

KEYWORD: Personal Conduct; Alcohol; Criminal Conduct

DIGEST: Applicant is a 49-year-old senior structural designer employed by a defense contractor. Between 1983 and 2001, he was convicted of six offenses, which included a felony and five alcohol related offenses, including a DWI. In 2003, he deliberately failed to disclose in his security clearance application his convictions and the full extent of his alcohol related treatment. Applicant failed to present sufficient evidence to mitigate security concerns raised by his criminal conduct, alcohol consumption, and personal conduct. Clearance is denied.

CASENO: 04-12279.h1

DATE: 05/23/2007

DATE: May 23, 2007

	)	
In re:	)	
	)	
-----	)	ISCR Case No. 04-12279
SSN: -----	)	
	)	
Applicant for Security Clearance	)	
	)	

**DECISION OF ADMINISTRATIVE JUDGE  
JUAN J. RIVERA**

**APPEARANCES**

**FOR GOVERNMENT**  
John Bayard Glendon, Esquire

**FOR APPLICANT**  
*Pro Se*

**SYNOPSIS**

Applicant is a 49-year-old senior structural designer employed by a defense contractor. Between 1983 and 2001, he was convicted of six offenses, which included a felony and five alcohol related offenses, including a DWI. In 2003, he deliberately failed to disclose in his security clearance application his convictions and the full extent of his alcohol related treatment. Applicant failed to present sufficient evidence to mitigate security concerns raised by his criminal conduct, alcohol consumption, and personal conduct. Clearance is denied.

### **STATEMENT OF THE CASE**

On October 10, 2006, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct). The SOR informed Applicant that, based on information available to the government, DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to grant him access to classified information.<sup>1</sup> On November 11, 2006, Applicant answered the SOR (Answer),<sup>2</sup> and requested a clearance decision based on the written record without a hearing.

Department Counsel prepared a File of Relevant Material (FORM) which was mailed to Applicant on March 13, 2007. He acknowledged receipt of the FORM on March 21, 2007, did not object to anything contained in the FORM, and submitted additional information for consideration within the 30-day time period provided to him. The case was assigned to me on April 30, 2007.

### **PROCEDURAL ISSUES**

The government moved to amend SOR ¶ 2, by adding ¶¶ 2.b, and 2.c.<sup>3</sup> Applicant did not object to the motion and failed to answer the new allegations. I granted the government's motion without objection.

### **FINDINGS OF FACT**

---

<sup>1</sup> See Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992) (Directive), as amended. On August 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised adjudicative guidelines (Guidelines) to all adjudications and other determinations made under the Directive in which the SOR was issued on or after September 1, 2006.

<sup>2</sup> Government Exhibit (GE) 3 (Applicant's answer to the SOR).

<sup>3</sup> The motion was included in the FORM. The text of the new allegations is as follow: "SOR ¶¶ 2.b You were arrested on or about August 22, 1993, in Warwick, Rhode Island, and charged with Domestic Assault and Domestic Disorderly Conduct. You pleaded *nolo contendere* to both counts. You were intoxicated at the time." "SOR ¶¶ 2.c That information set forth in subparagraphs 1.a.(1), 1.b.(1), 1.b.(2), 1.b.(3), 1.c.(1), 1.c.(2), and 1.c.(3)."

Applicant admitted all SOR allegations with explanations, except for amended SOR ¶¶ 2.b, and 2.c, which he failed to answer. I considered ¶¶ 1.a - 1.f (all Guideline E allegations), denied, because he denied providing false information with the deliberate intent to mislead the government. I also considered the additional allegations, ¶¶ 2.b, and 2.c, denied. His admissions and explanations are incorporated herein as findings of fact.

After a thorough review of the pleadings, Applicant's response to the FORM, and the FORM evidence, I make the following additional findings of fact:

Applicant is a 49-year-old senior structural designer.<sup>4</sup> He has worked for a defense contractor since 1979. He has had access to classified information at the secret level since March 1989.<sup>5</sup> Applicant married his first wife in August 1980, and they were divorced in February 1998. He has three children for whom he provides support. He disclosed no education beyond junior high school.

All the SOR allegations are based on the following facts and behavior:

In November 1983, Applicant was charged with second degree sexual assault, a felony.<sup>6</sup> He pled *nolo contendere* to assault with intent to commit sexual assault, a felony. He was found guilty and sentenced to serve one year at a correctional institution (suspended), to pay court costs, and placed on two-years probation.

In August 1993, Applicant had been drinking and was involved in an altercation with his wife. He was charged with domestic assault and domestic disorderly conduct. He pled *nolo contendere* to both charges.<sup>7</sup>

In December 1996, Applicant had been drinking and was involved in an altercation with his wife. He pled *nolo contendere* to the charge of domestic assault and battery. The court found him guilty and sentenced him, among other things, to undergo domestic violence counseling, to continue his alcohol counseling, and placed him on one-year probation.<sup>8</sup> His then wife tried to stop him from drinking and he refused to do so. After he assaulted his wife in 1996, she filed for divorce.

In 1997, he drove his car after consuming alcoholic beverages. He was charged with driving while intoxicated (DWI) after failing a Breathalyzer Test. As part of a prosecution deferment program for first time alcohol offenders, the court allowed Applicant to enter into a pretrial alcohol education program. He signed in the first day of the program and never returned.<sup>9</sup> He failed to complete the alcohol treatment program.

---

<sup>4</sup> GE 4 (Office of Personnel Management Security Clearance Application (SF86), dated May 1, 2003), unless indicated otherwise, is the source for the facts in this paragraph.

<sup>5</sup> GE 4, question 31.

<sup>6</sup> GE 8.

<sup>7</sup> GE 9.

<sup>8</sup> GE 11.

<sup>9</sup> GE 5.

In January 2000, Applicant consumed alcoholic beverages and was involved in an altercation with his new live-in girlfriend.<sup>10</sup> He pled *nolo contendere* to domestic assault. The court found him guilty and sentenced him, among other things, to serve one year at a correctional institution (suspended), and placed him on one-year probation with the condition that he undergo domestic violence counseling and substance abuse counseling.

From May 22, 2000 to May 31, 2000, Applicant underwent inpatient treatment for alcohol detoxification and was admitted into a hospital alcohol and drug program. He was diagnosed with “alcohol dependence, acute, and current.”<sup>11</sup> He then received alcohol treatment from approximately June 7, 2000, to January 8, 2001. During that period of time, he tested positive for alcohol in July 2000, and was involved in the two alcohol related offenses listed in the next two paragraphs. After undergoing intensive alcohol treatment from July 25, 2000 to August 7, 2000, Applicant continued to consume alcoholic beverages. From October 2000 to February 2001, Applicant underwent treatment with a physician who diagnosed him with alcohol dependence. Applicant failed to complete his alcohol treatment program. From April to June 2001, Applicant received outpatient and inpatient residential alcohol treatment for his alcohol dependence.

In July 2000, Applicant drove his car after consuming alcoholic beverages. He was stopped by police officers and charged with refusing to submit to a chemical test, operating an unregistered vehicle, and a lane roadway violation. He was convicted of refusing to submit to a chemical test.<sup>12</sup> The court sentence him to pay a fine, to pay court costs, to complete a DWI program, to perform community service, his driver’s license was suspended, and placed him on probation.

In January 2001, while serving probation, Applicant drove his car after consuming alcoholic beverages. He was involved in a car accident and left the scene of the accident. He was charged with probation violation and leaving the scene of an accident. His probation was revoked.<sup>13</sup> He was found guilty of leaving the scene of an accident and sentenced to serve six months at a correctional institution.<sup>14</sup> The sentence was suspended on the condition that he undergo residential alcohol treatment, serve two months home confinement, and comply with the terms of his one-year probation.

In his May 2003 security clearance application, Applicant answered “No” to question 21, which asked whether he had ever been charged with or convicted of any felony offense. Applicant failed to disclose that in 1983 he was charged with second degree sexual assault, a felony offense, and that he was found guilty of a felony offense, i.e., assault with intent to commit sexual assault. (SOR ¶1.a.1). In his answer to the SOR, Applicant stated that his failure to disclose the information

---

<sup>10</sup> GE 6 (Applicant’s March 2004 statement), and GE 13.

<sup>11</sup> GE 19, (Hospital records, with an admission date of 5/24/00 - 5/31/00. The records indicate Applicant has a long and extensive history of alcohol dependence since age 12, consuming up to a case of beer on a day, and undergoing detoxification treatment in 1986).

<sup>12</sup> GE 15 and 16.

<sup>13</sup> GE 17.

<sup>14</sup> GE 18.

was not deliberate. He claimed that in 2003, he told a background investigator that he did not disclose the information because he believed the felony charge had been reduced to a misdemeanor.

Applicant answered “No” to question 24, which asked whether he had ever been charged with or convicted of any offense(s) related to alcohol or drugs. Applicant failed to disclose his 1997 DWI charge/conviction; his July 2000 charge and conviction for failure to submit to a chemical test; and his January 2001 charges/conviction for probation violation (consuming alcoholic beverages) and leaving the scene of an accident.

Applicant also answered “No” to question 26, which asked whether in the last seven years he had been arrested for, charged with, or convicted of any offense(s) not listed elsewhere in the SF 86. Applicant failed to disclose he was arrested, charged, and found guilty of three different offenses, i.e., domestic assault both in December 1996 and January 2000, and for leaving the scene of an accident in January 2001. Applicant claimed his failure to disclose the information was not deliberate because he did not know what to answer at the time he completed the security clearance application.

Applicant also answered “Yes” to question 30, which asked whether in the last seven years his use of alcoholic beverages resulted in any alcohol-related treatment or counseling. Applicant disclosed he received treatment from April 2000 to July 2000 at one institution. He failed to disclose, however, inpatient treatment for alcohol detoxification at other hospital from May 22 to May 31, 2000; that he received additional alcohol treatment at two other institutions by qualified medical professionals from approximately June 2000 to January 2001; and that he underwent outpatient and inpatient residential alcohol treatment from April 2001 to June 2001. Applicant also failed to disclose alcohol detoxification treatment he received in 1986.<sup>15</sup>

In August 2003, Applicant was interviewed and provided a written, sworn statement to a government background investigator.<sup>16</sup> During the interview, he was asked to disclose any adverse contacts with law enforcement officials. He disclosed his 1996 charge/conviction for domestic assault, his 1997 DWI, and his 2001 conviction for leaving the scene of an accident. He failed to disclose, however, his 1983 felony charge/conviction for assault with intent to commit a sexual assault, his 2000 charge/conviction for refusal to submit to a chemical test, and his 2000 charge/conviction for domestic assault. Applicant claimed his omissions were not deliberate, because he believed his 1983 felony charge had been reduced to a misdemeanor. He did not explain why he failed to disclose the other two convictions. During the interview, he claimed he has not consumed alcoholic beverages since June 2001 to the day of the interview. He explained that when he used to drink, he did not drink regularly or on a daily basis, but from time to time he would go on weekend drinking binges.

In his February 2005 response to DOHA interrogatories, Applicant stated that the last day he consumed alcoholic beverages was in August 2000. Applicant’s last consumption of alcohol was at least on January 5, 2001, when he consumed alcoholic beverages, was involved in a car accident, and left the scene of the accident. He explained he made an honest mistake and reported the wrong date (the date he was released from treatment), and that he did not intend to mislead the government.

---

<sup>15</sup> GE 19.

<sup>16</sup> GE 5.

Applicant expressed remorse numerous times, stating that he was sorry for his past behavior, and for providing the wrong information in his security clearance application. He claimed he has not been in trouble during the last six years, and asked that his past mistakes not be considered against him. He averred he is reliable, truthful, a hard-worker, and a good person. There is no evidence he has mishandled or caused the compromise of classified information while employed by a defense contractor. Applicant highlighted that he has been working for his current employer for the last 28 years, and that he needed his job to support his children.

## **POLICIES**

The Directive sets forth adjudicative guidelines which must be considered in evaluating an Applicant's eligibility for access to classified information. Foremost are the Disqualifying and Mitigating conditions under each adjudicative guideline applicable to the facts and circumstances of the case. However, the guidelines are not viewed as inflexible ironclad rules of law. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive,<sup>17</sup> and the whole person concept.<sup>18</sup> Having considered the record evidence as a whole, I conclude Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct) are the applicable relevant adjudicative guidelines.

## **BURDEN OF PROOF**

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information.<sup>19</sup> The government has the initial burden of proving controverted facts alleged in the SOR. To meet its burden, the government must establish a prima facie case by substantial evidence.<sup>20</sup>

---

<sup>17</sup> Directive, Section 6.3. "Each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2 . . ."

<sup>18</sup> Directive, ¶ 2(a). ". . . The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. . . ." The whole person concept includes the consideration of the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the extent to which participation was voluntary; the presence or absence of rehabilitation and other permanent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; and the likelihood of continuation or recurrence. . ."

<sup>19</sup> See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

<sup>20</sup> ISCR Case No. 98-0761 at 2 (App. Bd. Dec. 27, 1999) (Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.); ISCR Case No. 02-12199 at 3 (App. Bd. Apr. 3, 2006) (Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.); Directive, ¶ E3.1.32.1.

The responsibility then shifts to the applicant to refute, extenuate or mitigate the government's case. Because no one has a right to a security clearance, the applicant carries the burden of persuasion.<sup>21</sup>

A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest to ensure each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of protecting national security.<sup>22</sup>

## CONCLUSIONS

Since this case is being decided without a hearing, my evaluation is necessarily limited to the contents of the various documents in the case file.

Under Guideline J (Criminal Conduct), criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.<sup>23</sup> The government established its case under Guideline J by showing that Applicant was convicted for seven offenses between 1983 and 2001, including a conviction for a felony offense. I also find, as discussed below under Guideline E, that Applicant deliberately falsified his 2003 security clearance application. His falsification of the SF 86 is a violation of 18 U.S.C. §1001, a felony.<sup>24</sup> Disqualifying Condition (DC) 31(a): *a single serious crime or multiple lesser offenses* and DC 31(c): *allegation or admission of criminal conduct regardless of whether the person was formally charged, formally prosecuted or convicted*, apply.

Applicant's past behavior, from 1983 to 2003, forms a pattern of criminal activity. His falsification brings to the forefront the criminal conduct and alcohol consumption concerns raised by his past behavior. I am required to consider Applicant's overall questionable behavior when evaluating the seriousness of the conduct alleged in the SOR to determine factors such as the extent to which his behavior is recent; the likelihood of recurrence; Applicant's explanations concerning the circumstances of the incidents alleged; and his rehabilitation.<sup>25</sup>

Under the totality of the circumstances, I find Applicant's criminal behavior is recent and not isolated. Applicant engaged in criminal misconduct over a period of at least 20 years, from the time

---

<sup>21</sup> *Egan, supra* n.10, at 528, 531.

<sup>22</sup> *See Id*; Directive Enclosure 2, ¶ 2(b).

<sup>23</sup> Guidelines ¶ 30. Hereinafter, the particular paragraph of the Guidelines will be cited as part of the relevant disqualifying and mitigating condition. *See* n.1 *supra*.

<sup>24</sup> It is a criminal offense to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation, or knowingly make or use a false writing in any matter within the jurisdiction of the executive branch of the Government of the United States. Security clearances are within the jurisdiction of the executive branch of the Government of the United States. *Egan*, 484 U.S. at 527 (discussing 18 U.S.C. § 1001).

<sup>25</sup> ISCR Case No. 04-09959 at 3 ( App. Bd. May 19, 2006).

he was 25 until he was 45. The available evidence indicates he has not been involved in criminal misconduct since 2003. However, considering his 20-year history of criminal behavior, the nature and seriousness of his misconduct, his falsification of the SF 86, and his prolonged, disregard for the law, I find his favorable information (i.e., good employee records, change in lifestyle, and remorse) is not sufficient to mitigate the Guideline J security concerns. His behavior raises questions about his ability and willingness to follow the law, and ultimately, to protect classified information. His falsification weighs against a finding of rehabilitation and positive behavioral changes. I find that none of the mitigating conditions apply.<sup>26</sup> Guideline J is decided against Applicant.

Under Guideline G (Alcohol Consumption), excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.<sup>27</sup> The government established its case under Guideline G by showing that from 1983 to 2001, he was charged/convicted for six alcohol-related incidents, including a DWI conviction. Applicant abused alcohol, and that resulted in his exercising questionable judgment. Guideline G Disqualifying Condition (DC) 22(a): *alcohol-related incidents away from work, such as driving while under the influence . . . applies.*

There is no evidence that Applicant has been involved in any alcohol-related misconduct since January 2001. As such, Alcohol Consumption Mitigating Condition (AC MC) 23(a): *so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment,* may apply.

Notwithstanding, the record establishes Applicant was diagnosed with acute alcohol dependence several times, and underwent repeated alcohol rehabilitation treatment numerous times. Considering Applicant's lengthy abuse of alcohol, the number of alcohol-related incidents, and the seriousness of his alcohol-related misconduct, he has failed to provide sufficient information as to his current level of alcohol use to show he is now a responsible user.<sup>28</sup> Nor does the available evidence establish a favorable diagnosis or prognosis for the Applicant, or that he has no alcohol related problems. In light of the extent of Applicant's alcohol related behavior, the passage of time since 2001, alone, is not sufficient to show that his past behavior is not likely to recur, or to show reliability, trustworthiness, and good judgment. Under the totality of the circumstances, I conclude that Applicant's favorable information is not sufficient to mitigate the alcohol consumption security concerns. I find that none of the mitigating conditions apply.

---

<sup>26</sup> I specifically considered Criminal Conduct Mitigating Condition (MC) 32(a): *so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;* and MC 32(d): *there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.*

<sup>27</sup> Guidelines ¶ 21.

<sup>28</sup> In his answer to the FORM, Applicant stated "last year I went back to "KH" (institution) for a revelation to get my drivers license back." It is not clear from Applicant's evidence whether he has been sober since 2001 or if he had a relapse.



Under Guideline E (Personal Conduct), conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.<sup>29</sup>

Applicant admitted he failed to disclose relevant information in his answers to SF 86 questions 21, 24, and 26. He further admitted providing false information to a defense investigator in 2003. In light of Applicant's admissions, age, length of employment, the number of incidents that he failed to disclose, the seriousness of those incidents, the circumstances surrounding those incidents, and the fact he has had access to classified information since 1989, I find Applicant's omissions were deliberate and made with the intent to mislead the government. Disqualifying Conditions (DC) 16(a): *deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . .*, DC 16(b): *deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative*; and DC 16(e): *personal conduct or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress . . .*, apply.

Concerning SOR ¶ 1.f, I find for Applicant. He disclosed his 2001 alcohol-related incident in his 2003 statement to a defense investigator. Thus, I considered Applicant's failure to provide the correct date he last consumed alcohol an oversight.

I specifically considered all Guideline E Mitigating Conditions (MC) and conclude that none apply. Although the falsification occurred in 2003, considering the totality of the circumstances in Applicant's case, the passage of time alone is not sufficient to mitigate the security concerns raised by his behavior. Furthermore, he presented no evidence that he has reduced his vulnerability to exploitation, manipulation, or duress. Additionally, for the same reasons outlined above under the discussions of Guidelines J and G incorporated herein, I conclude none of the MCs apply. Guideline E is decided against Applicant.

I have carefully weighed all evidence, and I applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guidelines. I specifically considered Applicant's age, the lack of any misconduct or questionable behavior since 2003, his 28 years working for a defense contractor, and his positive changes in behavior since 2003. As previously discussed, Applicant's overall past behavior forms a pattern of disturbing criminal activity and alcohol abuse with significant adverse security implications. His falsifications bring to the forefront the criminal conduct, drug use, and alcohol abuse concerns raised by his past behavior. His failure to provide truthful answers in his security clearance application shows he cannot be trusted, and show a serious lack of judgment. Applicant failed to present sufficient evidence to mitigate the overall judgment and trustworthiness security concerns raised by his behavior, and the likelihood of recurrence remains a concern.

---

<sup>29</sup> Guidelines ¶ 15.

## **FORMAL FINDINGS**

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1, Personal Conduct (Guideline E) Subparagraphs 1.a - 1.e Subparagraph 1.f	AGAINST APPLICANT Against Applicant For Applicant
Paragraph 2, Criminal Conduct (Guideline J) Subparagraphs 2.a - 2.c	AGAINST APPLICANT Against Applicant
Paragraph 3, Alcohol Consumption (Guideline G) Subparagraph 3.a	AGAINST APPLICANT Against Applicant

## **DECISION**

In light of all the circumstances 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.

Juan J. Rivera  
Administrative Judge