KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant was involved in an automobile accident and was arrested for aggravated DUI. Applicant knowingly and willfully failed to list the resulting civil suit in his SCA and failed to advise the DSS investigator that his vehicle had struck two pedestrians and one of them had filed suit against him. Applicant failed to mitigate personal conduct and criminal conduct security concerns. Clearance is denied.

CASENO: 04-10578.h1

DATE: 07/14/2005

DATE: July 14, 2005

In re:

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

Applicant for Security Clearance

ISCR Case No. 04-01578

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Kathryn A. Trowbridge, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was involved in an automobile accident and was arrested for aggravated DUI. Applicant knowingly and willfully failed to list the resulting civil suit in his SCA and failed to advise the DSS investigator that his vehicle had struck two pedestrians and one of them had filed suit against him. Applicant failed to mitigate personal conduct and criminal conduct security concerns. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 2 June 2004, DOHA issued a Statement of Reasons[(1)] (SOR) detailing the basis for its decision-security concerns raised under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on 19 June 2004 and elected to have his case decided on the record without a hearing. DOHA received Applicant's Answer on 7 July 2004. On 25 August 2004, Department Counsel requested a hearing before an administrative judge under Directive ¶ E3.1.7. The case was assigned to me on 21 March 2005. On 26 May 2005, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on 6 June 2005.

RULINGS ON PROCEDURE

Before traveling to the site of the hearing, I asked Department Counsel for a copy of her request for hearing. She advised she would submit it at the hearing. She was unable to produce the document at the hearing, but stated she had asked for the hearing on 25 August 2004. I received a copy of the Request for Hearing, dated 25 August 2004, on 10 June 2005.

"If the applicant has not requested a hearing with his or her answer to the SOR and Department Counsel has not requested a hearing within 20 days of receipt of the applicant's answer, the case shall be assigned to the Administrative Judge for a clearance decision based on the written record." Directive ¶ E3.1.7.[(2)] Department Counsel's request was issued some 49 days after DOHA received Applicant's request that his case be determined on the record without a hearing. Applicant did not object to the hearing, and I failed to recognize at the time that Department Counsel's request was not timely.

The Directive appears to make the filing of Department Counsel's request for a hearing mandatory as there is no provision for an extension of time for good cause shown. Therefore, I will not consider the testimony of Department Counsel's witness, the document authenticated by the witness-Ex. 6 (a report of investigation), Department Counsel's cross-examination of Applicant, or any argument referencing such testimony or exhibit. This effectively limits the scope of information to that which would have been received had this matter been decided without hearing per Direction ¶ D3.1.7.

FINDINGS OF FACT

Applicant is a 47-year-old software test engineer with a defense contractor. He has held a security clearance on three occasions over the past 26 years.

In July 2000, Applicant went to dinner with his family (wife, children, parents, and sister). He consumed two or three glasses of beer with his dinner. He drove home with his son in the rear seat of the vehicle. At about 8:30 p.m., Applicant was involved in an accident a few blocks from his home. The other driver failed to yield at a stop sign. Applicant tried to avoid the other vehicle, but struck its rear bumper as he tried to maneuver out of the way. Applicant's car careened off the road onto the sidewalk where it hit two pedestrians. When police officers arrived at the scene, they smelled the odor of alcohol on Applicant's breath. An officer performed a Horizontal Gaze Nystagmus test on Applicant which, according to the officer, produced four "clues," indicating possible intoxication. No other field sobriety tests were performed. They took Applicant and his son to the hospital although neither showed any signs of injury other than a few scratches. Because the injuries were minor, the hospital staff did not draw blood for medical reasons. Ex. 4 at 3-5.

The police asked him for consent to have his blood drawn under the state's implied consent statute. Applicant agreed, and his blood was drawn at 10:35 p.m. A police officer then told Applicant he was under arrest for aggravated driving under the influence (DUI),[(3)] handcuffed him, advised him of his *Miranda* rights, and led him off to the police station where he was photographed, fingerprinted, and released to his wife.

Analysis of the blood specimen revealed a blood/alcohol level of 0.025%. Ex. 4 at 9. Applicant's attorney told him he had not been arrested.[(4)] Ex. A at 2.

On 24 July 2002, one of the pedestrians Applicant's car hit filed a civil suit against Applicant. On 25 July 2004, the suit

was dismissed with prejudice after the parties had agreed to binding arbitration. The arbitrator concluded that, under all the circumstances of the case, Applicant's conduct did not constitute negligence.

Applicant completed an electronic security clearance application (SCA) on 13 January 2003. Ex. 1. Applicant caused Part II of the SCA to be suppressed. He certified the statements contained in the SCA were "true, complete, and correct" to the best of his knowledge and belief, and acknowledged that a "knowing and willful false statement" could be punished by fine and/or imprisonment under 18 U.S.C. § 1001. Applicant caused the complete SCA to be transmitted on 15 January 2003. Ex. 2. Question 21 asked if he had ever been charged with or convicted of any felony offense. Question 24 asked if he had been charged with or convicted of any offense related to alcohol. Question 26 asked if, in the previous seven years, Applicant had been arrested for, charged with, or convicted of any offenses not listed previously. Question 40 asked if, in the previous seven years, Applicant had been a party to any public record civil court actions not listed elsewhere on the form. Applicant answered "no" to each of these questions.

On 20 August 2003, Applicant submitted a signed, sworn statement to an agent of the Defense Security Service. In his statement, which he declared was "true, complete and accurate to the best of [his] knowledge and belief," Applicant described the automobile accident, his arrest, and the subsequent prosecution of the other driver. Applicant stated, in part, "I took evasive action to avoid a direct impact, and ended up clipping his right front bumper, which propelled my vehicle up the sidewalk curb into a landscape area, where we hit a tree and a rock." Applicant failed to disclose that his vehicle struck two pedestrians on the sidewalk or that he was later sued by one of them.

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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

Guideline E-Personal Conduct

In the SOR, DOHA alleged Applicant falsified material facts on his SCA by deliberately failing to note he had been charged with a felony offense (Question 21) and an offense related to alcohol (Question 24) (¶ 1.a), and by deliberately failing to list a civil court action (Question 40) (¶ 1.b); and omitted material facts from a signed sworn statement to a DSS agent by deliberately failing to note that he had struck pedestrians with his vehicle and that one of the pedestrians had sued him (¶ 1.c). Applicant admitted the civil court suit, but denied all allegations he deliberately falsified his SCA or his statement to the DSS agent. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate the applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

Questions 21 and 24 of the SCA ask if the applicant has ever been "charged with or convicted of" an offense. Question 26[(5)] asks if the applicant has been "arrested for, charged with, or convicted of an offense." From the additional language in Question 26, we can infer that the drafters did not equate being arrested for an offense with being charged with an offense. Instead, it appears the drafters used the term "charged with" to mean the applicant was formally charged with an offense.

To charge an individual with a felony, there must be an indictment or information. Although it is clear Applicant was arrested for aggravated DUI, there is no evidence an indictment or information was ever issued. Thus I conclude there is no evidence Applicant was ever "charged with" a felony as there is no evidence an indictment or information was ever issued. Therefore, there is no evidence Applicant answered Question 21 incorrectly or falsely.

To charge an individual with a misdemeanor, many jurisdictions do not require any formal charging document such as an indictment or information. Instead, a citation issued by a police officer may be sufficient. There is no admissible evidence of record that Applicant was ever cited for any offense involving alcohol. I conclude Applicant did not falsify his answer to Question 24. Therefore, I find for Applicant on ¶ 1.a.

The Government established that, more than a year before he completed his SCA, Applicant was sued by one of the pedestrians in the accident and that he failed to note this suit in answer to Question 40 on the SCA. He also failed to

acknowledge in his signed, sworn statement that his car had hit two pedestrians and that one had filed suit against him. Applicant clearly knew his vehicle hit the two pedestrians and that a suit had been filed-he acknowledged being deposed by the plaintiff's attorney some seven months before he completed the SCA. Conduct involving the deliberate omission of relevant and material facts from an SCA could raise a security concern and may be disqualifying. DC E2.A5.1.2.2. It is also potentially disqualifying for an applicant to deliberately provide false or misleading information concerning relevant and material matters to an investigator in connection with a security clearance determination. DC E2.A5.1.2.3.

Information is material if it would affect a final agency decision or, if incorrect, would impede a thorough and complete investigation of an applicant's background. ISCR Case No. 01-06870, 2002 WL 32114535 (App. Bd. Sep. 13, 2002). An applicant's criminal and civil court histories are matters that could affect a final agency decision and would impede a thorough investigation of an applicant's background.

Applicant admits he deliberately omitted information about the law suit from his SCA and deliberately failed to notify the DSS agent he had struck pedestrians or was sued, but asserts it was not done with fraudulent intent-he did not know the status of his case and his attorney told him not to discuss it. Under all the circumstances of the case, I find his explanation unpersuasive. I conclude he deliberately omitted this relevant and material information from his SCA and his signed, sworn statement.

The only applicable mitigating condition is that Applicant has taken positive steps to reduce his vulnerability to coercion or duress. MC E2.A5.1.3.5. During his second interview with the DSS agent, he admitted he struck two pedestrians and that one of them sued him. An applicant may mitigate personal conduct security concerns if the falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily. MC E2.A5.1.3.2. As the falsification concerned the current application for security clearance and a statement to the DSS agent investigating Applicant's security worthiness, I conclude the falsification was recent. An applicant may also mitigate personal conduct security concerns by proving the omission was caused by the improper or inadequate advice of *authorized personnel*. MC E2.A5.1.3.4. There is no evidence any security personnel gave Applicant improper or inadequate advice. After considering all of the evidence, I conclude Applicant failed to sufficiently mitigate the security concerns raised by his conduct. I find against Applicant on ¶¶ 1.b and 1.c.

Guideline J-Criminal Conduct

In the SOR, DOHA alleged Applicant's deliberate falsifications of his SCA and statement to the DSS agent constituted a violation of 18 U.S.C. § 1001. Applicant denied the allegation. A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1.

It is a criminal offense, punishable by up to five years in jail, to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation or knowingly make or use a false writing in any matter within the

jurisdiction of the executive branch of the Government of the United States. 18 U.S.C. § 1001. Security clearances are within the jurisdiction of the executive branch of the Government of the United States. *See Egan*, 484 U.S. at 527.

The Government established that Applicant knowingly and willfully made false statements on his SCA and to the DSS agent. I conclude Applicant violated 18 U.S.C. § 1001. Such conduct may raise security concerns and is potentially disqualifying as a single serious crime. DC E2.A10.1.2.2. None of the mitigating conditions apply. Applicant's criminal conduct was recent-his false statements were on documents used to determine his security worthiness-so MC E2.A10.1.3.1 does not apply. As applicant falsified both his SCA and his oral and written statements to the DSS agent, the criminal conduct was not an isolated incident, so MC E2.A10.1.3.2 does not apply. I find against Applicant on ¶ 2.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline E: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

James A. Young

Administrative Judge

1. As required by Exec. Or. 10865 (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended and modified (Directive).

2. The Directive is unclear as to whether the Department Counsel's 20-day time period begins to run when the applicant's answer is received by DOHA or received by Department Counsel. The better position is that the 20-day period begins to run when DOHA receives the answer. Regardless, Department Counsel failed to establish she filed the request for hearing within 20 days of her receipt of Applicant's answer or that DOHA received her request within the 20-day time period.

3. Driving under the influence with a minor in the vehicle.

4. Applicant's attorney is wrong. Applicant was arrested.

5. DOHA did not allege Applicant falsified his answer to Question 26.