

DATE: November 16, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-13925

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Marc Curry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant failed to disclose on his security clearance application (SCA) an arrest in 1995 as the answer to Question 21. The charges were false, and were later dismissed by the local court. Applicant mitigated the personal conduct security concern regarding his personal conduct. Clearance is granted.

STATEMENT OF THE CASE

On May 12, 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 to June 9, 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 7, 2004. Applicant waived the lack of 15 days notice before the hearing date (Tr. 9). The Government presented three exhibits. Applicant appeared and testified, and offered no exhibits. I received the transcript (Tr.) on October 15, 2004.

FINDINGS OF FACT

Applicant admitted the allegation 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 33 years old. He works for a defense contractor in the computer field. He is married and owns his own home. Applicant is about to graduate from college and receive a degree in computer management. (Tr. 17, 22, 25)

Applicant was arrested in August 1995 on an allegation of aggravated sexual assault on a child. Applicant's wife at the time had four children by her first marriage. The marriage was troubled, and Applicant sought a divorce in the summer of 1995. Applicant's wife then filed a rape (aggravated sexual assault) charge against him. Applicant denied the charges and cooperated with the police. During the time of this accusation and arrest he was in the Army. Applicant's wife made a similar charge against him in February 1995 that was later dismissed as unsubstantiated. The allegations in August 1995 were dismissed in 1996 because there were no physical signs of abuse. Later, Applicant was administratively discharged from the Army with a general discharge before the end of his enlistment term. (Tr. 20 to 23; Exhibit 2, Exhibit 3 at 2)

Applicant did not list this 1995 arrest on his security clearance application in response to Question 21 (Felony Arrests) because he knew the charges were dismissed and were false. He assumed that such charges, because they were false and later were dismissed, were not charges he needed to reveal. He also did not disclose them because the mere fact of stating them might make his employer think they were true even though they were false and had been dismissed. Applicant's statement also states he did not disclose the arrest because he feared losing his job, but at the hearing asserted he agreed to adding that sentence to the statement at the insistence of the Government investigator, even though it made him uncomfortable. (Tr. 16, 18, 19, 23, 28; Exhibit 1 at 6, Exhibit 2 at 3)

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. The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

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:

E2.A5.1.3.1. The information was not pertinent to a determination of judgment, trustworthiness, or reliability.

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:

With respect to Guideline E, I conclude the Government proved its case. Applicant did not respond to Question 21 with information about his 1995 arrest. Disqualifying Condition (DC) 2 applies.

Regarding Mitigating Conditions (MC), MC 1 applies. This accusation was false, and the false charges were later dismissed by the local court. This information was, therefore, not pertinent to a determination of judgment, trustworthiness, or reliability. Applicant made a common-sense judgment about disclosure of charges he knew were false and had been dismissed. Security clearance determinations should not be based on false accusations. Applicant was also truthful with the government investigator when he explained why he answered "no" on Question 21. While disclosure on Question 21 might have obviated the need for a hearing, I can understand Applicant's naivete on the law and what a charge and dismissal of criminal charges mean. I also found Applicant's explanation credible and his presentation, made in a logical, honest, and humble manner, to be persuasive. Therefore, after considering all of the record evidence, I conclude this guideline for 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: For Applicant

Subparagraph 1.a.: For Applicant

DECISION

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

Philip S. Howe

Administrative Judge