DATE: May 11, 2005

In Re:

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

Applicant for Security Clearance

CR Case No. 02-22025

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In 1993, Applicant was arrested and convicted of Driving While Intoxicated (DWI). He was required to attend a DWI course which he did not complete until 2004. He made a number of statements indicating the matter had been resolved, even though a warrant was still outstanding. The record evidence mitigates the negative security implications stemming from the DWI and his statements. Clearance is granted.

STATEMENT OF THE CASE

On May 27, 2004, 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 June 17, 2004, Applicant answered the SOR and requested a hearing. On October 2004, I was assigned the case. On November 10, 2004, I convened a hearing in this matter. On November 17, 2004, the transcript (tr.) of the hearing was received.

The record was kept open to allow Applicant to submit additional documents, which were received on November 17, 2004. Department Counsel having no objection, the documents were admitted into evidence as Applicant's Exhibit (App Ex B).

FINDINGS OF FACT

The SOR alleges Criminal Conduct and Personal Conduct. The Applicant admits to the following: he was arrested in 1993 and charged with DWI and a warrant was issued for failure to appear. Those admissions are incorporated herein as findings of fact. After thorough review of the whole record, I make the following additional findings of fact:

The Applicant is 44 years old, has worked for a defense contractor since May 1995, and is seeking to obtain security clearance.

In 1978, Applicant was arrested for DWI after he had an accident while driving drunk. The accident resulted in Applicant having surgery and part of his skull was removed. He pleaded nolo contendere to the charge.

In April 1993, Applicant was arrested for DWI after his car hit a stop sign. He had been drinking at a farewell party prior to leaving the state. He was found guilty, fined $400, and ordered to attend a DWI course in State 1. In May 1993, Applicant moved to another state, State 2. His move was delayed so he could appear in court for the DWI arrest. After paying the $400 fee, it was agreed he could attend the DWI program in State 2. In May 1994, a warrant was issued for his failure to appear in State 1. (Government Exhibit, Gov Ex 5) In May 1995, Applicant moved to State 3. In August 1995, Applicant gave a signed, sworn statement (Gov Ex 4) wherein he said he had not yet attended the DWI school, but had made arrangement to take that course.

In March 2003, Applicant gave a signed, sworn statement (Gov Ex 3) wherein he stated he had not attended a DWI program and assumed the $400 fee covered all his court imposed requirements. In the same sworn statement Applicant states that in May 2000, when he attempted to change his address on his State 3 driver's license he was informed there was an outstanding warrant from State 1. He was "provided information regarding whom to contact in [State 1], and I sent the appropriate agency the required fee of about $100 to clear the warrant." (Gov Ex 3) In his March 2003 statement he said he would make arrangements to fulfill the requirements to satisfy the warrant, if the warrant was not already satisfied. Applicant contacted State 1 and was told he needed to send $100 because of the DWI. (Tr. 35) When he sent the money, he assumed the matter was closed. Applicant now lives in State 4.

In March 2004, Applicant completed an interrogatory wherein he states, "I was not aware of a warrent [sic], till I received this, but I did have my license suspended also, that is why I thought it was corrected . . ." (Gov Ex 2)

In April 2004, Applicant paid $65 and attended a three-day DWI school in State 4. (App Ex A). As of September 2004, the warrant was still outstanding. (Gov Ex 5) In November 2004, Applicant contacted State 1 and provided a copy of his certificate for the DWI course. He was told the judge would be contacted to have the warrant removed.

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.

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 Criminal Conduct, Guideline J. Under Guideline J, the security eligibility of an applicant is placed into question when that applicant is shown to have a history or pattern of criminal activity creating doubt about his judgment, reliability, and trustworthiness. In 1993, Applicant was arrested and convicted of DWI. Applicant's conduct is aggravated because it took him 10 years before he completed the required DWI course. Because of this incident, Disqualifying Condition (DC) 1. (E2.A10.1.2.1. *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*) and 2. (E2.A10.1.2.2. *A single serious crime or multiple lesser offenses*) apply.

His arrest and conviction occurred in 1993, which was 11 years before the hearing. This behavior is not recent. MC 1 (E2.A10.1.3.1. *The criminal behavior was not recent.*) applies. I find for Applicant as to criminal conduct.

The allegations under Guideline E, (Personal Conduct) are unfounded. The Government has shown Applicant's statements were incorrect, but this does not prove the Applicant deliberately failed to disclose information about a warrant. The Applicant has denied intentional falsification. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government when applying for a security clearance is a security concern. But every inaccurate statement is not a falsification. A falsification must be deliberate and material.

In 1995, Applicant made a statement he had not taken the required DWI course, but had arranged to do so. The course was not completed until 2004. In 2000, Applicant learned there was an outstanding warrant from State 1 when he attempted to change his address on his State 3 driver's license. Applicant contacted the appropriate agency, sent them $100, assumed the matter was closed and the warrant cleared. In March 2004, Applicant completed an interrogatory wherein he stated he was unaware the outstanding warrant had not been cleared until he received the interrogatory.

The Government has shown Applicant stated the warrant had been cleared when it was still outstanding, but this does not prove the Applicant deliberately provided false information about the warrant. Applicant believed his statements were true. In 2000, when informed there was an outstanding warrant he contacted the appropriate agency, paid $100, and thought the matter was resolved. He believed the matter was closed. His 2003 and 2004 statements reflect this belief. When told in 2004, the warrant was still outstanding, he said he was unaware of a warrant. Actually, he knew a warrant had previously existed, but as of 2004 he thought it had been cleared, and said so, "I thought it was corrected." It would have been more accurate for Applicant to have said he was unaware the warrant was "still outstanding," until he was told of its existence when he received the interrogatory. There is no intentional falsification. I find for Applicant as to SOR paragraphs 2.a, 2.b., and 2.c and find for Applicant as to Personal Conduct, SOR subparagraph 2.

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: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Paragraph 2 Personal Conduct: FOR THE APPLICANT

Subparagraph 2.a.: For the Applicant

Subparagraph 2.b.: For the Applicant

Subparagraph 2.c.: 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.

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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.