KEYWORD: Personal Conduct, Criminal Conduct

DIGEST: Applicant was arrested and charged with Driving While Intoxicated in 1988 and one criminal felony offense in 1991. He was convicted of both and sentenced by the courts. His criminal record and driving record show no further similar activity. In 1998, Applicant resigned from his employment at the request of his employer. He deliberately failed to disclose this resignation in his security application. The security concerns raised by his criminal conduct have been mitigated by the passage of time and his successful rehabilitation. However, the security concerns raised under Guideline E, Personal Conduct, have not been mitigated. Clearance is denied.

CASENO: 04-03801.h1

DATE: 09/23/2005

DATE: September 23, 2005

In Re:

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

Applicant for Security Clearance

ISCR Case No. 04-03801

DECISION OF ADMINISTRATIVE JUDGE

MARY E. HENRY

APPEARANCES

FOR GOVERNMENT

Jason Perry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was arrested and charged with Driving While Intoxicated in 1988 and one criminal felony offense in 1991. He was convicted of both and sentenced by the courts. His criminal record and driving record show no further similar activity. In 1998, Applicant resigned from his employment at the request of his employer. He deliberately failed to disclose this resignation in his security application. The security concerns raised by his criminal conduct have been mitigated by the passage of time and his successful rehabilitation. However, the security concerns raised under Guideline E, Personal Conduct, have not been mitigated. Clearance is denied.

STATEMENT OF THE CASE

On March 30, 2005, 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 Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR details 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. Specifically, the SOR set forth security concerns arising under Guideline E, Personal Conduct, and Guideline J, Criminal Conduct, of the Directive. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On April 21, 2005, Applicant submitted a notarized response to the allegations. He requested a hearing. This matter was assigned to me on August 1, 2005. A notice of hearing was issued on August 3, 2005, and a hearing was held on August 25, 2005. Five exhibits marked Government Exhibits 1 through 5 were admitted into evidence. Applicant submitted one additional evidentiary document marked as Applicant's Exhibit A, which was admitted into evidence, and testified on his own behalf. The hearing transcript (Tr.) was received on September 6, 2005.

FINDINGS OF FACT

Applicant admitted, with explanation, the allegations in subparagraphs 1.a, 1.b, and 2.b through 2.f of the SOR.[(1)] Those admissions are incorporated herein as findings of fact. He did not admit the allegation in subparagraph 2.a and it is deemed a denial. After a complete review of the evidence in the record and upon due consideration, I make the following additional findings of fact:

Applicant is a 36-year-old senior systems engineer for a defense contractor.[(2)] He has worked for this contractor for seven years.[(3)] Applicant completed a security clearance application (SF 86) in June 2003.[(4)]

Applicant was born in the Philippines in 1968.[(5)] He immigrated to the United States with his family around 1974, and along with his family members became a U.S. citizen in 1978.[(6)] He graduated from high school with honors.[(7)] From August 1987 until his graduation in December 1991, Applicant attended a U.S. university, majoring in engineering.[(8)]

In April 1988 at the age of 19 and while a college student, the police stopped Applicant as he attempted to drive his car from a party.[(9)] Although he passed the field sobriety test, the breathalyzer test registered an alcohol level above the legal limit.[(10)] The police arrested and charged him with Driving While Intoxicated (DWI).[(11)] The court found him guilty of the offense and sentenced him to 10 days in jail (suspended), fined him $250.00, suspended his driver's license for six months, and referred him to an alcohol safety program.[(12)]

In February or March 1989, the resident advisor on Applicant's dorm floor came to his room when his friends were visiting.[(13)] The resident advisor found alcohol in his room, which resulted in a disciplinary action by the school against him and his roommate because the alcohol was found in their room and they were under age.[(14)]Applicant never admitted to possession of alcohol.[(15)] In April 1989, Applicant appeared before a university disciplinary committee to answer these charges.[(16)] The committee found him guilty of misconduct and sanctioned him by placing him on one semester of probation.[(17)]

In November 1989, Applicant received a reckless driving ticket.[(18)] He plead not guilty at his traffic hearing on January [(20)]

26, 1990. The court reduced the charge to speeding and fined him $57

plus $20 court costs.[21] In January 1991, he received a ticket for failure to stop for a school bus.[22] He plead not guilty at his April 1991 hearing.[23] The court found him guilty and fined him $100 plus costs of $26.[24] On appeal, the appellate court reduced the fine to $50.[25]

In September 1991, a grand jury issued a criminal indictment against Applicant, charging him with possession with intent to distribute and distribution of cocaine, a class C felony.[26] He plead not guilty initially, then upon the advice of counsel, changed his plea to guilty in January 1992.[27] The court accepted his plea and found him guilty.[28] On April 3, 1992, following review of the presentence report dated March 2, 1992,[29] the court sentenced him to six to twelve months in jail (a halfway house)/work release program, fined him $10,000.00, placed him on three years of probation, and directed him to attend substance abuse treatment on a out-patient basis.[30] Applicant complied with the terms of his sentence, including serving his six to twelve month sentence at a halfway house and in a work release program[31] His criminal record shows no additional felony criminal convictions.[32]

In the summer of 1991, Applicant worked for a company part-time.[33] He resumed his employment with this company upon graduation in December 1991, and continued working for this company as part of his work release program. In 1998, he sent a sexually explicit e-mail to his girlfriend at her job.[34] The IT administrator at his girlfriend's company intercepted the e-mail, then notified his company.[35] He wrote an immediate apology as requested by his supervisor.[36] A short time later, he met with his supervisor and a Human Resources representative to again discuss his conduct.[37] At this time, the company told him he could resign or be fired.[38] The Human Resources person advised him that if he resigned, there would be no record of this incident in his personnel folder.[39] He resigned.

At this meeting, Applicant questioned his employer about the need to resign.[40] He pointed out that a few months earlier, the company had reprimanded a co-worker who had been regularly observed viewing pornography sites on his office computer.[41] His boss responded that it was out of his hands as managers above him had made the decision.[42] Applicant was told that the IT person at his girlfriend's company "had been offended" by the e-mail.[43] His credible hearing testimony on this event indicates that he does not know why he was requested to resign.[44] He began his employment with his present employer about a month later.[45]

Applicant completed a Security Clearance Application on May 23, 2003.[46] Question 20 on Applicant's security application asked if the following has happened to him in the last ten years: 1) Fired from job; 2) Quit a job after being told you'd be fired; 3) Left a job by mutual agreement following allegations of misconduct; 4) Left a job by mutual agreement following allegations of unsatisfactory performance; and 5) Left a job for other reasons under unfavorable circumstances.[47] He responded no.[48] During the initial questioning by an investigator, he again responded no.[49] When confronted by the investigator with information that his previous employer had requested him to resign or be fired, he acknowledged that this was so.[50] He proceeded to provide the investigator with the above outlined details [51]

about his departure from his previous job in a written statement. In this written statement, he stated that during the interview and while completing the questionnaire, he struggled internally with the question and his response.[(52)] He also never wrote that he had been asked to resign because of misuse of his computers, but acknowledged in his statement that he had been asked this question by the investigator.[(53)]

POLICIES

Enclosure 2 of the Directive sets forth adjudication guidelines which must be considered in the evaluation of security suitability. An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the adjudicative process provision in Paragraph E2.2., Enclosure 2 of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Included in the guidelines are disqualifying conditions and mitigating conditions applicable to each specific guideline. In addition, each security clearance decision must be based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically, these are: (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. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.[(54)] The government has the burden of proving controverted facts.[(55)] The burden of proof is something less than a preponderance of the evidence.[(56)] Once the government has met its burden, the burden shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.[(57)] Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[(58)]

No one has a right to a security clearance[(59)] and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."[(60)] Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.[(61)] Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." The decision to deny an individual a security clearance is not necessarily a determination as to the allegiance, loyalty, and patriotism of

an applicant.[(62)] It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

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:

Personal Conduct - Guideline E: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulation could indicate that the person may not properly safeguard classified information.

Criminal Conduct - Guideline J: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

CONCLUSIONS

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

The government has established its case for allegation 1.a under Guideline E. Personal Conduct Disqualifying Condition (PCDC) E2.A5.1.2.2. (*The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire...*) applies. When Applicant completed his security application, he knew that he had resigned his prior position at the request of his former employer. He, however, answered "no" to Question 20, which inquired if he had ever been asked to resign from a job.

I have considered the Personal Conduct Mitigating Conditions (PCMC) and find that none apply. When he answered "no" to Question 20, Applicant knowingly failed to tell the truth. He admitted that he struggled internally with how to answer this question because he knew he had resigned from his prior position at the specific request of his former employer. This admission supports a finding that he knew and understood his negative answer was false. He testified that the Human Resources representative told him that his official personnel folder would reflect only that he had resigned, not that he resigned under pressure, and thus, future employment would not be impacted. For this reason, he answered no to Question 20. While his understanding about the content of his personnel folder and its impact on his future employment is reasonable, it cannot be the basis for his decision to answer "no". I conclude that Applicant has not

mitigated and overcome the government's case under Guideline E as to allegation 1.a.

The government has not established its case for allegation 1.b under Guideline E. For PCDC E2.A5.1.2.3. (*Deliberately providing false or misleading information concerning relevant and material matters to an investigator...*) to apply, the government must establish that Applicant's omission, concealment or falsification in regards to his negative response to whether he had been accused of misuse of any information technology systems, was a relevant and material fact and was deliberate.[(63)] The investigator asked Applicant if he had ever been accused of misuse of a computer system. This question can be interpreted a number of ways, including misuse of major company operating systems for illegal purposes or personal gain, or simply sending a personal greeting e-mail to anyone outside of the company or its customers. Most companies have developed policies regarding what constitutes misuse of systems and equipment; yet, the record contains no evidence of these policies or the appropriate penalty for different types of misuse. Likewise, the record contains no evidence that Applicant was discharged for misuse of a company computer system. The record reflects that Applicant was discharged for sending a sexually explicit e-mail, but does not indicate if the discharge was for misuse of the company e-mail or computer systems or violation of company policy on sending e-mail possibly considered as pornography.

It is clear from both the written documentation and Applicant's credible testimony that he does not understand why the e-mail sent to his girlfriend led to his forced resignation. He is perplexed about how he found himself in this situation because a co-worker, who had consistently viewed pornography on his computer, received a reprimand, while his former employer demanded his resignation, or face being fired, for what appeared to be similar conduct. His former employer's Human Resources representative told him that the IT administrator at his girlfriend's employment, the unintended recipient of his sexually explicit e-mail, had been offended by the e-mail, a statement which fails to clarify the reason he had to resign. The Human Resources representative did not tell him he was being terminated because of misuse of computer systems, nor did she explain the reasons why his conduct required termination instead of a reprimand. [(64)]

The government has assumed that Applicant was terminated from his previous job because of misuse of company computer systems without providing documentation which supports its assumption. Applicant may have been terminated for misuse of the company's computer systems or e-mail, or he may have been terminated for violation of company policy. Because he is unsure as to the reasons for his termination, the government has not proven that Applicant deliberately falsified his answer to this question of the investigator.

The government has established its case under Guideline J as to allegations 2.b and 2.f. Criminal Conduct Disqualifying Condition (CCDC) E2.A10.1.2.1. (*Allegation or admission of criminal misconduct, regardless of whether the person was formally charged*) and CCDC E2.A10.1.2.2. (*A single serious crime or multiple lesser offenses*) apply. Between 1988 and 1991, Applicant was arrested for DWI, a criminal offense, and for selling cocaine, a felony.[(65)] The courts convicted him on these charges. While he served no jail time on the DWI, he spent one year in a work release program for his drug conviction. His conduct clearly falls under the disqualifying conditions of this guideline.

I considered the Criminal Conduct Mitigating Conditions (CCMC) and concluded that CCMC E2.A10.1.3.1. (*The criminal behavior was not recent*); and CCMC E2.A10.1.3.6. (*There is clear evidence of successful rehabilitation*) apply. Applicant's DWI occurred in 1988, over 17 years ago. Since that arrest, he has not been arrested again for DWI. While more serious, his felony conviction for selling drugs is now 13 years old. He complied with all the terms of his court sentence and has remained out of trouble. He has maintained steady employment for the last 13 years, has a good financial record, and has earned the praised of his current supervisor for his work relationships and skills. He has changed his youthful behavior. I conclude that the Applicant has successfully mitigated and overcome the government's case under Guideline J as to Allegations 2.b and 2.f.

While Applicant has admitted to allegations 2.d, a speeding ticket, and 2.e,[(66)] a failure to yield right of way ticket, his admission is not enough to establish criminal misconduct under Guideline J.[(67)] Under the relevant state law, motor vehicle violations, such as these, are not criminal conduct, but

rather violations of the public order governed by the motor vehicle laws of the state.[(68)] The government has not established is case in regards to these allegations.[(69)]

Applicant also admitted to allegation 2.c, which alleges that he appeared before a disciplinary committee and was found guilty of possessing alcohol under age.[(70)] He credibly testified that this school discipline concerned a charge for having alcohol in his room, a violation of the University's internal rules because he was not 21. He has never admitted to possessing alcohol, only that it was found in his room. Under its regulations, the University convened an administrative disciplinary committee to review and consider the charge.[(71)] The disciplinary committee found him guilty of a violation of the University rules, and placed him on probation for one semester, a penalty it had authority to impose under its regulations, not state laws. Because Applicant admitted only to the results of the disciplinary hearing, the remaining evidence of record is insufficient to show he possessed alcohol when his friends were in the room. Thus, the government has not established that alcohol in his room constitutes a crime under state law.[(72)]

As Applicant did not admit to allegation 2.a, the government bears the burden of establishing that Applicant's failure to truthfully answer Question 20 on the security clearance application constitutes criminal conduct. Section 1001 of Title 18, United States Code makes it a crime punishable by a fine, imprisonment, or both to knowingly and willfully make a false statement on a writing, in this case the SF-86. I have concluded that Applicant deliberately falsified his answer to Question 20; thus, the government has established its case under Guideline J. Applicant has not overcome the government's case.

Finally, I have considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. I am persuaded by the totality of the evidence in this case, that Applicant has shown a significant change in his behavior since a college student. He has learned from the problems caused by his inappropriate decision making and has understood what he could lose should his conduct continue. He has assumed responsibility for his actions. I conclude that the Applicant has successfully mitigated and overcome the government's case as to his past

criminal conduct. Applicant's decision to falsely answer question 20 is not the result of youthful misguidance. Rather, he knowingly provided an incorrect answer just two years ago. I find that he has not overcome the government's case as related to his false statements. Accordingly, for the reasons stated, I find that it is not clearly consistent with the national interest to grant a security clearance to Applicant.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: For Applicant

Paragraph 2, Guideline J (Criminal Conduct): AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: For Applicant

Subparagraph 2.d: For Applicant

Subparagraph 2.e: For Applicant

Subparagraph 2.f: For Applicant

DECISION

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

Mary E. Henry

Administrative Judge

1. Applicant's Answer to the SOR, dated April 21, 2005, at 2-7.

2. Government Exhibit 1 (Security Clearance Application, dated June 3, 2003) at 3.

3. *Id*.

4. *Id*.

5. *Id*.

6. Government Exhibit 4 (1992 Presentencing Report, dated March 2,1992) at 8; Government Exhibit 1, *supra* note 2, at 1.

7. Government Exhibit 4, *supra* note 6, at 9.

8. *Id*. at 8; Government Exhibit 1, *supra* note 2, at 3.

9. Tr. at 21.

10. *Id*.

11. Government Exhibit 1, *supra* note 2, at 8; Government Exhibit 4, *supra* note 6, at 5.

12. *Id*.

13. Tr. at 23; Applicant's Answer to SOR at 5.

14. *Id*.

15. *Id*.

16. Government Exhibit 4, *supra* note 6, at 6.

17. *Id*. The record contains no evidence as to the source of this committee's authority to charge and discipline the Applicant, although he testified that he believed his conduct to be a violation of school rules. Tr. at 24.

18.

19. Applicant's Response to SOR at p. 5.

20. *Id*.

21. *Id*.

22. *Id*. at 6.

23. *Id*.

24. *Id*.

25. *Id*.

26. *Id*.; Government Exhibit 1, *supra* note 2, at 6; Government Exhibit 5 (U.S. District Court Judgment, dated April 3, 1992) at 1.

27. Government Exhibit 4, *supra* note 6, at 2.

28. *Id*.

29. *Id*.

30. Government Exhibit 5, *supra* note, 25 at 2-3; Tr. at 25-26; Government Exhibit 2 (Applicant's statement, dated November 22, 2003) at 3.

31. Tr. at 25-26; Government Exhibit 2, *supra* note 29, at 3.

32. Government Exhibit 3 (United States Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division Report, dated June 16, 2003).

33. Government Exhibit 4, *supra* note 6, at 10; Tr. at 30-31.

34. Government Exhibit 2, *supra* note 29, at 5-7.

35. Tr. at 15.

36. Government Exhibit 2, *supra* note 29, at 6.

37. *Id*.

38. *Id*. at 6-7.

39. *Id*. at 7; Applicant's Answer to SOR, at 2; Tr. at 16.

40. Applicant's Answer to SOR, at 2.

41. *Id*.; Tr. at 19.

42. Applicant's Answer to SOR, at 2.

43. Government's Exhibit 2, *supra* note 29, at 6.

44. Tr. at 16.

45. Government Exhibit 1, *supra* note 2, at 1.

46. *Id*.

47. *Id*. at 7.

48. *Id*.

49. Government Exhibit 2, *supra* note 29, at 6.

50. *Id*.

51. *Id*. at 6-7.

52. *Id*. at 6.

53. *Id*.

54. ISCR Case No. 96-0277 (July 11, 1997) at 2.

55. ISCR Case No. 97-0016 (App. Bd., December 31, 1997) at 3; Directive, Enclosure 3, ¶ E3.1.14.

56. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

57. ISCR Case No. 94-1075 (App. Bd., August 10, 1995) at 3-4; Directive, Enclosure 3, ¶ E3.1.15.

58. ISCR Case No. 93-1390 (App. Bd. Decision and Reversal Order, January 27, 1995) at 7-8; Directive, Enclosure 3, ¶ E3.1.15.

59. *Egan*, 484 U.S. at 531.

60. *Id*.

61. *Id*.; Directive, Enclosure 2, ¶ E2.2.2.

62. Executive Order No. 10865 § 7.

63. Applicant admitted to this allegation (subparagraph 1.b) with explanation. The effect of his explanation is a denial of the allegation.

64. Misuse of a computer system is one explanation for Applicant's requested resignation, but not the only.

65. Because Applicant's sentence for his felony conviction did not exceed one year, I will not consider his conviction under 10 U.S.C. § 986.

66. Applicant admitted to these allegation with explanation. The effect of his explanation is a denial of the allegation.

67. The security clearance application does not require that Applicant list traffic offenses with a fine of $150 or less which are over seven years old. *See* Government Exhibit 1, *supra* note 2, at 9. His traffic offenses occurred in 1989 and 1991. He received fines of less than $150 in both. *See* Government Exhibit 4, *supra* note 6, at 5-6.

68. [State] Code Ann. § 18.2-8.

69. The listing of the speeding ticket and the failure to yield right of way as previous criminal misconduct in the 1992 Presentencing report does not make the conduct criminal under state law. *See* [State] Code Ann. § 18.2-8; Government Exhibit 4, *supra* note 6, at 5-6.

70. Applicant admitted to this allegation with explanation. The effect of his explanation is a denial of the allegation.

71. State law prohibits the possession of alcohol under the age of 21. *See generally* [State] Code Ann. § 4.1-305. This law does not give the University authority to prosecute Applicant for this offense. The University derived its authority to convene a disciplinary committee from its internal regulations governing student conduct. The University disciplined Applicant on its finding that he possessed alcohol in his room when he was under age, which violated its rules.

72. The listing of the University disciplinary hearing as other criminal misconduct in the 1992 Presentencing report does not make the disciplinary proceedings criminal conduct under state law. *See generally* [State] Code Ann. § 18.2-8; Government Exhibit 4, *supra* note 6, at 5-6.