

DATE: November 16, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-24756

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Marc Curry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant did not disclose on his security clearance application completed in January 2001 his 1998 foreign country driving under the influence of alcohol arrest. Applicant said his failure to disclose was inadvertent because he and his family were under stress at the time, and he forgot about it. Applicant did not mitigate the personal conduct concern. Clearance is denied.

STATEMENT OF THE CASE

On March 30, 2004, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons under Guideline E (Personal Conduct) 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 conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked.

In a signed statement, sworn on May 20, 2004, Applicant responded to the SOR allegations. He requested a hearing. This case was assigned to me on September 15, 2004. A Notice of Hearing was issued on September 27, 2004 setting the hearing date for October 6, 2004. Applicant waived the lack of 15 days notice before the hearing date (Tr. 10). The Government presented two exhibits. Applicant appeared and testified, but offered no exhibits. I received the transcript (Tr.) on October 18, 2004.

FINDINGS OF FACT

Applicant admitted to the allegations in the SOR. Those admissions are incorporated herein as findings of fact. After a complete review of the evidence in that hearing record, I make additional findings of fact:

Applicant is 41 years old. He works for a defense contractor managing aircraft infrastructure support programs. Applicant is an engineer who has worked for his employer for 19 years. He is married with two children. (Tr. 15 to 17, 30; Exhibit 1 at 3,)

Applicant was arrested in December 1998 after driving his baby sitter home. Applicant and his wife had attended a Christmas party, during which Applicant consumed some alcoholic beverages. Applicant was in a foreign country on assignment from his employer. Applicant's wife and baby were living there also with him in an apartment. Applicant could not find a taxicab to take the baby sitter home, so he drove her home. During his return trip, the local constabulary apprehended him, took him to their police station, and charged him with an alcohol driving offense. Applicant paid a fine in February 1999 after pleading guilty to the charge. Applicant had a clean driving record from his home state. The foreign judge did not suspend or revoke Applicant's driving privileges. Applicant had never been arrested prior to this incident, nor has he been arrested since then. (Tr. 15 to 28 , Exhibits 1 and 2)

Applicant and his wife both worked long hours each week for the same employer at that time in executive high stress jobs. Adjusting to their new jobs and being in a foreign country with a young infant was also stressful. Applicant and his wife resolved their stressful situations when she quit her job to return to school for her masters' degree. Applicant has not had any further driving offenses and remains a law-abiding citizen. Applicant returned to the U.S. in December 2003. (Tr. 30 to 33)

Applicant did not list this 1998 arrest and 1999 guilty plea on his security clearance application (SCA) that he completed on January 4, 2001. Question 24 asked if Applicant had ever been charged with or convicted of any offense related to alcohol or drugs. Applicant claims he forgot about this offense because he tried to put it out of his mind acknowledging it was so offensive to him that he committed such an offense. Applicant did not disclose this arrest to the investigating agent for the U.S. government regarding Applicant's security clearance because he continued to forget about it, and again answered "no" to Question 24 when the investigator first went through the SCA questions with him during the interview. (Tr. 19 to 21, 33, 34; Answer; Exhibits 1 and 2)

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 judgement, 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." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicted upon the applicant meeting the security guidelines contained in the Directive.

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. Enclosure 2 to the Directive sets forth adjudicative guidelines that must be carefully considered according to the pertinent Guideline in making the overall common sense determination required.

Each adjudicative decision must also include an assessment of: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence (See Directive, Section E2.2.1. of Enclosure 2). Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring

pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

Guideline E - Personal Conduct:

E2.A5.1.1. *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.

E2.A5.1.2. Conditions that could raise a security concern and may be disqualifying also include:

E2.A5.1.2.2. 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.

E2.A5.1.3. Conditions that could mitigate security concerns include:

None

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions above, I conclude the following with respect to each allegation set forth in the SOR:

Applicant admitted he did not include on his SCA information, and did not initially acknowledge to the UFOS agent, his one alcohol-related driving arrest. Proof Applicant omitted this information from his SCA shifted the burden to Applicant to explain the omissions sufficiently to negate a finding of knowing and deliberate falsification. *See* ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004). He failed to do so. I do not find it credible that an educated business executive forgot to disclose to the Government his one arrest for anything in his life, especially an alcohol-related driving offense. I conclude Applicant hoped it would not be discovered because it occurred in a foreign country. He was wrong. Disqualifying Condition (DC) 2 applies. Regarding Mitigating Conditions (MC), none apply. Therefore, after considering all of the record evidence, I conclude this guideline against Applicant.

FORMAL FINDINGS

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline E: Against Applicant

Subparagraph 1.a.: Against Applicant

Subparagraph 1.a.(1).: Against Applicant

Subparagraph 1.b.: Against Applicant

DECISION

In light of all the circumstances and facts 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.

Philip S. Howe

Administrative Judge

