

DATE: March 30, 2007

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 04-07387

DECISION OF ADMINISTRATIVE JUDGE

SHARI DAM

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Michelle L. Perry, Esq.

SYNOPSIS

Applicant is a 39-year-old associate software engineer who works for a federal contractor. In 1997, he was convicted of contributing to the delinquency of a minor. When he completed a February 2002 security clearance application, he disclosed the conviction. In an August 2003 application, he again disclosed the conviction and provided some of the facts surrounding it. When interviewed in February 2004 regarding the matter, he was not forthright in discussing all of the details. He failed to mitigate the security concerns raised by personal and criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

On May 2, 2005, the Defense Office of Hearings and Appeals (DOHA) under Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons under Guidelines E (Personal Conduct) and J (Criminal Conduct) why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant a security clearance to Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted.

Applicant answered the SOR in writing on May 20, 2005, and elected to have a hearing before an administrative judge. The case was initially assigned to another administrative judge and reassigned to me on January 18, 2007. DOHA issued a Notice of Hearing on February 16, 2007, setting the case for March 2, 2007. At the hearing, Department Counsel introduced Government Exhibits (GX) one through five into evidence without objections and called one witness. Applicant testified in his case and called two witnesses. He introduced Applicant Exhibits (AX) A and B into evidence without objections. DOHA received the hearing transcript (Tr.) on March 12, 2007.

FINDINGS OF FACT

Based on the entire record, I make the following additional findings of fact:

Applicant is a single 39-year-old associate software engineer for a federal contractor. He has worked for his employer since August 2003 and has had an interim security clearance giving him access to classified network systems. From April 1988 until September 1993, he was on active duty in the U.S. Air Force as a Senior Airman (E4). He was on inactive duty from September 1993 until November 1995, and returned to active status as a reservist in February 2002. Currently he is on inactive duty because of his employment (Tr. 99). He received an honorable discharge at the time of his separation from the armed forces (GX 2 at 7). Prior to his current position, he has worked in private industry in graphic arts. He received a secret clearance in 1989 and reapplied for one in February 2002 when he entered the reserves (GX 2 at 9; Tr. 61). In August 2003, he submitted another security clearance application (SCA) for purposes of obtaining a top secret clearance.

On November 1, 1997, Applicant was arrested and subsequently convicted for Contributing to Delinquency of Minor. He was fined \$350 (*Id.* at 6). The night before the arrest, he attended a church function. On his way home around 11:45 p.m., two teenagers from his neighborhood flagged him down. He stopped his car and invited them into the car to get out of the rain. They drove to a local supermarket where Applicant purchased cigarettes for them. After leaving the store, Applicant drove to a city park in the neighborhood where he parked his car. Within a short period of minutes a patrol car pulled up behind his car. The teenagers jumped out and hid on the passenger side of the automobile. The policeman asked Applicant what they were doing and Applicant told him they were friends and talking. The policeman took the children home, after which one of the children told the policeman about the cigarettes. Based on the complaint of a parent, the policeman returned to Applicant's house in the early morning and arrested him for contributing to the delinquency of a minor. Applicant was convicted of two counts of Contributing to Delinquency of a Minor and fined \$100 on each count. He was placed on three to six months probation (Tr. 70). Applicant believed that the conviction was based on a curfew violation and did not know that it related to purchasing cigarettes for the minors until sometime later (GX 4 at 4; Tr. 72).

On November 25, 1997, Applicant met with a friend of his family who was the Director of Student Services at a local university for "counseling therapy." (GX 5) The Director noted that they would meet on a regular basis to discuss some of Applicant's issues (*Id.*). According to Applicant,

he did not consider the meetings with the Director related to his mental health issues, and consequently did not regard them as "counseling" in a psychological sense (Tr. 64, 102-103). He felt he was meeting with a friend who advised students (Tr. 66, 116). They met about three times (Tr. 113).⁽¹⁾

In February 2002, Applicant completed a SCA. In response to **Question 26: Your Police Record - Other Offenses**, he listed the November 1, 1997 Contribute to a Minor Offense and a \$350 fine (GX 1 at 6). In response to **Question 19: Your Medical Record**, *In the last 7 years, have you consulted a mental health professional (psychiatrist, psychologist, counselor, etc.) or have you consulted with another health care provider about a mental health related condition?*, he answered "no" and did not disclose his meetings with the Director of Student Services (*Id.* at 5). He was never interviewed by the government after completing this SCA (Tr. 62).

In August 2003, Applicant completed another SCA for purposes of obtaining a top secret clearance (Tr. 20). Under **Question 26: Your Police Record - Other Offenses**, he listed the November 1997 offense. In the Remarks Section, he reiterated some of the facts of what happened, but did not mention anything about driving the teenagers to purchase cigarettes and then parking next to the local park where the police pulled up behind his car (GX 2 at 8). At the time he completed it, he thought the conviction related to a curfew violation and did not know it related to purchasing cigarettes for the teen-agers (Tr. 71). In response to **Question 19: Your Medical Record**, he again answered "no." (*Id.* at 7)

The government investigator who interviewed Applicant in February 2004 and in March 2004 testified. He currently works as a special agent for the U.S. Navy. From September 2000 until February 2005, he was a special agent with the Defense Security Service. In that capacity, he conducted more than 2000 background investigations of individuals seeking security clearances (Tr. 16-18). The purpose of the initial interview was to obtain more information in response to Applicant's request for access to top secret information (Tr. 20).

In February 2004, the investigator interviewed Applicant about several items contained in the August 2003 SCA,

including the 1997 arrest (Tr. 38). During that interview, Applicant told the investigator that after the teenagers got into his car, he parked in front of the home of one of the minor's in the neighborhood where he lived (Tr. 20). Applicant did not mention anything about driving the minors anywhere (Tr. 23). The following day, the investigator obtained the police report. He learned that Applicant drove the teenagers for cigarettes, purchased them, and then drove to a nearby park (Tr. 22). The investigator considered those additional facts material in view of Applicant's specific statement that he did he did not drive the teenagers anywhere (Tr. 21-23, 39).

In March 2004, the investigator interviewed Applicant about the factual discrepancies between the police report and Applicant's answers during the previous interview. Applicant admitted that he picked up the teenagers, drove them to purchase cigarettes, and then parked in a park. The investigator stated that Applicant admitted he had not been truthful in the February 2004 interview because he had not been truthful during the 2002 secret clearance investigation and he was concerned that disclosing the additional facts would create a discrepancy in the investigation (Tr. 25, 49-50). The investigator asked Applicant for a sworn statement about the inconsistent statements. Applicant asked the investigator to write one for his review (Tr 27). The statement begins with the words "I was not completely forthcoming in my 23 Feb 04 interview with Agent Brewer in regards to this Nov 97 incident" (GX 4 at 1). As the investigator continued to summarize the interview about the discrepancies in Applicant's story, Applicant read it and crossed out certain sentences and phrases. The investigator reported that Applicant crossed out information pertaining to the reason Applicant had not made full disclosure during the prior interview because it "would just look bad for him." (Tr. 29)

Applicant denied that he told the investigator during that March interview that he purposely withheld information or had been untruthful during the 2002 investigative process (Tr. 75-76). He asserted that he could not have said he withheld information during the process because he was never interviewed after completing the 2002 application and the SCA did not request an explanation of the offense he listed (Tr. 62, 84; GX 1 at 7).

Applicant admitted he did not disclose the facts about the cigarettes or driving to the store during the February 2004 interview because he did not think the information was material or related to his arrest (Tr. 76-77). He did not list all of the details that he perceived "to be irrelevant." (Tr. 84) He may have told the investigator in March 2004 that he was crossing out some of the information in the draft statement because the facts, as recorded by the investigator, were not accurate and would make him look bad (Tr. 81-83). He denied that he told the investigator that he wanted to hide information (Tr. 83).

During his case in chief, Applicant's counsel asked him: "Is there any information that you purposely left out with regard to your arrest in that narrative statement that you prepared following question 26 in the 2003 application?" Applicant responded and said, "I'm sorry, did you say any relevant information?" (Tr. 72) He denied that he purposely withheld information that he felt was important during the February 2004 interview (Tr. 73-75).

Applicant believes he has matured since the 1997 incident. He is very remorseful about the situation and knows he made a grave mistake (Tr. 94-95). It has been a traumatic event in his life, one that he thinks about every day (Tr. 96). Other than this situation, he has never been charged with any criminal misconduct (Tr. 94-95). There have not been any allegations that he has breached his security clearance obligations while holding a clearance (Tr. 72).

Two character witnesses testified for Applicant. Both of them have known him a long time and believe he is a very honest and trustworthy person. In February 2005, he received a commendation from his employer for outstanding work (AX A).

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 . . . 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 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). Each security clearance decision "must be a fair and impartial common sense determination based upon consideration of all relevant and material information and the pertinent criteria and adjudication policy." Directive ¶ 6.3. 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 (App. Bd. Dec. 19, 2002).

The Adjudicative Guidelines (AG) set forth potentially 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

Upon consideration of all facts in evidence and application of the pertinent legal standards. I conclude the following with respect to the allegations set forth in the SOR:

Guideline E: Personal Conduct

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. E2.A5.1.1.

The Government alleged in Paragraph 1 that Applicant falsified material facts in six separate instances during the security clearance process, which constituted a disqualification under Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.2 (*The deliberate omission, concealment, or falsification 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*), and under PC DC E2.A5.1.2.3 (*Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination*). Applicant denied those allegations

When a falsification allegation is controverted or denied, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time the omission occurred. ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

Based on the evidence, the Government established a disqualification for SOR ¶¶ 1.b, 1.c and 1.d. It did not establish a disqualification for SOR ¶¶ 1.a, 1.e and 1.f. The analysis is as follows:

SOR ¶ 1.a alleges that Applicant falsified his security clearance investigation in 2002 because he failed to disclose all of the facts surrounding his 1997 arrest. In support of its position, the Government called an investigator who stated Applicant admitted lying during the 2002 investigative process. However, Applicant denied that admission and claimed he could not have made it because the only information he provided under Question 26 was the nature of the offense, as he was not required to give a further explanation in the SCA or during a subsequent interview. Based on my review of the SCA and the absence of any document referencing a subsequent interview, I find his testimony more credible than the investigator's on this issue.

SOR ¶ 1.b alleges that Applicant falsified his August 2003 application because he deliberately failed to disclose all of the facts surrounding the arrest in his written remarks addressing the offense. Applicant's written explanation of the facts surrounding the offense, which leaves out the facts that he picked up the minors, drove them for cigarettes and then parked his car, paints a very different picture of what occurred that evening and essentially minimized the incident. Based on his limited written explanation, regardless of what conduct he considered being the underlying basis for the charges, and his tendency to equivocate throughout this investigative process, I find the Government established a disqualification under PC DC E2.A.5.1.2.2.

SOR ¶ 1.c alleges that during a February 2004 interview, Applicant deliberately failed to disclose material facts about the 1997 criminal arrest. SOR ¶ 1.d alleges that during a follow-up interview in March, Applicant stated to the investigator that he did not want an explanation of why he failed to disclose the truth about the incident in the report. After carefully listening to the testimony of the investigator and Applicant, and reviewing the transcript, I find the investigator more credible than the Applicant on these issues. The investigator was straightforward in his recitation of the investigation. In contrast, Applicant attempted to delineate between relevant and irrelevant facts throughout. Instead of simply disclosing the facts as they occurred on the night of the arrest, he persisted in analyzing them in terms of what he construed to be important. That quibbling over the details leads me to conclude that he intentionally attempted to conceal information from the Government and did not want a truthful explanation in the statement, which is sufficient to establish a disqualification under PC DC E2A5.1.2.3 for these two allegations.

SOR ¶¶ 1.e and 1.f allege that Applicant failed to disclose in the February 2002 and August 2003 SCAs that he consulted with a mental health professional in 1997. At the time he completed those applications, he did not believe his three visits to the Director of Students, who was also a friend of the family, constituted a consultation with mental health professional as contemplated by Question 19. Given the number of visits and the dual role of the Director, Applicant's explanation is credible. These allegations are concluded in his favor.

After the Government raised a security concern, the burden shifted to Applicant to mitigate or rebut the allegations upon which a disqualification is established. Based on my review of all of the mitigating conditions under this guideline, I conclude none apply to ¶¶ 1.b, 1.c and 1.d.

Guideline J: Criminal Conduct

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. E2.A10.1.1.

Based on the evidence, the Government established a disqualification under Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2 (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged*). Applicant intentionally falsified material facts, as alleged in SOR ¶¶ 1.b, 1.c and 1.d, constituting a violation of Title 18, United States Code, Section 1001, a felony. After reviewing all of the mitigating conditions, I conclude none of them apply to these allegations.

Whole Person Analysis

In addition to evaluating the disqualifying and mitigating conditions under each guideline, the adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at a balanced decision. The essence of scrutinizing all appropriate variables in a case is referred to as the "whole person" analysis. Directive ¶ E2.2. In evaluating the conduct of the applicant, an administrative judge should also consider: (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.

I considered the totality of the evidence in view of the "whole person" concept, including Applicant's age, his successful performance in his current position, and his years of service in the U.S. Air Force. I took into account the fact that he has not been involved in any criminal misconduct since 1997, or had any allegations raised concerning security clearance violations while holding a clearance. I also believe he will not repeat the behavior underlying the issues raised in the SOR, as a result of his current understanding of the security clearance application process and criminal justice system. I carefully observed his demeanor while testifying and his remorse and guilt over the criminal charge. However, what is of concern is the equivocation he exhibited throughout this investigative process and proceeding, including his attempt to draw a distinction between "any" information versus "relevant" information when questioned by his lawyer about his intention to mislead the government. Instead of candidly disclosing all of the details (almost 10 years later), he continues to quibble about them, possibly out of a sense of embarrassment. Clearly, he has not come to terms with his

past conduct and it interferes with his current judgment and candor. Although his work history is impressive and his demeanor is sincere, he did not mitigate the security concerns raised by personal criminal and criminal conduct. Accordingly, Guidelines E and J are concluded against him.

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 as follows:

Paragraph 1: Guideline E (Personal Conduct) AGAINST APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: For Applicant

Subparagraph 1.f: For Applicant

Paragraph 2: Guideline J (Criminal Conduct) AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

DECISION

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

Shari Dam

Administrative Judge

1. There is no evidence in the record indicating the purpose for which the 1997 letter was written, although it could be inferred that it related to the pending criminal charges, given its proximity to the arrest.