KEYWORD: Personal Conduct; Criminal

DIGEST: Applicant was arrested and charged with DWI in 1988, 1999, and 2005. He received a suspended imposition of sentence on each occasion, and he remains on probation from the 2005 DWI until about November 2007. He deliberately failed to disclose his 2005 DWI and related alcohol counseling when he signed a security-clearance application in January 2006. Clearance is denied.

CASENO: 06-22361.h1

DATE: 05/29/2007

DATE: May 29, 2007

| | | |
|---|---|---|
| In re: | ) | |
| | ) | |
| ---------- | ) | ISCR Case No. 06-22361 |
| SSN: ---------- | ) | |
| | ) | |
| Applicant for Security Clearance | ) | |

**DECISION OF ADMINISTRATIVE JUDGE**
**MICHAEL H. LEONARD**

## APPEARANCES

**FOR GOVERNMENT**
James F. Duffy, Esq., Department Counsel

**FOR APPLICANT**
Larry Schaffer, Esq.

## SYNOPSIS

Applicant was arrested and charged with DWI in 1988, 1999, and 2005. He received a suspended imposition of sentence on each occasion, and he remains on probation from the 2005 DWI until about November 2007. He deliberately failed to disclose his 2005 DWI and related alcohol counseling when he signed a security-clearance application in January 2006. Clearance is denied.

## STATEMENT OF THE CASE

Applicant contests the Defense Department's intent to deny or revoke his eligibility for a security clearance. Acting under the relevant Executive Order and DoD Directive,[1] the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on October 18, 2006. The SOR—which is equivalent to an administrative complaint—details the factual basis for the action and alleges security concerns under Guideline E for personal conduct (falsification) and Guideline J for criminal conduct. Applicant timely replied to the SOR and requested a hearing.

In addition to the Directive, this case is brought under the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information approved by the President on December 29, 2005. The revised guidelines were then modified by the Defense Department, effective September 1, 2006. They supersede or replace the guidelines published in Enclosure 2 to the Directive and Appendix 8 to DoD Regulation 5200.2-R, and they apply to all adjudications and other determinations where an SOR has been issued on September 1, 2006, or thereafter.[2] Both the Directive and the Regulation are pending formal amendment. The revised guidelines apply to this case because the SOR is dated October 18, 2006. The applicability of the revised guidelines was made a matter of record at the start of the hearing (R. 11).

The case was assigned to me January 24, 2007. Thereafter, on February 16, 2007, a notice of hearing was issued scheduling the hearing for March 7, 2007. The hearing took place as scheduled. DOHA received the hearing transcript March 15, 2007.

## FINDINGS OF FACT

Applicant admits the three driving while intoxicated offenses (DWI) that resulted in suspended imposition of sentences, but he denies the allegations that he gave deliberately false answers in response to two questions on a security-clearance application. I make the following findings of fact set forth below in numbered paragraphs.

---

[1] Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).

[2] *See* Memorandum from the Under Secretary of Defense for Intelligence, dated August 30, 2006, Subject: Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005).

1. Applicant is a 54-year-old security officer for a company engaged in providing security services for the government. He earned a bachelor's degree from a state university in 1976. His first marriage ended in divorce in about 1982. He married his current wife in 1993. His employment history includes the following: from 1994 to 2003 he worked as a project manager for a transportation company; from 2003 to 2005 he worked as a truck driver; and in April 2005 he started working as a security officer at an arsenal. He has worked for his current employer since September 2005.

2. In January 1988, Applicant was arrested and charged with DWI. The result of the charge was a suspended imposition of sentence for one year. In this jurisdiction, a suspended imposition of sentence results in the defendant being placed on probation. If the defendant violates probation and faces revocation, the judge may order any sentence within the full range of punishment for the crime convicted. If the defendant successfully completes probation, no sentence is ever actually ordered. In that case, there is no conviction. Here, it appears Applicant successfully completed the one-year period of probation.

3. Applicant's second arrest for DWI took place in March 1999. The DWI charge resulted in a suspended imposition of sentence for two years. He was also ordered to attend a substance abuse traffic offenders program (SATOP), pay a fine and costs, and his driving privileges were revoked until August 1999.

4. He completed the SATOP in July 1999. He attended the first-level of the program, which is an offender education program consisting of a ten-hour education course in a group setting. It is strictly a educational program and involves no counseling. Thereafter, he successfully completed the two-year period of probation in about June 2001.

5. About four years later, Applicant started his first job as a security officer in April 2005. For that employment, Applicant completed a security-clearance application on April 1, 2005 (Exhibit B). In response to Question 23d[3] about his police record, he admitted that he had been charged with or convicted of an alcohol-related offense. He described an April 1999 "administrative alcohol suspension" and listed a local county court and the state where it took place. He did not disclose the 1988 DWI. In April 2005, he was granted an interim security clearance, which he held until about when the SOR was issued (R. 42).

6. Two months later on June 8, 2005, he was arrested for his third DWI (Exhibit 3). According to Applicant, he had backed into a ditch and was stuck when the police arrived at the scene (R. 126). He was required to perform a field sobriety test. The police officer arrested Applicant, placed him in handcuffs, put him in the police car, and took him to the police station where he was held for at least 45 minutes. When asked to submit to an alcohol test at the police station, he requested to speak with a lawyer. He was released without taking the alcohol test and the police noted on the ticket that he refused to do so (Exhibit 3). Based on the refusal, the state suspended or revoked Applicant's driver's license.

[3] The relevant part of Question 23 asks "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?"

7. In the meantime, another company was taking over the contract to provide security at the arsenal. Applicant was offered and accepted a job with the new company as a security officer working in dispatch. To facilitate this change, in August 2005, the company submitted paperwork to have Applicant's interim security clearance converted or transferred (Exhibit 5). Applicant started working for the new company, his current employer, in essentially the same job at the arsenal on or about September 1, 2005.

8. Applicant contested the suspension or revocation of his driver's license as allowed under state law. By counsel, he filed an application for a hearing and an evidentiary hearing was held October 17, 2005 (Exhibit A). The court took the case under advisement and a decision would be issued at a later date.

9. Concerning the DWI charge, the initial arraignment took place July 16, 2005 (Exhibit 3). After a couple of continuances, the DWI charge was disposed of in November 2005 via a plea bargain in municipal court that resulted in a suspended imposition of sentence for two years (Exhibit 3 and Attorney's testimony). The probation in conjunction with the suspended imposition of sentence is scheduled to conclude in about November 2007. In addition, Applicant was ordered to attend the SATOP.

10. On November 11, 2005, Applicant met with the SATOP and completed a driver risk inventory (R. 76). Based on this screening process, it was determined that he would attend the weekend intervention program (WIP). Thereafter, during the weekend of December 16–18, 2005, Applicant attended the WIP at a local hotel where he was required to stay starting Friday evening and ending Sunday afternoon. Applicant participated in the WIP and successfully completed it.

11. The WIP is for "repeat offenders or 'high risk' first-time offenders using intensive education and counseling intervention methods throughout a marathon weekend (48 continuous hours) of structured activities" (Exhibit 6). According to the owner of the company that runs the SATOP, the WIP involves intensive group processes and includes minimal counseling (R. 79). It is not a normal counseling situation with one-on-one counseling sessions, a treatment plan is not developed, progress notes are not recorded, and follow-up sessions are not conducted (R. 79–80). The counseling is done by qualified professional counselors in small groups of 10 to 12 people.

12. Also in December 2005, Applicant learned that it was necessary for him to submit another security-clearance application. This happened when the company facility security officer (FSO) called the Defense Department to check on the status of Applicant's security clearance and was told a case had not been opened. The FSO was told to have Applicant submit another security-clearance application to get the process moving (R. 44–45). As a result, another company employee met with Applicant and told him to complete an in-house, company worksheet (*See* Exhibit 4) that would be used to complete the official, electronic version of the security-clearance application. According to Applicant, he submitted his previous security-clearance application (Exhibit B). But the employee was emphatic that she would only accept and use the in-house, company worksheet for completing the electronic version of the security-clearance application (R. 26, 63). In addition, it was policy not to accept anything more than 30 days old (R. 26–27).

13. Using the information provided by Applicant, the employee completed the electronic version of the security-clearance application (R. 27–28). Following her standard practice, she printed a

display copy of the application for Applicant to review. She told him to review it carefully because it was going to be submitted to the government. After review, it was electronically submitted to the government. A copy of the in-house, company worksheet is not available because it is her standard practice to give it to the employee or destroy it as it contains private, confidential information.

14. Exhibit 1 is the written version of Applicant's security-clearance application. As part of it, he executed a signature form for the application on January 3, 2006. When he signed the form, he certified that his statements in the security-clearance application were true, complete, and correct to the best of his knowledge and belief and were made in good faith. Also, he acknowledged that a knowing and willful false statement could be punished under federal law.

15. Concerning his alcohol-related offenses, Applicant did not reveal his 1988 DWI and his 2005 DWI when answering the relevant question. In response to Question 23d[4] about his police record, he admitted the 1999 DWI, although with more detailed information than in the April 2005 security-clearance application. In addition, in response to Question 25[5] about his use of alcohol, he denied in the last seven years that his use of alcoholic beverages resulted in any alcohol-related treatment or counseling.

16. On January 17, 2006, the circuit court judge that heard Applicant's driver's license suspension/revocation case issued a written decision (Exhibit A). The court determined that Applicant was not allowed by the police officer the right or opportunity to personally contact an attorney within the time allowed by law. Accordingly, the court set aside and held for naught the state's decision suspending or revoking Applicant's driver's license and directed the state to reinstate his driving privileges. The court further determined that the revocation was to be held and adjudged void, null, and of no effect, and the state was directed to remove any indication of suspension or revocation from Applicant's driver's record. The news of the court's judgment was communicated to Applicant by his attorney by telephone and then in a follow-up letter, dated January 20, 2006 (Exhibit A).

## POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.[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 those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination

[4] The relevant part of Question 23 asks "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?"

[5] The specific language of this question is "In the last 7 years, has your use of alcoholic beverages (such as liquor, beer, wine) resulted in any alcohol-related treatment or counseling (such as for alcohol abuse or alcoholism)?"

[6] Directive, Enclosure 2, ¶ E2.2.1 (setting forth nine factors to consider under the whole-person concept).

of an applicant's loyalty.[7] Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

## BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.[8] There is no presumption in favor of granting or continuing access to classified information.[9] The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.[10] An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[11] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[12]

No one has a right to a security clearance.[13] As noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."[14] Under *Egan,* Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

## CONCLUSIONS

### *1. The Personal Conduct Security Concern*

Personal conduct under Guideline E addresses issues of questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. In this regard, the deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the government when applying for a security clearance or in other official matters is a security concern. It is deliberate if it is done knowingly and willfully. An omission of relevant and material information is not deliberate if the person genuinely

[7] Executive Order 10865, § 7.

[8] ISCR Case No. 96-0277 (App. Bd. Jul. 11, 1997).

[9] ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

[10] Directive, Enclosure 3, ¶ E3.1.14.

[11] Directive, Enclosure 3, ¶ E3.1.15.

[12] Directive, Enclosure 3, ¶ E3.1.15.

[13] *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) ("It is likewise plain that there is no 'right' to a security clearance, so that full-scale due process standards do not apply to cases such as Duane's.").

[14] *Egan*, 484 U.S. at 531.

forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported.

At issue here is the truthfulness of Applicant's answers to Questions 23d and 25 in his January 2006 security-clearance application (Exhibit 1). Concerning Question 23d about his police record, Applicant contends he did not list his 1988 DWI because he was told when he completed his April 2005 application (Exhibit B) that he only had to disclose information within the last seven years. He contends he did not list his 2005 DWI because it had not yet occurred when he completed his April 2005 application and he simply turned that document in for use in December 2005. He testified that he "had no reason to believe that anything had changed" (R. 116), despite that he was arrested for DWI in June 2005 and the matter was disposed of via the suspended imposition of sentence in November 2005.

His explanation for not disclosing the 2005 DWI in response to Question 23d is not credible. First, the employee responsible for processing applications was emphatic in her testimony. She would not and did not accept Applicant's April 2005 application because it was out of date and not on the in-house, company worksheet that she used for all individuals. Her testimony was consistent and credible.

Second, comparing Applicant's April 2005 application with his January 2006 application reveals significant differences in content. For example, the April 2005 application (Exhibit B) describes the 1999 DWI as the offense of administrative alcohol suspension and the action taken as suspension. It mentions the name of the county court and the state, but without a city or zip code. In contrast, the January 2006 application (Exhibit 1) describes the offense as driving under the influence of alcohol and the action taken was license suspension-reinstated-administrative. It mentions the name of the county court and provides the street address, city, county, state, and zip code. If the April 2005 application had been used as the source document for the January 2006 application, it would follow that the information for the 1999 DWI would be the same. Instead, there are several differences.

Third, to believe Applicant when he said that he had no reason to believe that anything had changed ignores the well-established chronology of events. When he went through the process of submitting a second security-clearance application, his police record had recently changed. In June 2005, he was arrested and charged with a DWI offense. The initial arraignment for the DWI charge was in July. He had begun the process of contesting the suspension/revocation of his driver's license, he attended an evidentiary hearing in October, and a decision from the circuit court was pending. His DWI charge was disposed of via the suspended imposition of sentence in November, and he met with SATOP as required by the court on or about November 11, 2005. All these events took place before Applicant was asked to submit a second security-clearance application in December 2005. Given these facts, Applicant's hearing testimony that he had no reason to believe that anything had changed is rejected as a fabrication.

Applicant is also accused of falsifying his answer to Question 23d by omitting his 1988 DWI. Because I concluded that Applicant falsified his answer to Question 23d when he deliberately failed to disclose the 2005 DWI and find against him in SOR ¶ 1.a, it is unnecessary to address his omission of the 1988 DWI, which is also alleged in SOR ¶ 1.a.

Concerning Question 25 about alcohol-related treatment or counseling, Applicant contends he answered this question in the negative because he did not consider what he went through as counseling. It is factually correct that Applicant did not have any treatment due to his alcohol use. Therefore, a negative answer is correct on the treatment aspect of the question.

But the same cannot be said for the counseling aspect of the question. According to information from the state (Exhibit 6), the WIP involves counseling intervention methods. And according to Applicant's own witness, the WIP involves minimal counseling in a small-group setting by qualified professional counselors. Based on these facts, Applicant received counseling when he participated in the WIP in November 2005, and his negative answer to Question 25 was factually incorrect. Moreover, it follows that since he deliberately omitted the 2005 DWI in response to Question 23d, he had to continue his falsehood when he answered Question 25, which meant omitting any information about the consequences of the DWI (to include his participation in the WIP). Accordingly, I conclude his negative answer to Question 25 was a deliberately false statement and find against him in SOR ¶ 1.b.

I reviewed the mitigating conditions under the guideline and conclude none apply. Making false statements to the federal government during the security-clearance process is serious misconduct, and it is not easily explained away, extenuated, or mitigated.

***2. The Criminal Conduct Security Concern***

Under Guideline J, criminal conduct is a concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures for safeguarding and handling classified information.

Here, a criminal conduct concern is raised under Guideline J. First, the record shows that Applicant has been arrested and charged with DWI in 1988, 1999, 2005. All three incidents resulted in a suspended imposition of sentence, which under state law is not a conviction. These circumstances establish a pattern of multiple offenses regardless of whether Applicant was formally convicted.

Second, Applicant is serving probation until November 2007 per the suspended imposition of sentence for the 2005 DWI. His status as a probationer militates against a favorable decision.

Third, the criminal conduct at issue also includes making a false statement within the jurisdiction of a federal agency in violation of 18 U.S.C. § 1001 based on the falsification allegations. Because I concluded that two falsification allegations were substantiated, the criminal conduct concern under Guideline J is decided against Applicant as well. None of the mitigating conditions apply.

In conclusion, after weighing the favorable and unfavorable information, I conclude that Applicant has failed to rebut, explain, extenuate, or mitigate the security concerns. Likewise, he did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, I also considered Applicant's case under the whole-person concept, and my whole-person analysis does not support approval of a clearance for Applicant.

## FORMAL FINDINGS

Here are my conclusions for each allegation in the SOR:

| | |
|---|---|
| SOR ¶ 1–Guideline E: | Against Applicant |
| Subparagraphs a–b: | Against Applicant |
| SOR ¶ 2–Guideline J: | Against Applicant |
| Subparagraphs a–c: | Against Applicant |

## DECISION

In light of all the facts and circumstances, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Michael H. Leonard
Administrative Judge