

DATE: November 28, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-14673

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Deputy Chief Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant incurred four separate arrests over a four-year period spanning 1995 and 1998 (one alcohol-related and another involving honesty issues of failure to identify himself correctly to the arresting officer). Later falsified his security clearance application (SF-86) and failed to correct his omissions in prompt fashion before being confronted with the arrests. Failing to mitigate his falsification of a security clearance application, he is unable to absolve himself of clearance concerns about his judgment, reliability, and trustworthiness, sufficient to meet minimum security clearance eligibility requirements. Only the underlying arrests are mitigated sufficiently to warrant favorable conclusions about his clearance eligibility. Clearance is denied.

STATEMENT OF THE CASE

On July 16, 2003, 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 August 23, 2003, and requested a hearing. The case was assigned to me Judge on September 12, 2003, and was scheduled for hearing. A hearing was convened on October 29, 2003, 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. At hearing, the Government's case consisted of seven exhibits; Applicant relied on one witness (himself) and two exhibits. The transcript (R.T.) of the proceedings was received on November 7, 2003.

PROCEDURAL ISSUES

Before the close of the hearing, Government moved to amend subparagraph 1.c of the SOR to substitute failure to

identify a witness for failure to identify a fugitive from justice. There being no objection from Applicant, and good cause being shown, the Government's amendment request was granted.

STATEMENT OF FACTS

Applicant is a 29-year old associate engineer for a defense contractor who seeks a security clearance.

Summary of Allegations and Responses

Under Guideline E, Applicant is alleged to have been arrested on five different occasions between 1995 and 1998, one (in May 1995) being alcohol-related.

Also, under Guideline E, Applicant is alleged to have falsified a security clearance application (SF-86) of February 13, 2001 by omitting (a) his alcohol-related arrest of May 1995 and (b) his September 1996 and February 1997 arrests.

For his response to the SOR, Applicant admitted each of his arrests (claiming two of his listed arrests were one and the same). He claimed three of his listed arrests resulted in fines of less than \$150.00, and hence were excepted from listing in his SF-86.

Relevant and Material Findings

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 involved in four separate arrests between 1995 and 1998. He was first arrested in May 1995 for possession of alcohol by a minor. He later found guilty of the offense as charged and fined \$100.00. In September 1996, he was arrested again and charged with running a red light and failure to have insurance. Upon his failure to appear in court, a charge of failure to appear in court was added to the other charges. Applicant was fined \$100.00 on the charge of running the red light and the lack of insurance charge was dismissed.

Applicant was arrested for a third time in February 1997. On this arrest, he was charged with failure to identify a witness, driving under a suspended driver's license, giving a false name to the arresting officer, and driving without a valid license. Applicant was later fined \$205.00 for each of the covered charges (*see* R.T., at 41). The arresting officer had observed Applicant exceeding the speed limit and stopped his vehicle (*see* ex. 6). When the officer asked Applicant for his driver's license, Applicant indicated he had no driver's license or means of identification with him. When pressed further for identification, Applicant stated the vehicle was his brother's and identified himself as his brother in the belief that unlike himself, his brother had no outstanding warrants (*see* ex. 6; R.T., at 38-41). After finding identification of Applicant in the glove compartment of the vehicle, the officer ran Applicant's name through the computer and learned he had a driver's license that was suspended (*see* ex. 6). When asked the name of the friend whose pagers were found in the vehicle, Applicant failed to identify the friend (saying only they were students at the same university and had a physics class together). Subsequently, he did identify the friend by name but would not provide any telephone number or address of the friend.

Applicant was arrested for a fourth time in July 1997. Preceding his arrest, Applicant was stopped by the arresting officer who had observed Applicant make a right turn into the wrong lane (*see* ex. 7). When asked by the arresting officer at the scene, Applicant was unable to provide the officer with a driver's license or insurance information.

Applicant was arrested for a fifth time in June 1998 and charged with driving without a valid driver's license. He currently has a valid driver's license and has averted any further arrests since last arrest in June 1998.

Asked to complete an SF-86 in February 2001, Applicant (a college graduate with a BS degree in computer science from a reputable university) omitted his 1995 alcohol-related arrest when responding to question 24. He omitted two of his covered arrests as well when he answered question 26 (*i.e.*, both his 1995 alcohol-related arrest and his February 1997 arrest that carried a fine in excess of \$150.00). Applicant attributed his omissions to confusion, embarrassment, concern his arrests could impact his employment, and understatement of the importance of being truthful in completing

his SF-86 (*see ex. 2; R.T., at 27-28, 57*). Not until prompted by an interviewing DSS agent in a March 2002 interview (over a year later and after being afforded an opportunity in an initial interview) did Applicant disclose his omitted arrests and provide the key details of the incidents (*see ex. 2*).

Applicant is well regarded by supervisor and colleagues who characterize him as honest and conscientious (*see exs. A and B*).

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) list "binding" policy considerations to be made by Judges in the decision making process covering DOHA cases. The term "binding," as interpreted by the DOHA Appeal Board, requires 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:

Personal Conduct

Basis: conduct involving questionable judgment, untrustworthiness, unreliability, 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.

DC 5: A pattern of dishonesty or rule violations.

Mitigating conditions:

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

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's request 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 comes to these proceedings with a praiseworthy civilian record, but also with raised security concerns over his omission of his alcohol-related and misdemeanor arrest over mis-identity and driving issues that cloud the confidence in his judgment, reliability, and trustworthiness required to access him to classified information.

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 SF-86 omissions of his 1995 alcohol-related arrest and subsequent February 1997 arrest over identity and driving issues. So much trust is imposed on persons cleared to see classified information that deviation tolerances for incidents of trust betrayal are calibrated narrowly.

In omitting his arrests from his SF-86, Applicant claimed some confusion about the nature of his arrests but impresses that he was embarrassed and very concerned about the impact that disclosure of his arrests might have on his employment. While these reasons might be understandable, historically such reasons have been considered by our Appeal Board to be insufficient to avert drawn conclusions of knowing and wilful concealment. Applicant's SF-86 omissions are imputed to have been 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 take advantage of earlier opportunities afforded him to correct his SF-86 omissions (including an initial interview) before being confronted with the information in his second DSS interview in March 2002 (over a year later). 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 correct SF-86 omissions before being confronted with the information months later (in this case over a year later). *Compare* ISCR Case No. 97-0289 (January 1998) with DISCR Case No. 93-1390 (January 1995).

No question but that Applicant has inspired confidence and trust among his defense contractor supervisor and colleagues. But in the face of his admitted omissions, his favorable character evidence alone is not enough to absorb security concerns extant with the Government over his failure to be truthful through in his SF-86. Mitigation is further weakened by the lack of any detailed knowledge of Applicant's omissions by his character witnesses. Because Applicant's identity misrepresentations covered in his February 1997 arrest reflect a pattern of omission and deception when faced with choices about his personal well being, they cannot be separated from his SF-86 omissions. DC 5 (pattern of dishonesty or rules violations) of the Adjudication Guidelines for personal conduct is applicable when considered in connection with his ensuing SF-86 omissions of his arrests (his 1997 arrest included).

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.g and 1.h of Guideline E.

Based on a full review of the evidence and drawn inferences from the developed record, Applicant's arrests (two of which involved the same alcohol-related incident in 1995), save for his February 1997 arrest which relates to similar trustworthy issues raised by his SF-86 omissions, are mitigated by time and demonstrated compliance with laws and regulations since his last arrest in 1998. Favorable conclusions warrant with respect to the balance of the allegations covered by Guideline E, except for subparagraph 1.c.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the factors set forth in the Procedures section (paragraph 6) of the Directive, as well as E.2.2 of the Adjudicative Process of Enclosure 2 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 (PERSONAL CONDUCT): AGAINST APPLICANT

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: FOR APPLICANT

Sub-para. 1.c: AGAINST APPLICANT

Sub-para. 1.d: FOR APPLICANT

Sub-para. 1.e: FOR APPLICANT

Sub-para. 1.f: FOR APPLICANT

Sub-para. 1.g: AGAINST APPLICANT

Sub-para. 1.h: 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.

Roger C. Wesley

Administrative Judge