

DATE: September 23, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-06552

## **DECISION OF ADMINISTRATIVE JUDGE**

**CHARLES D. ABLARD**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Eric Borgstrom, Esq., Department Counsel

#### **FOR APPLICANT**

Richard M. Schall, Esq.

### **SYNOPSIS**

Applicant failed to mitigate personal conduct allegation for failure to report on his SF 86 a 1995 arrest for drug use and possession and an alcohol/drug related driving offense. Applicant's security interviewer had provided an opportunity to him to offer any new information to correct the SF 86 and to change the draft statement. He declined to do so. Applicant's signed sworn statement admitted that omission was because of a fear that to do so would be prejudicial to obtaining a security clearance. so. Clearance is denied.

### **STATEMENT OF CASE**

On May 6, 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 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 May 18, 2005, Applicant responded to the SOR allegations, and requested a hearing. The matter was assigned to me on June 20, 2005. A notice of hearing was issued on July 18, 2005, for a hearing on August 4, 2005, and held that day. Applicant acknowledged that he had received two weeks oral notice. The government offered four exhibits into evidence and Applicant offered one. All were accepted. Four witnesses testified for Applicant. The transcript was received on August 17, 2005. The record was left open for submission of additional material until September 19, 2005 and one additional document was submitted within that time and accepted in evidence.

### **FINDINGS OF FACT**

Applicant denied all SOR allegations. After a complete review of the record, I make the following findings of fact:

Applicant is a 31-year-old employee of a defense contractor performing computer services since June, 2003, when he filed a security clearance application (SF 86). He also works in an office supply store managing logistics as a second job.

In 1995 in a mid-western state where Applicant was raised and lived with his mother, who was divorced, he was charged with two drug-related charges concerning use and possession of marijuana, and two traffic-related offences concerning driving under the influence of liquor/drugs, and lane straddling. He pled guilty to a lesser charge of reckless driving and was fined \$322.00. The two drug charges were dismissed.

After the 1995 arrest, Applicant realized he was associating with the wrong crowd and needed to change his entire environment. He contacted his father, told him of his problems, and asked if he could move in with him on the East coast. He did so and has changed his life-style, does not use drugs, and drinks moderately. He is engaged to be married to a young woman he met five years ago at his private employment who is in college studying psychological counseling.

Applicant did not list the charges in answer to Question 24 on his SF 86 relating to his police record for alcohol/drug offenses as he was required to do. During his interview with the Defense Security Service investigator on March 17, 2004, he signed a statement saying he did not disclose the information on the SF 86 or to the investigator until he was confronted about it because he was afraid he would not be granted a security clearance (Exh. 4). The investigator had given him an opportunity at the beginning of the interview to voluntarily offer any additional information that he might have forgotten. Applicant declined to do so.

Applicant is well regarded by his supervisor at his private employment (TR. 41-44), and has good ratings for work and attendance at his defense contractor employer (Exh. A and B). He is now in a stable environment living with another young man, engaged to be married, and has a solid relationship with his father (TR. 22-39).

### **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 alcohol/drug offenses at Question 24 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.) Applicant's failure to report the offenses was deliberate by his own statement that he feared if he did so it might jeopardize his ability to obtain a security clearance.

Applicant raised certain issues at the hearing relating to his statement to the investigator saying that he did not intend to deceive and that he did not tell the investigator of his intent to deceive to obtain a clearance. However, he did admit that he read the statement, albeit hurriedly, and that he signed it with the statement included making no effort to get it changed. No mitigating conditions apply.

Guideline J (Criminal Conduct) is alleged both as a violation of 18 U.S.C. §1001 by failing to answer question 24 (SOR ¶2.a) and as to the conduct itself (SOR ¶2.b). The allegations could be mitigated if the criminal behavior was not recent (E2.A10.1.3.1), the crime was an isolated incident (E2.A10.1.3.2.), or there is clear evidence of successful rehabilitation (E2.A10.1.3.6.). I conclude that 2 b is mitigated for all three conditions. However, I find that ¶2.a is not mitigated because of the existence of the signed statement admitting that the omission was deliberate and for the purpose of deceiving.

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 promising future with his employer and his enterprise in holding two jobs is commendable. He took his life in hand, made changes, and self-corrected the direction he was heading. He has built a solid relationship with his fiancé, and his father has provided pivotal guidance for him. The case is unfortunate since, but for the SF 86 omission, the government likely would not have pressed the case since the underlying offense was ten years old. However, I must consider the fact that the evidence includes a sworn statement admitting a serious deceit in not only failing to report the 1995 arrest but doing so for the purpose of deceiving. Applicant read the statement before signing it and had an opportunity to request changes if it was inaccurate. He did not do so.

After considering all the evidence in its totality, including the whole person of Applicant, I conclude it is premature to grant him a security clearance.

### **FORMAL FINDINGS**

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

Paragraph 1. Guideline E: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: For Applicant

### **DECISION**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national

interest to grant or renew a security clearance for Applicant. Clearance is denied.

Charles D. Ablard

Administrative Judge