DATE: November 30, 2006

In Re:

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

Applicant for Security Clearance

CR Case No. 04-11034

DECISION OF ADMINISTRATIVE JUDGE

CHARLES D. ABLARD

APPEARANCES

FOR GOVERNMENT

Jason Perry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Through passage of time, Applicant mitigated. security concerns arising from criminal convictions for kidnaping and drugs in 1981 for which he received concurrent sentences of ten years probation and for three DUIs in 1985, 1991, and 1993. He also mitigated failure to report the last two DUIs on his SF 86 since he fully reported all other arrests, and the omission was not deliberate. He has been employed by the same company since 1981, married since 1985 with a family of five children. Clearance is granted.

STATEMENT OF CASE

On October 21, 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.

In a sworn written statement received November 25, 2005, Applicant responded to the SOR allegations in the SOR admitting all of the criminal conduct allegations. He elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the government's written case on June 13, 2006. A complete copy of the file of relevant material (FORM) was provided to the Applicant on August 1, 2006, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation by August 31, 2006. The case was assigned to me on September 25, 2006.

In the FORM the government moved to amend the SOR to add a new allegation under Guideline J alleging felony criminal conduct under 18 U.S. Code Section 1001.1. The motion also seeks to add SOR 2.a. under Guideline E relating to personal conduct for failure to list two arrests for DUI in 1991 and 1993 in response to Question 24 concerning

alcohol/drug offenses on his application for a security clearance (SF 86) filed December 9, 2003. Applicant submitted no additional information in response to the FORM and raised no objection to the motion to amend the SOR, although invited to do so. The motion to amend the SOR is granted.

FINDINGS OF FACT

Applicant is a 52-year-old employee of a major defense contractor who has worked as a plant service worker since April, 1981. After a complete and thorough review of the information in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant was arrested in December 1981 in connection with the kidnaping and murder of a woman who was taken from an apartment where Applicant was visiting. When the police came to investigate they found Applicant in a bar and discovered drugs in his car. At that time he used marijuana and occasionally cocaine, but he no longer uses drugs. He was charged with drug possession, kidnaping, and murder. The two men who came to the apartment where the girl was taken were convicted of murder and kidnaping. Applicant plead guilty to drug possession and kidnaping upon the advice of his lawyer and was sentenced to ten years probation on each charge to be served concurrently. He was neither tried nor incarcerated.

Applicant has been arrested three times for DUI over an eight year period. They were:

1. February 1985-DUI-found guilty and fined $777 with community service;

2. January 1991-DUI and no proof of insurance, nolle prossed when arresting officer twice did not appear;

3. June 1993-DUI and no proof of insurance, found guilty and fined $1,000.

The first DUI was reported at Question 21 Alcohol/drug offenses along with his 1981 arrests; the last two were not reported in response to any of the SF 86 questions.

Applicant still drinks beer but does not drink and drive. He has no record of alcohol-related incidents for the past 13 years. He was twice interviewed and gave statements in connection with the security investigation on December 22, 2004 and February 28, 2005 (Items 5 and 6). He candidly discussed all of the arrests and their outcomes. In the second statement he credibly denied any intent to deceive by omitting the information concerning the last two DUIs.

Applicant has been married for 21 years since November 1985 and has five children all in their 20's. One attends a state university.

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 that it is clearly consistent with the national interest to grant or continue the applicant's 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 legal precepts, factors, and conditions above, I conclude the following with respect to all allegations set forth in the SOR:

Applicant's arrests and convictions for criminal conduct raises concerns under Guideline J (E2.A10.1.1) involving a history or pattern of criminal activity creating doubt about a person's judgment, reliability and trustworthiness. Conditions that could raise a security concern and may be disqualifying include allegations or admissions of criminal conduct whether the person was formally charged (E2.A10.1.2.1.), or a single serious crime or multiple lesser offenses (E2.A10.1.2.2.).

The facts upon which the case is based are derived solely from Applicant's SF 86, his statements to the investigator, and the FBI report (Item 7) which concerned only the last two DUI's. Applicant has been a steady worker for the same company since a few months before his first arrest in 1981. He has been married since November 1985 and raised a family. His other DUIs occurred six and eight years thereafter. Since one of those was nolle prossed. The second and most recent resulted in a $1,000 fine. It is impossible to determine the circumstances of the offenses other than from his statements to investigators. In both cases, he admitted he was drinking. The first was not prosecuted because the arresting officer failed to appear. In the second, he had a lawyer who advised a nolo contendere plea resulting in the fine. The government did not charge him with alcohol-related offenses under Guideline G so I will not consider security concerns over use of alcohol.

The 1981 incident, arrest, plea, and conviction raise serious issues. However, it occurred a quarter of a century ago. Applicant's conduct since that time indicates no likelihood of recurrence. From the fact that he received only probation for two serious criminal pleas indicates that he had minimal involvement and is consistent with his statement indicating that his arrest was likely because of his presence at the place where the abduction occurred and not because of any active participation. The allegations concerning criminal conduct occurring in 1981 are mitigated by the passage of time in that they occurred over 25 years ago (E2.A10.1.3.1.). I conclude the same as to SOR 1.c., d., and e., the three DUI allegations, the most recent of which occurred 13 years ago and have not been repeated since. The same is true of the three arrests and two convictions in 1985, 1991 and 1993 since the most recent was 13 years ago.

Also alleged under Guideline E by the amendment to the SOR is Applicant's failure to acknowledge the last two DUIs at Question 24 of his SF 86. This omission 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.). Such conduct falls under E2.A5.1.2.2 regarding the deliberate omission of relevant and material facts from any personnel security questionnaire. Viewing the SF 86 in its totality, Applicant accurately reported both the 1981 arrests and convictions and the first DUI thus alerting the investigators to all of the offenses alleged. I conclude that the omission of the two most recent arrests was inadvertent and thus not deliberate as required by the guideline.

The amended allegation of a criminal violation under 18 U. S. C. 1001 has not been proven as the omission was not deliberate.

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. His record of arrest, conviction, and incarceration are uncontested. However, the facts surrounding the work and family history of Applicant as well as the distant dates of the arrests and convictions can be mitigated sufficient to grant a clearance.

After considering all the evidence in its totality and as an integrated whole to focus on the whole person of Applicant, I conclude that it is clearly consistent with the national interest to grant a security clearance to him.

FORMAL FINDINGS

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

Paragraph 1. Guideline J: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: For Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

DECISION

After full consideration of all the facts and documents 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.

Charles D. Ablard

Administrative Judge