent. However, he did so in the knowledge the agent had all of the pertinent arrest information concerning his old arrests and charges and volunteered the details of his arrests and charges in the expectation the agent would be asking him about them (R.T., at 58). Never before had he volunteered to come forward with the details of his arrest history. So, while his disclosures were technically voluntary they were under circumstances of anticipated questioning about them by the interviewing DSS agent (R.T., at 53-54).

Applicant is highly regarded by his supervisor of his trucking employer. His direct supervisor describes him as a good, safe driver who is timely and dependable in completing his driver assignments (R.T., at 68-69). In the early 90s when Applicant was hired, it was his company's policy to examine the age of felonies attributable to an applicant. The supervisor indicated no familiarity with Applicant's arrest record when he was hired in 1993. But he acknowledged his understanding of the disposition of the company's driver recruiter to encourage driver applicants to lie in their applications (R.T., at 70-72).

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These revised Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Criminal Conduct

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness

Disqualifying Conditions:

DC 1 Allegations or admission of criminal conduct.

DC 2 A single serious crime or multiple lesser offenses.

Mitigating Conditions:

MC 1 The criminal behavior was not recent

MC 6 There is clear evidence of successful rehabilitation.

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.

Disqualifying Conditions:

DC 2 The deliberate omission, concealment, falsification or misrepresentation 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.

Mitigating Conditions: None.

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a

security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his

or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

CONCLUSIONS

Applicant brings a lengthy record of criminal arrests and charges, and in some cases convictions, spanning over 25 years between 1969 and 1986. While his 1971 felony theft conviction is allegedly covered by 10 U.S.C. Sec. 986, the recent amendment to the statute by the 2005 Defense Authorization Act (Sec. 1062(a)(2)) makes this allegation moot. The legislative amendment now limits the *per se* clearance bar to persons who were convicted and actually served at least a year. Applicant, by contrast, served only nine months of his imposed two-year sentence. Since there is nothing in the legislative amendment that indicates any Congressional intent not to apply the change retroactively, it will be so applied to the facts of Applicant's case. Raised security concerns also include Applicant's multiple omissions in his February 2002 SF-86 concerning his past felony and alcohol-related arrests, which he failed to list in both his current and previous security clearance applications. Applicant's prior arrest history and SF-86 omissions raise security concerns about Applicant's judgment, reliability and trustworthiness required to continue his eligibility to access classified information.

Applicant's arrest history

Applicant's series of arrests and charges (some resulting in convictions) reflect a pattern of criminal conduct over an extended period during Applicant's younger years. His 1971 conviction on two counts of felony theft reflects especially serious judgment lapses that has trust and reliability significance for anyone like Applicant who seeks continued access to classified information. Applicant's offenses (both those that were dismissed and those that were carried to conviction) reflect a pattern of criminal conduct that invites application of two disqualifying conditions (DC) of the Adjudicative Guidelines: DC 1 (allegations or admission of criminal conduct) and DC 2 (a single serious crime or multiple lesser offenses).

To his credit, Applicant has averted any further confrontations with law enforcement authorities since his last incident in 1986 and assures he has matured and can be trusted not to engage in criminal behavior again in the foreseeable future. Applicant draws some corroboration from his supervisor who expressed high regard for his work ethic and accountability in his driving assignments. This opinion of Applicant represents an important assessment of his overall reliability and trustworthiness.

Applicant's manifest avoidance of any further charges of criminal offenses over the past 18 years represents important restorative action on his part and is encouraging. Assessment of his past criminal conduct (some of it alcohol-related) must be made on the basis of a review of the entire evidentiary record developed to date, not merely the information developed with respect to his identified eight characterized criminal offenses. In making an overall assessment of Applicant's clearance eligibility, major emphasis must be accorded his most track record, his lack of any recurrent problems with law enforcement over the past 18 years, and the adequacy of the time elapsed since his last criminal offense.

By his actions to date, Applicant provides credible evidence of his learning from his judgment lapses associated with his spate of criminal offenses in his younger years. For these corroborated efforts, he may take advantage of two of the mitigating conditions (MC) of the Adjudication Guidelines for criminal conduct to mitigate security concerns associated with his prior offenses: MC 1 (criminal behavior not recent) and MC 6 (clear evidence of successful rehabilitation).

Considering the record as a whole, Applicant makes the convincing showing that he has both the maturity and resource support at his disposal to avert any recurrent problems with judgment lapses related to the types of criminal activity he was involved with earlier in his life o warrant safe predictions that he is no longer at risk to judgment impairment associated with such conduct. Favorable conclusions warrant with respect to the criminal arrest/charge allegations covered by subparagraphs 1.a through 1.h and 1.j of Guideline J. Because of his repeated omissions of his arrest history in his executed clearance applications, complete mitigation of Guideline J security concerns is not available.

Applicant's omissions of his arrest history

Potentially serious and difficult to reconcile with the trust and reliability requirements for holding a security clearance are the timing and circumstances of Applicant's omissions of his arrests and charges in the three SF-86s he executed. So much trust is imposed on persons cleared to see classified information that permissible exceptions must be narrowly confined.

By omitting his arrests and charges in each of his clearance applications, Applicant concealed materially important background information needed for the government to properly process and evaluate his security updates. He makes no claim of misunderstanding the questions, which were posed in a straightforward way in the questionnaire. Applicant attributes his omissions to (a) concern about how disclosure of the adverse information would impact on his employment and clearance and (b) the unlikelihood of the Government ever finding out, given the age of the arrests. While these reasons are understandable from Applicant's perspective, they have never been considered good reasons by the Appeal Board to avert drawn conclusions of knowing and wilful concealment.

Applicant makes clear that he approached the questions seeking to enlist information about his arrest history of his respective clearance applications with the intent to withhold information about his arrests out of concern for his job and clearance. His omissions were knowing, deliberate, and material to a determination about his clearance suitability. They invite application of Disqualifying Conditions (DC) for personal conduct of the Adjudicative Guidelines: DC 2 (falsification of a security questionnaire).

Mitigation is difficult to credit Applicant with, since he failed to notify and officials of DSS at any time following his earlier 1993 and 1995 omissions and only disclosed the details of his arrests in his May 2002 DSS interview when faced with the likelihood of being asked about them. Not only has our Appeal Board found the use of Mitigating Condition (MC) 2 of the Adjudicative Guidelines for personal conduct (isolated, corrected falsification) to be unavailable to applicants seeking mitigation by treating the omission as isolated, but it has denied applicants availability of MC 3 (prompt, good faith disclosure) as well in circumstances (as here) where the applicant has failed to take advantage of earlier opportunities to come forward with the omitted information. *Compare* ISCR Case No. 97-0289 (January 1998) with DISCR Case No. 93-1390 (January 1995).

There can be no doubt but that Applicant has performed productively and reliably for his defense contractor over the 10 plus years of his employment. But in the face of his repeated acts of omission, his favorable character evidence alone is not enough to absorb security concerns extant with the Government over his failure to be truthful in the three security clearance applications he completed between 1993 and 2002.

Considering all of the evidence produced in this record and the available guidelines in the Directive (inclusive of the E.2.2 factors), unfavorable conclusions warrant with respect to subparagraphs. 1.a and 1.b of Guideline E.

Criminal coverage of falsification issues

That none of Applicant's SF-86 omissions resulted in formal charges and adjudication against Applicant does not mean that the falsification issues may not be raised and considered anew in a clearance proceeding such as the present. Our Appeal Board has repeatedly stated that the government can prove applicant engagement in criminal conduct, even in the absence of a criminal conviction. *Cf.* ISCR Case No. 94-1213 (June 7, 1996). Accordingly, two of the disqualifying conditions of the Adjudication Guidelines for criminal conduct may be invoked: DC 1 (criminal conduct regardless of whether the person was formally charged) and DC 2 (a single serious crime or multiple lesser offenses).

Unlike Guideline E-covered omissions, Guideline J is designed to afford more recognition to an applicant's overall judgment and reliability history. Still, an applicant must meet the requirements of at least some of the mitigation conditions if he is to successfully mitigate its related falsification parameters under 18 U.S.C. Section 1001.

Applicant's belated coming forward with his full disclosure of his arrest history in his 2002 DSS interview represented a positive shift in his attitude about withholding arrest information that he had long felt could imperil his job and clearance if disclosed. His meritorious work record merits consideration, too, in weighing the extent of his exhibited rehabilitation. Given his considerable history of withholding his multiple arrests and charges in clearance applications, however, his disclosure, while commendable, is not enough to meet the mitigation requirement of evidenced clear rehabilitation to entitle him to take advantage of MC 6 (clear evidence of successful rehabilitation) of the Adjudication Guidelines at this time. More time is needed before Applicant is in a position to make the case his rehabilitation efforts are sufficient to mitigate the criminally-related features of his arrest omissions. Based on a full review of the evidence and drawn inferences from the developed record, unfavorable conclusions warrant with respect to subparagraph. 1.I of Guideline J as well.

In reaching my decision in this case, I have considered the evidence as a whole, including each of the E 2.2 factors enumerated in the Adjudicative Guidelines of the Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the FINDINGS OF FACT, CONCLUSIONS, CONDITIONS, and the factors listed above, this Administrative Judge makes the following FORMAL FINDINGS:

GUIDELINE J (CRIMINAL CONDUCT): AGAINST APPLICANT

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: FOR APPLICANT

Sub-para. 1.c: FOR APPLICANT

Sub-para. 1.d: FOR APPLICANT

Sub-para. 1.e: FOR APPLICANT

Sub-para. 1.f: FOR APPLICANT

Sub-para. 1.g: FOR APPLICANT

Sub-para. 1.h: FOR APPLICANT

Sub-para. 1.I: AGAINST APPLICANT

Sub-para. 1.j: FOR APPLICANT

GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT

Sub-para. 2.a: AGAINST APPLICANT

Sub-para. 2.b: AGAINST 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 Applicant's security clearance. Clearance is denied.

Roger C. Wesley

Administrative Judge