

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant was convicted in 1996 burglary from an auto, felony, and given a deferred conviction and sentence pending completion of probation, community service, and payment of fees and restitution. State law provided, after completion of the sentence for the particular crime, he was not deemed to have been "convicted." Confusion of his counsel and a change in policy of the district attorney's office led him to conclude that the record had been expunged but it had not. He failed to report the events at Question 21 on his SF 86 in 2002 and on an application for private employment in 2000. Failure to report was not deliberate. The security concern is mitigated by passage of time, lack of intent to falsify, and the whole person analysis. Clearance is granted.

CASENO: 02-33714.h2

DATE: 03/08/2006

DATE: March 8, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-33714

REMAND DECISION OF ADMINISTRATIVE JUDGE

CHARLES D. ABLARD

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq. , Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was convicted in 1996 burglary from an auto, felony, and given a deferred conviction and sentence pending completion of probation, community service, and payment of fees and restitution. State law provided, after completion of the sentence for the particular crime, he was not deemed to have been "convicted." Confusion of his counsel and a change in policy of the district attorney's office led him to conclude that the record had been expunged but it had not. He failed to report the events at Question 21 on his SF 86 in 2002 and on an application for private employment in 2000. Failure to report was not deliberate. The security concern is mitigated by passage of time, lack of intent to falsify, and the whole person analysis. Clearance is 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 exhibits were submitted by Applicant without objection on March 29, 2005. The transcript was received on March 10, 2005. The government appealed and on January 13, 2004, the Appeal Board remanded the case to me with instructions to correct the errors identified in the Board's decision and issue a new decision in accordance with their decision.

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 defense contractor. In 1996, when he was 19 years old, he was charged with burglary of stereo equipment from an auto that he participated in with two other youths who were a year younger and not prosecuted. In an effort to avoid embarrassing his parents and to keep them from knowing about the prosecution, Applicant pled guilty to a felony count on advice of his court-appointed counsel. The court entered a deferred judgment in January 1997. A sentence of three years was withheld and 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 community service and paid the costs. A letter in evidence from the district attorney states that, under the applicable state law, a deferred sentence for the crime to which Applicant pled, Burglary II, "is not a conviction" (Exh. A). On advice of his counsel, Applicant believed after completion of his community service he would have no record since it would be expunged (Exhibit 3).

Based on this understanding, Applicant thought 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 as explained in a letter from his present attorney (Exh. C). As a result Applicant reasonably concluded he was not required to report the charge or conviction on his SF 86 filed in January, 2002. For the same reason he had not reported it on an application for private employment in 2000 that asked if he had been convicted of a felony.

While Applicant admitted under rigorous government cross-examination that he did not want others to know of his 1996 offense, this was an understandable reaction and one he had held from the outset of the offense when he withheld the information from his family. However, he believed at the time of submission of the SF 86 that he had legally resolved the question of his criminal record. As a result of the mistaken belief of Applicant that he had no recorded conviction, his present lawyer has now taken steps completed on January 12, 2005, to expunge the conviction from the record (Exh. B).

Applicant has had no difficulties with law enforcement in the past nine years. He clearly learned his lesson from his one encounter with the criminal justice system. He is abjectly apologetic about the event. He has a high school education. He and his wife both work and they have two children. He has a good record with his employer and is valued for his professionalism. He has been employed with the same security contractor for over three years and his supervisors and colleagues speak highly of him in their letters of support. He is highly regarded for honesty, integrity, and credibility (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

CONCLUSIONS

In light of the Appeal Board Remand Order, upon reconsideration 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 all allegations set forth in the SOR:

Applicant's failure to report his police record for felony charges 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.) While the question has a limited exception for expungement under the Federal Controlled Substance Act which was not applicable to this case, the testimony of Applicant was persuasive that he had no intent to deceive when he completed the form and believed he had no record, a conclusion supported by the district attorney's letter regardless of whether expungement had occurred. While the record was not expunged at the time of the filing of his SF 86, the letter from the district attorney states that the deferred sentence was not a conviction. With a high school education, I find it credible that he relied on his lawyer's advice. Since he had reason to believe he was not convicted, his negative answer to Question 21 was an honest one and he had no intent to falsify.

In view of the confusion regarding the expungement process in the state court of the county where the conviction occurred as stated by the district attorney and the lawyer who represented him (Exhs. A and C), and the statement and testimony of Applicant, I conclude that the omission was not deliberate as required in the guideline. When this matter arose, Applicant took steps by counsel to complete the expungement he thought had been done and this was completed in January 2005 (Exh. B). The same rationale is applicable to his omission from the application for private employment.

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 there is clear evidence of successful rehabilitation (E2.A10.1.3.6.). All three conditions are applicable. Also alleged is that Applicant violated 18 U.S.C. § 1001 by falsifying his answer to Question 21 on his SF 86. Since I find that his answer was not given with intent to deceive, I find in his favor on that allegation.

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 been fully rehabilitated since his the 1996 incident for which he completed the court-ordered terms. He has since established a family, has been successfully employed over the past three years, and is a worthwhile member of his community.

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 to him.

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