DATE: November 30, 2006

In re:

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

Applicant for Security Clearance

ISCR Case No. 06-07140

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

Applicant was convicted of speeding and driving under the influence (DUI) in May 1994. In April 2002, he pleaded guilty to possession of a controlled substance after his female companion, who was driving his truck, had an accident and cocaine was found in her purse. In May 2003, he pleaded guilty to reckless driving after he damaged his truck while driving in a mud field. He failed to disclose an unpaid judgment on his security clearance application (SF 86), but produced evidence at the hearing that he was unaware of the judgment when he executed his SF 86. He refuted the allegation of falsifying his SF 86 and mitigated the security concern based on criminal conduct. Clearance is granted.

STATEMENT OF THE CASE

On June 9, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive). The SOR alleged security concerns raised under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on June 20, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on October 11, 2006. The case was heard on November 2, 2006, as scheduled. DOHA received the hearing transcript (Tr.) on November 16, 2006.

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is a 44-year-old machinist employed by a federal contractor. He has worked for his current employer since

December 2004. His performance reports reflect he consistently meets or exceeds his employer's performance standards (Applicant Exhibit (AX) B). He served in the U.S. Air Force from May 1981 to May 1983. He has held a clearance since October 1981.

Applicant's supervisor for the past six or seven months took personal leave to testify for him. He has daily contact with Applicant and regards him as a good and loyal employee (Tr. 70-71). He was unaware of the specific allegations in the SOR (Tr. 72).

Applicant was married in February 1993 and divorced in December 1995. He married his current spouse in August 1999. He has a son from his first marriage and four stepchildren. His son is on active duty in the U.S. Air Force (Tr. 100).

Applicant was arrested for driving under the influence (DUI) and speeding in May 1994. He pleaded guilty and was sentenced to probation for 12 months and fined $1,000, and his driver's license was suspended for one year (GX 2 at 3; Tr. 49-50).

Applicant was arrested in April 2002 for possession of Schedule II drugs and drug paraphernalia. Cocaine and drug paraphernalia were found in the purse of a woman who was driving Applicant's truck and involved in an accident. Applicant and his wife were separated at the time (Tr. 86). The arrest record recites, "[Applicant] was charged because he was the owner of the vehicle and was presumed to have knowledge because he was present at the time she was driving the vehicle." (Applicant Exhibit (AX) A at 1.) Applicant gave that same explanation at the hearing, denying he had actual knowledge that the woman was in possession of drugs and paraphernalia (Tr. 33, 66). He pleaded guilty to a misdemeanor charge of possessing a controlled substance and entered a pretrial diversion program. He was placed on supervised probation for 11 months and 29 days, fined $750, and spent weekends in jail for two months (Tr. 52).

In May 2003, Applicant was driving his truck off-road in a mud field when he struck a rock, causing a flat tire. He left the truck in the field, notified the land owner, and called his wife, who brought him home. At home he consumed two or three shots of tequila. The police came to his home and administered a field sobriety test, which he failed. He was taken to the county jail and administered a blood-alcohol test, which registered .06, below the cutoff for DUI (AX H at 5). When interviewed by police, he admitted he had taken Xanax (an anti-anxiety drug) and Hydrocodone (an opium-derivative pain reliever), for which he had prescriptions, but he denied consuming any alcohol until after the accident (AX H at 2; Tr. 35-36, 53). He was charged with driving under the influence and leaving the scene of an accident. Pursuant to a plea agreement, he pleaded guilty to reckless driving. He was sentenced to six months of unsupervised probation and a $250 fine (AX H at 2). His driver's license was not suspended, and his probation from the April 2002 incident was not revoked (Tr. 55-56).

Applicant executed a security clearance application (SF 86) on December 23, 2004. In response to question 24, asking about his police record, he disclosed his drug-related charges in April 2002. In response to question 26, he disclosed a DUI arrest in September 2003 that was dismissed because his blood-alcohol level was below the legal limit. He answered "no" to question 37, asking if he had any judgments against him in the last seven years that were unpaid, and he did not disclose a judgment for $2,601 for an unpaid hospital bill. He knew a judgment had been entered against his wife, but not against him. The execution and garnishment order listed only his wife, and it was not served on her until April 24, 2006 (Answer to SOR, Attachment A).

The bill was incurred when his wife was hospitalized in May 2001 and their insurance did not cover the entire amount of the bill. Applicant and his wife had several negotiations with the hospital about the amount of the bill. His wife is the family treasurer and usually takes care of all the bills (Tr. 80). After his wife filled out forms for financial aid in August 2001, she was advised the bill had been paid by a charitable organization (Tr. 77). Applicant was suffering from colon cancer and was on medical leave when the garnishment order was issued (Tr. 81). His disability payments were not garnished (Tr. 59-61). He and his wife both testified they were unaware of the judgment until she was served with the garnishment order in April 2006. They received no bills or inquiries about unpaid bills (Tr. 39). Applicant was unaware he was a named defendant until May 2006, when he asked for and received a pleadings summary from the court clerk (Answer to SOR, Attachment B).

When Applicant and his wife found out that there was an unpaid judgment against them, they paid the amount due.

Their latest credit report reflects a zero balance on the collection account (AX C at 2).

Applicant stopped consuming alcohol about three years ago because he suffers from liver disease. Occasionally, he will celebrate a special event by consuming a "sissy drink" made from a mixer and almost no liquor (Tr. 49).

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. The President has 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), as amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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 Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through 6.3.6.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in persons with access to classified information. However, 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.

Initially, the government must establish, by substantial evidence, conditions 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. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3; *see* Directive ¶ 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 security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

Guideline J (Criminal Conduct)

A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1. Disqualifying conditions may be based on allegations or an applicant's admission of criminal conduct, whether or not charged (DC 1). Directive ¶ E2.A10.1.2.1. A single serious crime or multiple lesser offenses may also be disqualifying (DC 2). Directive ¶ E2.A10.1.2.2. Applicant's record of arrest and convictions raise DC 1 and DC 2.

Since the government produced substantial evidence to establish DC 1 and DC 2, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. Applicant has the burden of

proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). Criminal conduct can be mitigated by showing it was not recent (MC 1), an isolated incident (MC 2), or there is clear evidence of successful rehabilitation (MC 6). Directive ¶¶ E2.A10.1.3.1, E2.A10.1.3.2, E2.A10.1.3.6. The issues under both MC 1 and MC 6 are whether there has been a significant period of time without any evidence of misconduct, and whether the evidence shows changed circumstances or conduct.

The Directive is silent on what constitutes a sufficient period of reform and rehabilitation. The sufficiency of an applicant's period of conduct without recurrence of past misconduct does not turn on any bright-line rules concerning the length of time needed to demonstrate reform and rehabilitation, but rather on a reasoned analysis of the facts and circumstances of an applicant's case based on a careful evaluation of the record. If the evidence shows that a significant period of time has passed without evidence of misconduct by an applicant, then an administrative judge must articulate a rational basis for concluding why that significant period of time does not demonstrate changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation. ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

Applicant has three criminal convictions. Thus, I conclude MC 2 is not established. However, his DUI conviction is more than 12 years old and is his only alcohol-related conviction. He has consumed virtually no alcohol for three years because of his medical problems. His drug-related conviction in April 2002 was, at most, a serious lapse of judgment. Even if he knew his female companion had cocaine in her purse, which he denies, there is no evidence he has ever possessed or used illegal drugs on any other occasion. This offense occurred while he and his wife were having marital difficulties. His conviction of reckless driving in May 2003 was a crime of negligence and not alcohol-related. Had he not failed the field sobriety test as a result of drinking hard liquor after the accident, in combination with prescription drugs taken before the accident, it is unlikely that he would have been charged with any offense, much less an alcohol-related offense. I conclude MC 1 and MC 6 are established.

Guideline E (Personal Conduct)

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1. A disqualifying condition (DC 2) under this guideline may be established by "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." Directive ¶ E2.A5.1.2.2.

The SOR alleges Applicant intentionally failed to disclose the unpaid judgment for medical expenses. When, as in this case, a falsification allegation is controverted, the government has the burden of presenting substantial evidence to support it. An omission, standing alone, does not establish 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).

The evidence reflects that only Applicant's wife was listed on the execution and garnishment order. Other court records show that Applicant was also listed as a defendant. Both Applicant and his wife testified plausibly and credibly that they believed the bill had been settled. Applicant first learned that he was a named defendant in May 2006. The judgment apparently did not cause a problem when Applicant and his wife refinanced their home mortgage in 2003. His wife was not served with the notice of execution and garnishment until April 2006. When they realized the bill had not been settled, they paid it (Attachment F to Answer). I am satisfied Applicant did not know he was a named defendant on the judgment when he executed his SF 86. Accordingly, I conclude DC 2 is not raised. No other disqualifying conditions under this guideline are raised by the evidence. SOR ¶ 2 is resolved in Applicant's favor.

Whole Person Analysis

In addition to considering the specific disqualifying and mitigating conditions under each guideline, I have also considered: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant's age and maturity

at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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. *See* Directive ¶¶ E2.2.1.1 through E2.2.1.9.

Applicant was a mature adult at the time of all three convictions, and he should have exercised better judgment. On the other hand, he loves his work and is regarded as a good and trustworthy employee. He has held a clearance for 25 years. His convictions are a matter of public record and do not make him vulnerable to pressure, coercion, exploitation, or duress. He has now stopped drinking alcohol for medical reasons, and his marriage seems to have stabilized. His health problems and the possibility of losing his clearance seem to have gained his attention. He was candid, sincere, well-prepared, and very remorseful during the hearing.

After weighing the disqualifying and mitigating conditions under Guidelines J, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on based on criminal conduct. He has refuted the allegation of falsification under Guideline E. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the interests of national interest to grant him a security clearance.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline J: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph 2.a: For Applicant

DECISION

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

LeRoy F. Foreman

Administrative Judge