

DATE: November 30, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-32155

ECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Deputy Chief Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In September 1998, Applicant pleaded guilty to possession of marijuana with intent to distribute, a felony, and sentenced to two years incarceration, which was suspended. He was also involved in two incidents akin to shoplifting and alleged public fighting. In 2001, he completed a security clearance application listing only his felony arrest. Applicant has sufficiently mitigated or extenuated the negative security implications stemming from his criminal conduct and personal conduct. Clearance is granted.

STATEMENT OF THE CASE

On September 30, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding ⁽¹⁾ it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On October 14, 2003, the Applicant answered the SOR and elected to have his case decided on the written record in lieu of a hearing.

On March 22, 2004, Applicant received a complete copy of the file of relevant material (FORM) dated March 17, 2004, and was given the opportunity to file objections and submit material in extenuation, mitigation, or refutation. On April 26, 2004, Applicant response to the FORM was received. Department Counsel did not object to Applicant's response, which was admitted as Applicant's Exhibit (App Ex) A. In the FORM, DC presented eight exhibits (Items). I was assigned the case on May 20, 2004. A moratorium was subsequently placed on all cases involving Title 10 U.S.C. § 986 in which an applicant was sentenced to more than one year of incarceration, but did not actually serve at least one year in jail. The moratorium ended November 1, 2004.

FINDINGS OF FACT

The SOR alleges Criminal Conduct, Guideline J and Personal Conduct, Guideline E. The Applicant admits to being charged in 1998 with possession of marijuana with intent to distribute and the 1998 charge of theft of less than \$300.

Those admissions are incorporated herein as findings of fact. He denies the charge of fighting in a public place, receiving stolen property, and falsifying his security questionnaire. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

The Applicant is 26-years-old, has worked for a defense contractor since July 2001, and is seeking to obtain a security clearance. The Applicant is regarded by those who know him as possessing the highest moral character, sobriety, prudence, positive attitude, eagerness to learn new skills, aptitude to learn, teamwork, and having a good work ethic. Twice in 2002 and once in 2003, he has received recognition awards for personal commitment, teamwork, creativity/innovation, leadership, communication, and a sense of urgency.

In May 2001, Applicant completed his bachelor of science degree and in 1994, he completed a master's of science degree in mechanical engineering. He actively participates in his church and community. He is involved in community service programs, and with youth sports through his church. He states his number one responsibility is taking care of his daughter who was born in January 1997.

In April 1996, Applicant--then age 18--was charged with receiving stolen property. He had an acquaintance who was working as a clerk at a department store. This individual gave him a bigger discount on his purchase than proper. In his September 2002 statement (Item 6), he said he was questioned by the police at the store, issued a citation, and he believes he had to pay a fine. In his answer to the SOR, he denied he was ever "charged" in this incident and does not remember going to court concerning this matter. His police record (Item 7) lists the incident as an arrest for "receive stolen prop[erty]." The police record does not indicate a disposition for the incident. In his response to the FORM, Applicant states he "vaguely remembers this situation."

In June 1996, Applicant was involved in an incident at a hotel pool party. He says he was only trying to break up a fight and was trying to restrain his friend's brother when the police arrested those in close proximity to the fight. He was taken to a holding cell at the jail and released three hours later. He says the district attorney read his statement and dropped the charge. The SOR alleges he was found guilty of fighting in a public place and fined \$277, which he denies.

In July 1996, he was with some friends who were looking at houses under construction. The police told them they were not supposed to be there and he was given a ticket for trespassing. He paid a fine and did community service. His police record (Item 7) fails to indicate a disposition of the incident. The SOR does not allege his failure to list this incident on his September 2001 security clearance questionnaire, Standard Form (SF) 86.

In September 1998, Applicant--then age 20--was arrested and later pleaded guilty to possession of marijuana with intent to distribute, a felony. He had a half pound of marijuana, which he alleges was for his personal use. He was sentenced to serve two years in with the department of corrections. The sentence was suspended and he was placed on two years supervised probation.

In November 1998, he was charged with theft of less than \$300. He was with a group of friends at a department store. They, in fact, had stolen goods from the store. After the group exited the store, a store employee came after them, at which point his friends took off running. He was left behind and taken back into the store to await the police. He had not assisted his friends with the theft, was not involved with the theft, but was aware his friends were not doing the right thing. Applicant completed a pre-trial diversion program, which involved paying a fine to the store, and signing an agreement not to return to that store. He does not think the incident resulted in an arrest.

In September 2001, when he completed his SF 86, he listed the 1998 felony for possession of marijuana with intent to distribute. In his September 2002 sworn statement (Item 6), he stated he did not list the store incidents in April 1996 or 1998

on form 86 because I was told by someone in Human Resources to only indicate charges that showed up on my police check. I had a police check done by an attorney who also gave me the same advice for any employment I might seek. I was not trying to cover up any information in my background.

However, the 1996 store incident was on his police record. (Item 7) In his February 2002 sworn statement (Item 5), Applicant states he did not list the trespass charge or the fighting charge because he was not convicted of the charges

and both cases were dismissed.

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive. The government has the burden of proving any controverted fact(s) alleged in the SOR, and the facts must have a nexus to an Applicant's lack of security worthiness.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

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

Criminal Conduct (Guideline J) The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

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

- a. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
- b. A single serious crime or multiple lesser offenses;

Conditions that could mitigate security concerns include:

- a. The criminal behavior was not recent;
- f. There is clear evidence of successful rehabilitation;

Personal Conduct (Guideline E) 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.

Conditions that could mitigate security concerns include:

- 2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily.

BURDEN OF PROOF

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a

position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to "United States citizens . . . whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Executive Order 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances which indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, then the applicant has the ultimate burden of establishing his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

Security clearances are granted only when "it is clearly consistent with the national interest to do so." *See* Executive Orders 10865 § 2 and 12968 § 3.1(b). "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 ¶ E2.2.2 "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." *See Egan*, 484 U.S. at 531. Doubts are to be resolved against the applicant.

CONCLUSIONS

The Government has satisfied its initial burden of proof under Guideline J, criminal conduct. Under Guideline J, the security eligibility of an applicant is placed into question when an applicant is shown to have a history or pattern of criminal activity which creates doubt about his judgment, reliability, and trustworthiness. In 1996, he was charged with receiving stolen property and was arrested in 1998 for felony possession of marijuana with intent to distribute. Disqualifying Condition (DC) b⁽²⁾ applies.

Applicant admits he was charged in 1998 with theft of less than \$300 when he was with a group of friends who stole items from a department store. He completed a pre-trial diversion program.

He denies he was ever "charged" or "arrested" for fighting in a public place related to the 1996 incident. He says the district attorney dropped the charge after reading his statement. An assertion not disputed by the record. This incident does not appear on his state police report. (Item 7) His 1996 charge of receiving stolen property occurred when he--then age 18--had an acquaintance ring up his department store purchases for less than the proper value. He received a citation and paid a fine, but denies being "charged" in this case.

Applicant has not been involved in any criminal conduct since November 1998. Since then he has completed his bachelor's degree and master's degree. He was 20 at the time of his last arrest and is now 26. He lists taking care of his seven-year-old daughter as his number one responsibility. He is active in his church and in the community. Mitigating Condition (MC) a⁽³⁾ mitigates the Applicant's criminal conduct because the conduct is not recent, his most recent arrest having occurred six years ago. I find for the Applicant as to SOR paragraphs 1.a, 1.b, 1.c, and 1.d.

In 1998, Applicant was sentenced to two years with the state department of corrections. However, the sentence was suspended and he was placed on two years supervised probation. At the time the SOR was issued, absent a waiver from the Secretary of Defense, the Department of Defense was prohibited from granting or continuing a security clearance for any applicant who, as a result of a conviction in any U.S. court, had been sentenced to more than a year in jail. 10 U.S.C. § 986. On 28 October 2004, the President signed into law amendments to that statute. The statute now provides that the prohibition on granting security clearances to applicants convicted of crimes for which they were sentenced to more than one year in jail applies only to cases in which the applicant actually served at least a year in jail. 10 U.S.C. §

986 does not apply to Applicant, because he was never incarcerated for one year. I find for the Applicant as to SOR paragraph 1.f.

Under Personal Conduct, the security eligibility of an applicant is placed into question when that applicant is shown to have been involved in personal conduct that creates doubt about the person's judgment, reliability, and trustworthiness. In September 2001, Applicant completed an SF 86 and listed his 1998 felony arrest for marijuana possession. The government alleges he should have listed three other incidents where he was arrested or charged.

Under Personal Conduct, guideline E, the security eligibility of an applicant is placed into question when that applicant is shown to have been involved in personal conduct which creates doubt about the person's judgment, reliability, and trustworthiness. Complete honesty and candor on the part of applicants for access to classified information is essential to make an accurate and meaningful security clearance determination. Without all the relevant and material facts, a clearance decision is susceptible to error, thus jeopardizing the nation's security.

Applicant denies he intentionally falsified his answers on his SF 86. Applicant did not list the 1996 public fighting incident. The record fails to establish he was arrested or charged for public fighting in 1996. This incident is not on his state police record. Applicant did not list being charged in 1998 for accompanying a group of people who shop lifted. He did not take any items, but knew his friends were stealing from the store. This incident is not on his state police record.

Every inaccurate statement is not a falsification. A falsification must be material and deliberate, and it is deliberate if it is done knowingly and willfully. He did not list the two incidents because he was told by human resources to only indicate charges on his police record; advice also given to him by an attorney.

The SF 86 requires an applicant to list any time he was arrested, charged, or convicted of any offense, during the previous seven years. Applicant relied upon bad advice in completing his SF 86. MC 4⁽⁴⁾ does not apply because the record fails to establish the improper or inadequate advice was given by "authorized personnel." The attorney was not authorized personnel and the record fails to establish who at human resources gave the advice. Even if the advice he did receive was correct, Applicant should have listed the April 1996 incident that appears on his police record.

According to his own statement, he should have listed those arrests that appeared on his police record. The 1996 arrest does appear on his police record and is not listed on his SF 86. Before completing his SF 86 he had an attorney obtain a copy of his police record. It is unknown if the information on that report was the same as on the report in the record (Item 7). The police report lists the 1996 receiving stolen property offence as an "arrest." Applicant denies he was arrested and asserts he only received a citation for this incident and paid a fine.

Applicant listed his most serious arrest on his SF 86 and failed to list two incidents akin to shoplifting. MC 2⁽⁵⁾ applies because the falsification was to a single question on his SF 86, the falsification is not recent, and he has subsequently provided correct information voluntarily. I find for Applicant as to SOR paragraph 2.a.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

FORMAL FINDINGS

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

Paragraph 1 Criminal Conduct, Guideline J: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: For the Applicant

Subparagraph 1.e.: For the Applicant

Subparagraph 1.f.: For the Applicant

Paragraph 2 Personal Conduct, Guideline E: 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 clearly consistent with the national interest to grant or continue a security clearance for the Applicant. Clearance is granted.

Claude R. Heiny

Administrative Judge

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.
2. DC b. A single serious crime or multiple lesser offenses.
3. MC a. The criminal behavior was not recent.
4. MC 4. 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.
5. MC2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily.