

DATE: October 31, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-02791

DECISION OF ADMINISTRATIVE JUDGE

CHARLES D. ABLARD

APPEARANCES

FOR GOVERNMENT

John Bayard Glendon Jr., Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant failed to mitigate criminal conduct and personal conduct allegations. His criminal conduct was from 1979 until 2001. His conduct before 2000 was mitigated by the passage of time and the lack of prosecution. The arrest in 2000 resulted in a sentence of confinement for one year suspended. Applicant failed to report a 2001 arrest on his SF 86 at Question 26. He also failed to report it in his initial investigative interview as well as the fact that he was convicted in 2000. Clearance is denied.

STATEMENT OF CASE

On October 4, 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 dated October 26, 2005, Applicant responded to the allegations set forth in the SOR, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's written case on April 28, 2006. A complete copy of the file of relevant material (FORM) was provided to the Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within thirty days after receipt. No additional material was received and the case was assigned to me on August 14, 2006.

FINDINGS OF FACT

Applicant is a 47-year-old employee of a defense contractor who works as a senior electronics technician. He admitted

all of the allegations concerning criminal conduct between 1979 and 2001 and denied allegations of personal conduct in falsifying information on his security clearance application (SF 86) and statements to an investigator. 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 five times between 1979 and 2001. The first was for petit larceny in 1979 and was nolle prossed. The second was for a battery on his former wife in 1982 the disposition of which is not clear but he was not convicted. The third was an assault charge in 1992 relating to an incident at a hockey game where he was a coach. The charge was dismissed after his team testified for him. The fourth and most serious was in 2000 and related to his use of a credit card found on a store floor to purchase a \$400.00 television set. He was discovered in two hours, arrested at his home, and charged with several felony offenses all of which were dismissed except for credit card larceny, a misdemeanor. He was sentenced to a year in confinement suspended with a \$50.00 fine. The most recent arrest was in 2001 for assault on his step-son in a disciplinary dispute. The charge was nolle prossed.

Applicant failed to report his 2001 arrest in response to Question 26 on his SF 86 requiring that all arrests in the past seven years be reported if not otherwise reported in response to other questions. He did report the 2000 arrest at Question 26 but stated that it had been nolle prossed. However, that was only as to some of the charges since he was convicted of credit card theft and that was required to be reported in answer to the same question. He offered explanatory information in his answer about several of the arrests including their disposition and his confusion concerning proper responses to the SF 86 questions.

Applicant was interviewed twice in connection with his application for a security clearance. The first was on October 2, 2003, when many issues were discussed with the investigator but he did not reveal the first three arrests and the most recent arrest in 2001. He did discuss candidly the credit card incident in 2000 but not the conviction and the sentence he received for credit card theft. In a subsequent interview on March 23, 2004, all the information was revealed.

Applicant delights in his work, believes he has found his niche, and is meeting his work requirements successfully. He is married with children and step-children.

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.

Enclosure 2 of the Directive sets forth personnel security guidelines, and the disqualifying and mitigating conditions under each guideline. 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 the appropriate laws and policies, I conclude the following with respect to all allegations set forth in the SOR:

Applicant's arrests and conviction 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 allegations concerning incidents occurring in 1979, 1982, and 1992 are mitigated by the fact that all occurred over five years ago or were dismissed or nolle prossed. (E2.A10.1.3.1.) In view of the 22 year period over which the five arrests occurred, the disposition of most of the arrests, and the lack of conviction for all but one, I do not find that a pattern of criminal conduct was established.

However, the two most recent arrests occurred in 2000 and 2001. The first concerned serious allegations of credit card theft and a conviction for which he was given a substantial sentence of 12 months confinement suspended and a small fine. This was not a youthful indiscretion but was a conscious act of a mature man over 40 years of age.

Also alleged under Guideline E is Applicant's failure to acknowledge on his SF 86 his January 2001 arrest. To his credit the 2000 arrest was reported by him which was the most serious allegation and the only offense for which he was found guilty and sentenced. However, he failed to include the most recent arrest that occurred only six months later. It is difficult to believe that he would have forgotten it, although he may erroneously believed, since it was nolle prossed, that he was not required to report it. These omissions indicate questionable judgment, unreliability, unwillingness to comply with rules and regulations, and could indicate that the person may not properly safeguard classified information (E2.A5.1.1.). His conduct falls under E2.A5.1.2.2. regarding the deliberate omission of relevant and material facts from any personnel security questionnaire. His stated excuses for the omissions that he was confused about the questions and the required answers are possibly credible but not sufficient on this record to mitigate the security concerns under Guideline E.

Applicant's initial statement to the investigator failed to accurately report the disposition of the 2000 arrest and the other arrests since 1979. He was forthcoming on all subjects in the subsequent interview in 2004 but this does not mitigate the allegation concerning the initial interview since there is no evidence that he voluntarily reported it after making the erroneous first statement. However, his statements regarding his confusion are sufficiently credible to mitigate the allegation concerning criminal conduct under 18 U.S.C. 1001 which requires a higher standard of proof of deliberate intent.

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. While Applicant expresses his regret for his conduct and omissions asserting his concern for the protection of the national security, the written record is insufficient to establish a basis for applying the mitigating conditions to all of the allegations under Guideline E.

Applicant agreed to submit this matter on the record without a hearing and did not offer any evidence that might be used to justify application of the whole person doctrine. While some of the material submitted indicates the type of person Applicant may be, I have no valid basis to apply it in reaching my conclusion. Thus, after considering all the evidence in the record in its totality, I conclude that it is not clearly consistent with the national interest to grant clearance to Applicant.

FORMAL FINDINGS

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

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against 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: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

DECISION

After full consideration of all the facts and documents presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Charles D. Ablard

Administrative Judge