

DATE: September 26, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-14371

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant mitigated the security concerns about his personal conduct and criminal conduct stemming from his alcohol/drug-related arrest and his omission of past drug use from a security clearance application. Clearance is granted.

STATEMENT OF THE CASE

After reviewing the results of Applicant's background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding⁽¹⁾ that it is clearly consistent with the national interest to give Applicant a security clearance. On January 19, 2006, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed in the Directive under Guideline E (personal conduct), and Guideline J (criminal conduct). Applicant timely responded to the SOR and requested a hearing.

This case was originally assigned to another administrative judge on February 27, 2006, but transferred to me on March 1, 2006. I convened a hearing on April 26, 2006, at which the government presented four exhibits (Gx1 - 4). Applicant testified in his own behalf and presented one witness. DOHA received the transcript (Tr.) on May 8, 2006.

FINDINGS OF FACT

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant is a 21-year-old employee of a defense contractor supporting construction, maintenance, and overhaul of U.S. Navy nuclear submarines. In June 2002, at age 17, he graduated from a vocational/technical high school. Before graduation, a recruiter from the company where he now works visited the school looking for prospective employees. Applicant submitted an application and was accepted to the pipe fitter apprenticeship program, but he had to wait until October 2002, when he turned 18, to actually start work. Through regular pay raises and performance based increases, his pay has more than doubled since 2002. Applicant's supervisor, who has worked at the company for nearly 20 years,

regards him as a model employee, who is very reliable, honest, and able to work independently. This is the first time he has applied for a security clearance.

In August 2002, Applicant and two friends went to a park where Applicant drank at least six beers and his friends smoked marijuana. Applicant is adamant he did not smoke marijuana that evening. A police officer found them, searched the car and found small amounts of marijuana and cocaine. Applicant was charge with underage possession of alcohol, possession of marijuana, and possession of cocaine. Applicant was convicted of at least one of the charges, (2) fined, assigned 32 hours of community service, and ordered to attend a drug awareness class. He successfully completed the terms of his sentence. Applicant disclosed this information in a security clearance application (SF 86) he submitted on September 4, 2002.

At the hearing, Applicant revealed he was arrested in October 2004, and charged with driving under the influence (DUI) of alcohol. He had been celebrating the long-hoped for success of his favorite baseball team and had too much to drink. He was found guilty, his license was suspended for 90 days, and he was ordered to attend an alcohol safety awareness class. He completed all the terms of his sentence. (3)

Applicant smoked marijuana about 15 times in high school starting in 1999. He last used marijuana in June 2002 during a graduation party. (4) When he filled out his SF 86, he answered "no" in response to question 27 (illegal drugs), because he was afraid he would not be hired. When Applicant was interviewed during his background investigation by a government investigator a year after he submitted the SF 86, Applicant disclosed his drug use in response to general questioning by the investigator. Other than Applicant's disclosure in his SF 86 of a 2002 drug-related arrest, the investigator had no information with which to confront Applicant about his drug use. (5)

Applicant lived at home until June 2005. He now fully supports himself and lives responsibly and within his means. He does not associate with people who use drugs and, since 2004, he has had no adverse contact of any kind with law enforcement. His disciplinary record at work is spotless.

POLICIES AND BURDEN OF PROOF

The Directive sets forth adjudicative guidelines (6) to be considered in evaluating an applicant's suitability for access to classified information. Security clearance decisions must reflect consideration of both disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive. (7) The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information.

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest (8) for an applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, the burden then shifts to the applicant to refute, extenuate or mitigate the government's case. A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. Because the government has a compelling interest in ensuring each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own, no one has a right to a security clearance. (9) The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government. (10) Accordingly, applicants bear a heavy burden of persuasion in the face of disqualifying information.

CONCLUSIONS

Personal Conduct. The government alleged Applicant should be disqualified from holding a security clearance because he deliberately falsified the information in a security clearance application (SF 86) he signed as being true and accurate

to the best of his knowledge on September 4, 2002. Specifically, the government alleged he intentionally omitted his drug use between 1999 and 2002 when he answered "no" to question 27 (SOR ¶ 1.a). The government produced sufficient information to support this allegation, and Applicant admitted he deliberately omitted this information because he was concerned if he disclosed his drug use he would not be hired. His deliberate falsification raises a security concern addressed in the Directive through Guideline E; that is, 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.⁽¹¹⁾ Available information requires application of Guideline E disqualifying condition (DC) 2.⁽¹²⁾

By contrast, the record also supports application of Guideline E mitigating condition (MC) 1.⁽¹³⁾ Applicant's falsification was an isolated event, especially in light of the fact he disclosed other adverse information in the form of a drug/alcohol-related arrest in August 2002. The falsification also occurred nearly four years before his hearing and before he actually reported for work at the defense contractor. Further, Applicant disclosed his marijuana use when he was interviewed during his background investigation. He was not confronted with independent information about his drug use; rather, the investigator went through the SF 86 questions about drugs and Applicant, having then worked for a year in a classified environment and understanding the gravity of this matter, answered truthfully.

The totality of information about Applicant's omission of this information also requires consideration of specific "whole person" factors. Applicant's age (he was 17 when he submitted the questionnaire) must be considered. He was relatively inexperienced and immature at the time, so it is not surprising he made a bad decision. Additionally, Applicant had not yet reported to work and did not fully appreciate the importance of the SF 86. Having personally heard his testimony and assessed his demeanor at hearing, I found his testimony to be credible and devoid of any attempt to minimize the severity of his actions. It is clear he has matured in the four years since he submitted his SF 86 and now understands the government's concerns in this regard. His work record is solid and he appears to have the potential for a long and successful career in his field. Based on all of the foregoing, I conclude there is little likelihood he will repeat this conduct in the future and that the government's concerns about his personal conduct are mitigated.

Criminal Conduct. The government alleged the Applicant should be disqualified from holding a security clearance because his deliberate omission of his drug use from his SF 86 is a violation of federal law against making false statements to the government as stated in 18 U.S.C. § 1001 (SOR ¶ 2.a); and he was arrested and charged with an alcohol/drug-related offense in August 2002. (SOR ¶ 2.b). There is sufficient information in the record to support these allegations, which, in turn, raise a security concern addressed in the Directive through Guideline J. A person who is willing to disregard the law and risk fines or incarceration may also be willing to disregard rules and regulations governing the protection of classified information.⁽¹⁴⁾ The criminal activity at issue may consist of a single serious crime or multiple lesser offenses.

Here, available information requires consideration of Guideline J DC 1 and DC 2.⁽¹⁵⁾ As discussed above, Applicant deliberately omitted from his SF 86 the fact he used drugs in high school. This is a clear, but uncharged, violation of 18 U.S.C. § 1001, the key provisions of which are stated in the SF 86 immediately above where Applicant signed his name, thus signifying his answers therein were true and accurate to the best of his knowledge and belief. Applicant was also charged and convicted of at least one misdemeanor alcohol/drug-related offense. Both his falsification and arrest occurred nearly four years ago when Applicant was 17 years old. Without more, it would be possible to mitigate these facts for lack of recency under Guideline J MC 1.⁽¹⁶⁾ The "whole person" factors discussed under Guideline E, above, would also apply to Applicant's criminal conduct and support application of MC 6.⁽¹⁷⁾

Complicating my assessment of the security significance of Applicant's conduct in this regard is, as Applicant disclosed at hearing, the fact he was arrested and convicted of DUI in October 2004. However, for the same "whole person" reasons discussed, above, I conclude Applicant is not likely to engage in such conduct in the future. At the time of his DUI arrest, Applicant was still living at home and did not have to worry about the repercussions of his conduct. Since then, he has moved out on his own for the first time and developed an appreciation for the severity of drinking and driving, particularly as it relates to his ability to hold a security clearance. Applicant does not drink and drive, and he occupies his free time working on his car and playing basketball. On balance, I conclude the security concerns about Applicant's criminal conduct have been mitigated.

A fair and commonsense assessment⁽¹⁸⁾ of Applicant's personal and criminal conduct, taken in the context of all of the information before me shows that the government expressed reasonable doubts persist about Applicant's ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. However, the record contains sufficient information to mitigate those doubts, and I conclude it is clearly consistent with the national interest to grant Applicant's request for a clearance.

FORMAL FINDINGS

Formal findings regarding each SOR allegation are as follows:

Paragraph 1, Guideline E (Personal Conduct): FOR THE APPLICANT

Subparagraph 1.a: For the Applicant

Paragraph 2, Guideline J (Criminal Conduct): FOR THE APPLICANT

Subparagraph 2.a: For the Applicant

Subparagraph 2.b: For the Applicant

DECISION

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

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. Available information about this arrest is incomplete. The government did not produce a police report, arrest record, or other official record of this arrest, but Applicant admits he was arrested. In his sworn statement to a government investigator in August 2003, Applicant refers only to the marijuana and alcohol charges. In his security clearance application, he listed charges relating to marijuana, alcohol, and cocaine. At hearing, he stated his belief he was only charged with marijuana possession.
3. Tr., 29 - 30.
4. GX 3; Tr., 28.
5. Tr., 25, 35, 40 - 41.
6. Directive, Enclosure 2.
7. Commonly referred to as the "whole person" concept, these factor are as follows:
 1. Nature and seriousness of the conduct and surrounding circumstances.
 2. Frequency and recency of the conduct.
 3. Age of the applicant.
 4. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved.
 5. Absence or presence of rehabilitation.
 6. Probability that the circumstances or conduct will continue or recur in the future;

8. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
9. *See Egan*, 484 U.S. at 528, 531.
10. *See Egan*; Directive E2.2.2.
11. Directive, E2.A5.1.1.
12. Directive, 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.
13. Directive, E2.A5.1.3.2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily.
14. Directive, E2.A10.1.1.
15. Directive, E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged; E2.A10.1.2.2. A single serious crime or multiple lesser offenses.
16. Directive, E2.A10.1.3.1. The criminal behavior was not recent.
17. Directive, E2.A10.1.3.6. There is clear evidence of successful rehabilitation.
18. Directive, E2.2.3.