DATE: November 19, 2003

In re:

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

Applicant for Security Clearance

CR Case No. 02-12975

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 23-year-old never married man employed as an IT technician for a governmental contractor. He is unable to mitigate the security concerns under Guideline E based on the cumulative effect of his criminal conduct (constituting a pattern of rule violations) as well as his false answer in response to a specific question on his security-clearance application seeking information about his police record. Clearance is denied.

STATEMENT OF THE CASE

On May 2, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.[(1)] The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline E for personal conduct.

Applicant answered the SOR on June 5, 2003, wherein he admitted to the allegations in SOR subparagraphs 1.a through 1.f, which alleged criminal conduct. He denied the allegations in SOR subparagraphs 1.g and 1.h, which alleged falsification of his security-clearance application and failure to disclose certain matters during an interview with an agent of the Defense Security Service (DSS). He also requested a clearance decision based on a hearing record.

On September 24, 2003, DOHA assigned this case to another administrative judge to conduct a hearing and issue a written decision. Subsequently, the case was reassigned to me due to caseload considerations. On October 1, 2003, a notice of hearing was issued to the parties scheduling the hearing for October 29, 2003. Applicant appeared without counsel and the hearing took place as scheduled. The record was left open to allow Applicant to submit additional documentary evidence. That document, a letter of recommendation from Applicant's supervisor, was timely received and, government counsel having no objection, it is admitted into the record as Applicant's Exhibit C. DOHA received the hearing transcript November 6, 2003.

FINDINGS OF FACT

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant is a 23-year-old never married man. He is a high-school graduate who has attended some college, although he has not earned a degree. He is employed by a governmental contractor as an IT technician. His work duties consist of providing IT technical support to the employees and servicemembers of a military department at its national headquarters. He has worked for this company, or its successor, since June 1999.

Applicant is very good at his job. He has worked in various capacities as he has grown and matured into his job. His supervisor, a retired military officer, describes Applicant as a "reliable, talented, tenacious technician" who because of his ability routinely works with general officers and members of the senior executive service. Applicant was working in the Pentagon on September 11, 2001, and, according to his supervisor, was essentially "blown out of his office." Applicant was back to work within 48 hours and worked long days for weeks assisting in restoring IT services to his customers.

Outside of work, Applicant is actively involved with a church and he professes a strong religious faith. Applicant's church involvement consists of leadership roles in various youth activities.

In January 1998, at the age of 17, Applicant was arrested and charged with the felony offense of hinderment in State 1. The offense stemmed from an incident between Applicant and his mother when a dispute went beyond mere disagreement and his mother called the police. After spending about three weeks in a juvenile facility without incident, Applicant was released and the charge was dismissed.

In November 1998, Applicant was charged with the offense of reckless driving[(2)] in State 2. He was found guilty and sentenced to serve confinement for 30 days, to pay a $100.00 fine and $186.00 court costs, and to perform 50 hours of community service. Applicant's sentence to confinement was suspended and he was placed on unsupervised probation for 18 months.

On or about July 12, 1999, Applicant completed a security-clearance application, also known as a SF 86.[(3)] In response to a specific question[(4)] about felony offenses, Applicant answered "Yes" disclosing the hinderment offense. In addition, in response to a catchall question[(5)] about his police record, Applicant answered "No" thereby denying any arrests, charges, or convictions within the last seven years. Nowhere in his security-clearance application did Applicant mention the November 1998 reckless driving offense. Applicant's explanation for not disclosing the incident is that as he considered the matter a traffic offense with a $100.00 fine, the incident was not reportable.

On July 18, 1999, back in State 1, Applicant was arrested and charged with obstruction of justice (a misdemeanor) and public intoxication. These offenses stemmed from an incident when Applicant challenged an off-duty police officer working as security at a bowling alley where Applicant and a friend were bowling. Represented by counsel, Applicant agreed to plead guilty to the public intoxication offense (although he had not drunk any alcohol) in exchange for favorable treatment of the obstruction of justice offense. Consequently, the obstruction of justice offense was *nolle pros*sed, and Applicant was ordered to pay a $100.00 fine and $40.00 in court costs on the remaining offense.

Four months later in November 1999, Applicant was arrested and charged with driving while intoxicated (DWI) in State 1. This offense stemmed from an incident when Applicant and a friend were sitting in a car parked outside the friend's residence. The key was in the ignition and the car was turned on to provide heat while Applicant and his friend were loudly singing along to Top-40 tunes. Police investigated and a blood-alcohol test revealed Applicant had been drinking alcohol. Under age at the time, Applicant was charged with DWI, which was subsequently reduced to reckless driving. The state court ordered Applicant to serve confinement for 30 days (suspended) and to pay a $250.00 fine and $80.00 court costs.

On or about October 30, 2000, now in State 3, Applicant was arrested and charged with public urination. This offense stemmed from an incident when Applicant took the blame for two women in his group of friends who were unable to hold their water. Applicant paid a $25.00 fine as a result of the arrest. Although Applicant's explanation for this matter is unusual, it is nonetheless deemed credible.

As part of the background investigation, Applicant was interviewed in March 2002 by an agent of the DSS. As the agent did not testify at the hearing, the record evidence is less than clear exactly how this interview occurred. The initial interview took place to address the hinderment offense. During that discussion, Applicant mentioned the reckless driving offense in State 2, but could not provide details. Subsequently, another interview was scheduled and Applicant then provided the details. After doing so, Applicant was asked if any other matters should have been

revealed in his July 1999 security-clearance application. Applicant responded in the negative. Thereafter, the agent brought up the post-SF 86 offenses and interviewed Applicant about those matters. The result of that interview was Applicant provided a signed, sworn statement wherein he addressed those matters.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including the disqualifying and mitigating conditions for each applicable security 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. Considering the record evidence as a whole, the following adjudication guidelines are most pertinent here: Guideline E for personal conduct.

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)] The government has the burden of proving controverted facts.[(7)] The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.[(8)] The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.[(9)] "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."[(10)] 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 him.[(11)] 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

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 and handle classified information. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate a person may not properly safeguard or handle classified information.

Likewise, the deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the government when applying for security processing, processing for a position of responsibility, 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, considering the record evidence as a whole, the government has established its case under Guideline E. Notwithstanding his assertions to the contrary, Applicant deliberately falsified his answer to Question 26 on the security-clearance application. First, the reckless driving offense in State 2 was not merely a speeding offense resulting in a small fine. The seriousness of the offense is reflected by the sentence, which included 30 days' confinement (suspended), 50 hours of community service, as well as the $100.00 fine and court costs. The fact that one part of the sentence was a fine of less than $150.00 did not make the entire matter unreportable. Indeed, a reasonable person reading that question would realize that the reckless driving offense was required to be disclosed. Second, I cannot excuse his answer because he misunderstood the question in light of the less than $150.00 fine qualification. Applicant was well aware of the November 1998 reckless driving offense when he completed the SF 86 in July 1999. He chose to answer the question using an overly-legalistic or hyper-technical approach instead of providing a full, frank, and candid answer. Under the facts and circumstances here, I conclude his answer was deliberately false and thus, disqualifying condition (DC) 2[(14)] applies against Applicant.

The same cannot be said, however, for the interview with the DSS agent. The record evidence does not establish, by substantial evidence, that Applicant deliberately tried to withhold or conceal his post-SF 86 offenses. In simpler terms, the government has not proved its case on this point. Accordingly, the finding is for Applicant on SOR subparagraph 1.h.

Applicant's history of multiple criminal offenses, none of which were alleged under Guideline J for criminal conduct, is a warning sign that he may not possess the necessary attributes to be granted access to classified information. The cumulative effect of this pattern of rule violations creates a security concern and thus, DC 5[(15)] applies against Applicant. Taken together, the information is indicative of irresponsible behavior, questionable judgment, or unreliability, or all three. It may be argued that none of these individual items or incidents may seem particularly significant or noteworthy. But viewed as a whole, as I'm required to do, these matters create doubt about Applicant's fitness for access to classified information.

I have reviewed the mitigating conditions (MC) under Guideline E and conclude none apply.

Under the whole-person concept, however, Applicant does receive some credit. His criminal conduct started in January 1998 when his was 17-years-old and continued, with the exception of the public urination offense, for about two years ending in November 1999. Accordingly, Applicant's youthful age and lack of maturity at the time do mitigate these matters somewhat. But Applicant's continuing assertions that he did nothing wrong by not revealing the reckless driving offense in response to Question 26 prevents me from excusing the falsification as not recent, as an isolated incident, or as another youthful mistake or indiscretion.

An applicant who deliberately fails to provide full, frank, and candid answers to questions on a security-clearance application is not a suitable candidate for access to classified information. Making a false statement to the federal government is serious business not easily mitigated or explained away. Indeed, doing so is a federal offense.[(16)] Viewed in this light, and considering the record evidence as a whole, Applicant has not mitigated or extenuated his false answer in response to Question 26.

Applicant is an enthusiastic young man and a capable IT technician who has earned the respect of his customers and supervisor. In the future, with the benefit of additional seasoning and with counsel from a wise mentor, Applicant may be able to affirmatively demonstrate he is a mature, responsible, reliable, and trustworthy individual who can be counted on to disclose all derogatory information when required. As of today, however, Applicant has not met his ultimate burden that it is clearly consistent with the national interest to grant him security clearance. Guideline E is decided against Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline E: Against the Applicant

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

Subparagraph 1.c: Against the Applicant

Subparagraph 1.d: Against the Applicant

Subparagraph 1.e: Against the Applicant

Subparagraph 1.f: Against the Applicant

Subparagraph 1.g: Against the Applicant

Subparagraph 1.h: 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 or continue a security clearance for Applicant. Clearance is denied.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, as amended, and DoD Directive 5220.6 (Directive), dated January 2, 1992, as amended and modified.

2. Reckless driving is a class 2 misdemeanor in State 2. N.C.G.S.A. § 20-140 (West 2003).

3. Exhibits 1 and 2.

4. Question 21 asked "Have you ever been charged with or convicted or any felony offenses? (Include those under the Uniform Code of Military Justice.)."

5. Question 26 asked "In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in [questions] 21, 22, 23, 24, or 25? (Leave out traffic fines of less than $150 unless the violation was alcohol or drug related.)."

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

7. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Paragraph 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, Paragraph E3.1.15.

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

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

14. Paragraph E2.A5.1.2.2 of Guideline E.

15. Paragraph E2.A5.1.2.5 of Guideline E.

16. Title 18 U.S.C. § 1001.