

DATE: June 1, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-17465

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant erroneously omitted his misdemeanor citations in 1994 and 1999 for marijuana possession from his Security Clearance Application (SF 86) in March 2001. However, he did not intend to conceal the information or mislead the government about it. Because Applicant lacked the requisite intent to mislead, no disqualifying conditions apply. Clearance is granted.

STATEMENT OF THE CASE

On May 23, 2003, in accordance with DoD Directive 5220.6, as amended (Directive), the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR)⁽¹⁾ alleging facts that raise security concerns addressed in the Directive under Guideline E (personal conduct). The SOR further informed Applicant that, based on information available to the Government, DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to continue Applicant's security clearance.⁽²⁾

On June 16, 2003, Applicant answered the SOR (Answer) and requested that his case be decided without a hearing.⁽³⁾ Applicant has admitted with an explanation the single SOR allegation.

On December 29, 2003, DOHA Department Counsel submitted a file of relevant materials (FORM) in support of the government's preliminary decision, a copy of which was sent to Applicant on January 22, 2004. Applicant received the FORM on February 5, 2004. He thus had until March 6, 2004, to submit any response, rebuttal, or objection to the FORM. However, Applicant did not submit anything further in his own behalf and the case was assigned to me on March 29, 2004.

FINDINGS OF FACT

Applicant's aforementioned admission is incorporated herein as facts. After a thorough review of the pleadings and

exhibits, I make the following additional findings of fact:

Applicant is 27 years old and is employed by a defense contractor as a security guard. He has been with his current employer since April, 2001. He also worked as a security guard for a different company from 1998 until 2001. He is married and has two children. Applicant graduated from high school in 1994 and has held a variety of jobs since then. This appears to be his first employment with a defense contractor and his first application for a security clearance.

In October 1994, Applicant was with some friends outside a recreation center when a police officer approached the group and saw a small quantity of marijuana on the ground near them. Applicant, who had just turned 18 years old, and his friends were issued citations for possession of marijuana. When he appeared in court several months later, the charges were dropped.

In November 1999, Applicant was pulled over by the police because the car he was driving - his brother's - had a burned out tail light. The police conducted a search of the car and found the remnants of a marijuana cigarette in the ashtray. Applicant again received a citation for possession of marijuana and assigned a court date. When Applicant appeared in court his license was suspended for six months and the possession charge was dropped.

Both of these charges are misdemeanors under the applicable laws of the state where they occurred. In neither of the aforementioned incidents did the marijuana belong to Applicant; nor does it appear he knew the drugs were present until the police found them. Further, in neither of the aforementioned incidents was Applicant taken into custody, photographed, or placed in jail.

Applicant submitted a Security Clearance Application (SF 86) on March 28, 2001. In response to question 24, which asked if he had ever been arrested or charged with any criminal offense related to drugs or alcohol, Applicant answered "no."⁽⁴⁾ When interviewed about his arrests and his answers to the SF 86 by a Defense Security Service (DSS) agent on October 19, 2001, Applicant stated he did not intentionally falsify his answers. He further explained that he did not understand the question and that he thought the word "charge" meant an actual custodial arrest and prosecution, neither of which occurred in his case.⁽⁵⁾

POLICIES

The Directive sets forth adjudicative guidelines⁽⁶⁾ to be considered in evaluating an Applicant's suitability for access to classified information. The Administrative Judge must take into account both disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having considered the SOR allegations and having reviewed the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are those conditions listed in the Directive under Guideline E (Personal Conduct).

BURDEN OF PROOF

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁽⁷⁾ for an Applicant to either receive or continue to have access to classified information. The government bears the initial burden of proving, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If the government meets its burden, it establishes a *prima facie* case that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden then shifts to the Applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, the Applicant bears a heavy burden of persuasion.⁽⁸⁾

A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. The Government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The

"clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the Government. ⁽⁹⁾

CONCLUSIONS

Under Guideline E, a security concern arises where it is shown an applicant has exhibited questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Such conduct may indicate the person may not properly safeguard classified information. ⁽¹⁰⁾ Here, the government's concerns are about Applicant's honesty in situations where the truth may not be favorable to Applicant's personal interests. The SOR alleges that Applicant falsified question 24 in an electronically-submitted SF 86 dated May 1, 2001. However, the only security questionnaire provided in the FORM is a handwritten SF 86 dated March 28, 2001. (Item 4) The question at issue in Item 4 is question 23.d, which poses the same question as that quoted in SOR 1.a, albeit in a different format. It is also worth noting that Applicant did not answer question 23.d in Item 11. Nonetheless, Applicant discussed his alleged SF 86 omission with a DSS agent in October 2001, and he has admitted the allegation as presented in the SOR. Therefore, I conclude Department Counsel has presented sufficient evidence in the FORM to establish that Applicant deliberately omitted relevant and material information about his background from a security clearance form.

Guideline E disqualifying condition (DC) 2-⁽¹¹⁾ appears to apply here. However, a key facet of this guideline is that there be a deliberate attempt to mislead or conceal. I do not believe that element is present here. Just because a person erroneously answers "no" to a question does not mean he intends to conceal information from the government to protect his own interests. Applicant has offered a perfectly plausible explanation for his omission. He was never taken into custody, fingerprinted and photographed, or jailed; rather, he was given what amounts to a traffic ticket in each instance. Both times the charges were dismissed. It is perfectly understandable that Applicant did not equate two minor infractions in which he was not culpable ⁽¹²⁾ and for which he was not prosecuted, with formal criminal charges and arrests. As attorneys, we know that even a parking ticket is, technically, a charge that one has violated a law or ordinance even though we have not been detained or locked up. But for the average, lay applicant, receiving a summons may not necessarily equate with being charged with a crime. The circumstances in this case are not unlike instances in which an applicant who has a felony arrest in his past fails to respond affirmatively to SF 86 question 23.a, which asks if one has in fact been charged with or convicted of a felony, because the charge was later reduced to a misdemeanor. Or the applicant may simply not know the difference. I conclude, therefore, that this Applicant lacked the requisite intent to mislead but simply made an understandable mistake. Thus, I conclude no disqualifying conditions apply and I resolve Guideline E for Applicant.

I have carefully weighed all of the evidence, and I have applied the disqualifying and mitigating conditions as listed under each applicable adjudicative guideline. To the extent possible given the paucity of information in this regard, I have also considered the whole person concept as contemplated by the Directive in Section 6.3, and as called for by a fair and commonsense assessment of the record before me as required by Directive Section E2.2.3.

FORMAL FINDINGS

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1, Guideline E (Personal Conduct): FOR THE APPLICANT

Subparagraph 1.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 denied.

Matthew E. Malone

Administrative Judge

1. Item 1.
2. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
3. Item 3.
4. Item 4.
5. Item 5; Answer.
6. Directive, Enclosure 2.
7. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
8. *See Egan*, 484 U.S. at 528, 531.
9. *See Egan*; Directive E2.2.2.
10. Directive, E2.A5.1.1.
11. Directive, E2.A5.1.2.2. 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; (emphasis added)
12. His claims of innocence are bolstered by the negative urinalysis test he took as a condition of his current employment. (Item 5).