

DATE: May 10, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-33714

DECISION OF ADMINISTRATIVE JUDGE

CHARLES D. ABLARD

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq. , Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was arrested and convicted in 1996 of felony theft from an auto and given a deferred conviction and sentence pending completion of probation, community service and payment of fees and restitution. Confusion on the part of his counsel and change in policy of the district attorney's office led him to conclude that the record had been expunged and he failed to report the events on his SF 86 in 2002 and on an application for private employment in 2000. Failure to report was not deliberate and the conviction is mitigated by passage of time. Clearance in granted.

STATEMENT OF CASE

On November 16, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, 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 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. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On November 29, 2004, Applicant responded to the SOR allegations, and requested a hearing. The matter was assigned to another administrative judge on January 18, 2005, and re-assigned to me on February 1, 2005. A notice of hearing was issued on February 8, 2005, for a hearing on February 28, 2005, and held that day. Five government exhibits and two exhibits for Applicant were admitted into evidence. The record was left open for 30 days and an additional nine Applicant exhibits were submitted without objection. The transcript was received on March 10, 2005.

FINDINGS OF FACT

Applicant denied both allegations with explanation and admission of some of the details in the allegations. After a complete review of the record, I make the following additional findings of fact:

Applicant is a 28-year-old security guard at a defense facility working for a contractor. In 1996 he was charged with felony auto theft that he participated in with two others. He was given a deferred judgment and the sentence of three years was withheld after a plea of guilty. He was placed on unsupervised probation for three years, ordered to pay \$145.00 and restitution, and perform 50 hours of community service (Exh. 4). He completed his service and paid the costs (Exh. A).

Based on his understanding with his court appointed counsel, Applicant believed his record had been expunged when he completed his application for a security clearance (SF 86) in 2002. Some confusion in the district attorney's office had led to this conclusion (Exh. C). As a result he did not report the arrest and conviction on his SF 86 filed in January, 2002. He had also not reported it on an application for private employment in 2000.

Applicant has had no difficulties with law enforcement in the past nine years. He is a high school graduate, is employed with an annual salary of \$30,000.00, and his wife has a salary of \$24,000.00 per annum. They have two children.

Applicant has a good record with his employer and is valued for his professionalism. He has been employed with the company for over three years and his supervisors and colleagues speak highly of him in their letters of support (Exhs. D-K).

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.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (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 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. Directive, ¶ E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Executive Order No. 10865 § 2. *See* Executive Order No. 12968 § 3.1(b).

Initially, the Government must establish, by something less than a preponderance of the 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. The applicant then bears the burden of demonstrating it is clearly consistent with the national interest to grant or continue a security clearance. "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. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Executive Order No. 12968 § 3.1(b).

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate adjudicative factors, I conclude the following with respect to all allegations set forth in the SOR:

Applicant's failure to report his police record for felony arrests or convictions at Question 21 on his SF 86 raises issues under Guideline E that might indicate questionable judgment, unreliability, and unwillingness to comply with rules and regulations and could indicate that the person may not properly safeguard classified information (E2.A5.1.1.). Specifically, the deliberate omission, concealment, or falsification of relevant and material facts from a personnel security application could raise a security concern and be disqualifying. (E2.A5.1.2.2.)

In view of the confusion regarding the expungement process in the courts in the county where the conviction occurred as stated by the district attorney and the lawyer who represented him (Exhs. A and C), I conclude that the omission was

not deliberate as required in the guideline. When this matter arose, Applicant sought counsel to complete expungement that he thought had been done and it is was completed in January, 2005 (Exh. B).

Guideline J (Criminal Conduct) is alleged. The Government has established a sufficient basis that Disqualifying Condition E2.A10.1.1. might be applicable to Applicant in that he was charged and convicted of a criminal offense. It could be mitigated by the facts that the criminal behavior was not recent (E2.A10.1.3.1), the crime was an isolated incident (E2.A10.1.3.2.), and that there is clear evidence of successful rehabilitation (E2.A10.1.3.6.). I conclude that all three conditions are applicable.

In all adjudications the protection of our national security is of paramount concern. Persons who have access to classified information have an overriding responsibility for the security concerns of the nation. The objective of the security clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information.

The "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be judged on its own merits taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. Applicant has a good record with his company and has been fully rehabilitated after the 1996 arrest and conviction.

After considering all the evidence in its totality, and as an integrated whole to focus on the whole person of Applicant, I conclude Applicant's record of conduct justifies a finding that it is clearly consistent with the national interest to grant a security clearance.

FORMAL FINDINGS

Formal findings as required by the Directive (Par. E3.1.25) are as follows:

Paragraph 1. Guideline E: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Paragraph 2. Guideline J: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or renew a security clearance for Applicant. Clearance is granted.

Charles D. Ablard

Administrative Judge