

DATE: August 31, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-12680

DECISION OF ADMINISTRATIVE JUDGE

SHARI DAM

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 49 years old and has been employed as a program manager with a federal contractor since 1984. He has held a security clearance for the last ten years. When he filled out his security clearance application in 2002 to update his record, he did not disclose two 2001 criminal charges. He mitigated the security concerns raised by his personal conduct and criminal history. Clearance is granted.

STATEMENT OF THE CASE

On May 8, 2002, Applicant completed a security clearance application (SCA). On August 3, 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 a 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.

On August 24, 2005, Applicant filed his Answer and elected to have the case decided on the written record in lieu of a hearing. On July 28, 2006, Department Counsel prepared a File of Relevant Material (FORM), and provided Applicant with a complete copy on July 11, 2006. Applicant had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. Applicant submitted additional information on August 9, 2006, which I marked as Applicant Exhibit (AX) A (8 pages). Department Counsel had no objection to this exhibit. The case was assigned to me on August 16, 2006.

FINDINGS OF FACT

Based on the entire record, including Applicant's admissions in his Answer to the SOR, I make the following findings of

fact:

Applicant is 49 years old and has worked as a program manager for a federal contractor since January 1984. He has held a security clearance for 10 years without interruption.

In June 2001, Applicant was arrested and charged with (Count 1) Operating Under the Influence of Liquor (DUI), and (Count 2) Operating Negligently. He was acquitted of Count 1, DUI, found guilty of Count 2, driving a car negligently, and ordered to pay a \$325 fine. His driver's license was suspended for at least 90 days because he refused to take a Breathalyzer test. Prior to the incident he and his daughter attended a concert where he consumed three or four beers over a four-hour period.

One month later he was arrested and charged with Operating With a Suspended License. He paid the court costs and the matter was dismissed.⁽¹⁾ At the time of the arrest, he was driving his son's car to the repair shop when he was stopped because the car did not display a valid registration sticker. Applicant admitted he should not have been driving on a suspended license.

During this 2001 time frame he was going through a difficult period, as he recently was divorced and had his children living with him. He normally does not drink during the week, but may have a couple beers or a glass of wine on the weekend. Alcohol has not caused him any personal or work-related problems. He has not been intoxicated "in about 25 years." (Item 5 at 4). He told one of his co-workers about the June incident, but did not report it to his employer because he did not know he was required to do so. (*Id.* at 3)

In May 2002, Applicant completed a security clearance application (SCA) to update his record. In executing that form he certified that his answers were "true, complete, and correct" to the best of his knowledge and belief. In response to Question 24. Your Police Record - Alcohol/Drug Offenses: *Have you ever been charged with or convicted of any offenses(s) related to alcohol or drugs? For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607,* Applicant answered "No," and did not disclose the June 2001 charges.

In response to Question 26. Your Police Record - Other Offenses *In the last 7 years have you been arrested for, charged with, or convicted of any offense (s) not listed in modules 23, 22, 23, 24 or 25? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related) For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607.,* Applicant answered "No," and did not list the July 2001 arrest and charge for driving on a suspended license.

Applicant did not disclose the two charges because he did not take enough time while completing the SCA to fully understand the scope of the questions, which included an inquiry into all matters, including arrests, regardless of the outcome. After re-reading both questions twice during his interview with the government's investigator, he realized he should have disclosed the information. He denied he intentionally withheld information from the government. (AX A at 2) He fully appreciates the seriousness of the allegations and their potential impact on his security clearance, and admits his mistake. (*Id.* at 1; Item 5 at 2)

Two of Applicant's colleagues attest to his overall responsible character and trustworthiness, including the colleague to whom he reported the June 2001 incident. His March 2006 work evaluation documents his above average job performance in multiple categories. (AX A at 3-8)

POLICIES

Enclosure 2 of the Directive, *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, sets forth criteria which must be evaluated when determining security clearance eligibility. Within those adjudicative guidelines are factors to consider in denying or revoking an individual's request for access to classified information

(Disqualifying Conditions), and factors to consider in granting an individual's request for access to classified information (Mitigating Conditions). By recognizing that individual circumstances of each case are different, the guidelines provide substantive standards to assist an administrative judge in weighing the evidence in order to reach a fair, impartial and common sense decision.

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. Section E2.2. of Enclosure 2 of the Directive describes the essence of scrutinizing all appropriate variables in a case as the "whole person concept." In evaluating the disqualifying and mitigating conduct an administrative judge should 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.

Granting an applicant's clearance for access to classified information is based on a high degree of trust and confidence in the individual. Accordingly, decisions under the Directive must include consideration of not only the *actual* risk of disclosure of classified information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information. Directive, Enclosure 2, ¶ E2.2.2. The decision to deny an individual a security clearance is not necessarily a judgment about an applicant's loyalty. Executive Order 10865, § 7. Instead, it is a determination that an applicant has not met the strict guidelines established by the Department of Defense for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988). The Directive presumes a rational connection between past proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the corresponding burden of rebuttal shifts to the applicant to present evidence in refutation, extenuation, or mitigation sufficient to overcome the position of the government. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); Directive, Enclosure 3, ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his clearance." *Id.*

Based upon the allegations contained in the SOR and a consideration of the evidence as a whole, the following adjudicative guidelines are pertinent to an evaluation of the facts of this case:

Guideline E - Personal Conduct: A security concern may exist when 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.

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

The disqualifying and mitigating conditions, raising security concerns or mitigating security concerns applicable to this case, are discussed in the Conclusions section below.

CONCLUSIONS

After consideration of all evidence and the application of the appropriate legal standards, I conclude the following with respect to the allegations set forth in the SOR:

Guideline E: Personal Conduct

The Government alleged that Applicant falsified his SCA by failing to disclose an alcohol related offense and driving offense, which constituted a disqualification under Personal Conduct Disqualifying Condition (PC DC) 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 determines security clearance eligibility or trustworthiness, or award fiduciary responsibilities*). Although Applicant admitted he failed to disclose the information, he denied any intent to falsify his application.

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. *See* 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).

Applicant's explanation that he did not intentionally withhold information, but instead misunderstood the questions is reasonable, and not contradicted by any substantive evidence from the Government. Hence, the allegations contained in SOR ¶¶ 1.a and 1.b are concluded in his favor. Accordingly, Guideline E is decided for him.

Guideline J: Criminal Conduct

The Governments established a potential disqualification under Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged.*) In 2001, Applicant was convicted of two misdemeanors related to driving, specifically driving negligently and driving on a suspended license.

The Government having established a case, the burden shifted to Applicant to mitigate or rebut the allegations. After reviewing all of the mitigating conditions under this guideline, I conclude that two apply. (1) Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3 (*The criminal behavior was not recent*). The charges of misconduct occurred in June and July 2001, five years ago. Hence, the criminal behavior is not recent. (2) CC MC E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation.*) Other than these two minor incidents, there is no evidence of other criminal conduct, indicating successful rehabilitation. Nor is there a reason to anticipate future misconduct, given his remorse and untainted history up to 2001 and subsequent to it.

After weighing the disqualifying and mitigating factors, and evaluating the evidence in the context of the whole person, including his years of holding a security clearance without interruption and his colleagues' support, I conclude Applicant has sufficiently mitigated the security concerns based on criminal conduct. Accordingly, SOR ¶¶ 2. a and 2.b. are concluded in his favor, and Guideline J is decided for 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) FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Paragraph 2: Guideline J (Criminal Conduct) FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is granted.

Shari Dam

Administrative Judge

1. The amount of the fine is not included in this record.