

DATE: December 30, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-09409

DECISION OF ADMINISTRATIVE JUDGE

ROGER E. WILLMETH

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has failed to mitigate his criminal offenses, including a 1999 Driving Under the Influence conviction in 1999, two Operating Under the Influence (OUI) convictions in 1997 and 1983, a 1996 Assault and Battery charge against his then wife, and a 1983 felony theft charge. He has also failed to mitigate his alcohol consumption since he admits he still drinks to the point of intoxication an average of once a month and his consumption of alcohol has increased since his divorce in 1998. Finally, he has failed to mitigate his admitted deliberate omission of the two OUI convictions from his security clearance application, as well as his admission of the 1983 felony theft charge. Clearance is denied.

STATEMENT OF THE CASE

On April 21, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to the applicable Executive Order⁽¹⁾ and Department of Defense Directive,⁽²⁾ issued a Statement Reasons (SOR) to Applicant. The SOR details security concerns under Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct). The SOR states that DOHA was unable to find that it is clearly consistent with the national interest to grant him access to classified information and recommends that his case be submitted to an Administrative Judge.

On May 19, 2003, Applicant executed a response to the SOR and requested a decision without a hearing. Applicant received the File of Relevant Material (FORM), which contains 12 documents, on August 7, 2003. He has not submitted any additional information or objections to the material contained therein. The case was assigned to me on September 26, 2003.

FINDINGS OF FACT

Having thoroughly considered the evidence in the record, including Applicant's admission to SOR ¶ 1.a, I make the following findings of fact:

Applicant is a 38-year-old calibration technician employed by a defense contractor. He is seeking a security clearance.

On September 20, 1983, Applicant was charged with Larceny Over \$100.00, a felony. The charge was later dismissed.

On October 21, 1983, he was charged with Operating Under the Influence (OUI). On October 31, 1983, Applicant was convicted and fined \$250.00.

On March 11, 1996, his then wife filed a restraining order against him with the local police.

On August 17, 1996, Applicant was charged with Assault and Battery of his wife. The charge was later dismissed.

On February 28, 1997, his then wife filed another restraining order against him with the local police.

On July 26, 1997, Applicant was involved in an automobile accident and again charged with OUI. On December 15, 1997, he was placed on probation for one year, fined \$235.00, had his driver's license suspended for 45 days, and was ordered to attend an alcohol education program.

Since his divorce in July 1998, Applicant has consumed alcohol to the point of intoxication an average of once a month.

On March 7, 1999, he was charged with Driving Under the Influence (DUI). On March 30, 1999, Applicant was convicted of that offense and sentenced to 18 months probation and fined \$843.00.

On April 17, 2001, Applicant executed a security clearance application (SF 86). In response to question 21, ⁽³⁾ he answered, "no," deliberately omitting the 1983 charge of Larceny over \$100.00.

In response to question 24, ⁽⁴⁾ Applicant answered, "no," deliberately omitting his convictions for OUI.

On December 6, 2001, Applicant was interviewed by a special agent for the Defense Security Service (DSS) with regard to his omission of two of his alcohol related offenses from his security clearance application. He was again interviewed by the DSS special agent on January 23, 2002 concerning the omission of his 1983 felony charge from his SF 86. Applicant said that he did not recall the offense.

POLICIES

Department Counsel is responsible for presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted. Directive E3.1.14. The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Directive E3.1.15.

Eligibility for access to classified information is predicated upon an individual meeting adjudicative guidelines discussed in Enclosure 2 of the Directive. An evaluation of whether an applicant meets these guidelines includes the consideration 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 decision. This assessment should include the following factors: (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 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 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. Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of national security. Directive E2.2.2.

Enclosure 2 provides conditions for each guideline that could raise a concern and may be disqualifying, as well as further conditions that could mitigate a concern and support granting a clearance. The following guidelines are applicable to this case.

Guideline J: Criminal Conduct

The concern under Guideline J is a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. Conditions that could raise a security concern and may be disqualifying under Guideline J include: a single serious crime or multiple lesser offenses (Disqualifying Condition 2).

Conditions that could mitigate security concerns include: Mitigating Condition 6, there is clear evidence of successful rehabilitation.

Guideline G: Alcohol Consumption

The concern under Guideline G is that excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness. Conditions that could raise a security concern and may be disqualifying include: alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use (Disqualifying Condition 1).

Conditions that could mitigate security concerns include: the alcohol related incidents do not indicate a pattern (Mitigating Condition 1); the problem occurred a number of years ago and there is no indication of a recent problem (Mitigating Condition 2); and positive changes in behavior supportive of sobriety (Mitigating Condition 3).

Guideline E: Personal Conduct

The concern under Guideline E 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. Conditions that could raise a security concern and may be disqualifying under Guideline E include E2.A5.1.2.2 (Disqualifying Condition 2). Disqualifying Condition 2 covers 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.

None of the conditions that could mitigate security concerns are applicable in this case.

CONCLUSIONS

Guideline J

Applicant's two convictions for OUI (SOR ¶ 1.b and e) conviction for DUI (SOR ¶ 1.a), felony arrest (SOR ¶ 1.f), arrest for Assault and Battery (SOR ¶ 1.c), and restraining orders filed by his then wife (SOR ¶ 1.d) establish Disqualifying Condition 2.

Applicant's latest conviction for DUI (SOR ¶ 1.a) occurred little more than two years before his security clearance application that resulted in this case. Therefore, Mitigating Condition 1 is not applicable. Applicant has not responded to the FORM and his response to the SOR fails to provide a basis for establishing clear evidence of rehabilitation. Even though the charges for Larceny Over \$100.00 (SOR ¶ 1.f) and Assault and Battery (SOR ¶ 1.c) were dismissed, the evidence in the file establishes that he committed offenses. Therefore, I find against Applicant with regard to SOR ¶ 1.

Guideline G

Applicant's three alcohol related driving convictions over a 16 year period (SOR ¶ 2.b), establish Disqualifying Condition 1.

Despite the fact Applicant's three alcohol related driving convictions occurred over a 16 year period, he denies there is a pattern and asserts that his last offense was more than four years ago. In his response to the SOR, he states the first offense resulted from "celebrating" and that the latest offenses were attributable to a divorce he was going through.

Applicant further contends that he has gotten his drinking under control and that he no longer drives while drinking.

Applicant's three alcohol related driving convictions over a 16 year period do reflect a pattern so as to negate the applicability of Mitigating Condition 1. Mitigating Condition 2 is also not applicable, since his latest conviction occurred little more than two years before his security clearance application that resulted in this case and he admits he still drinks to the point of intoxication. In addition, Applicant has failed to establish Mitigating Condition 3. In addition to admitting he drinks to the point of intoxication an average of once a month (SOR ¶ 2.a), he acknowledges his use of alcohol has actually increased since his divorce. Under the circumstances, Applicant has failed to demonstrate positive changes in behavior supportive of sobriety or otherwise mitigate the Government's evidence concerning his alcohol use. Therefore, I find against Applicant with respect to SOR ¶ 2.

Guideline E

Applicant's deliberate omission from his security clearance application (SF 86) of two of his alcohol related driving offenses (SOR ¶ 3.a) establishes Disqualifying Condition 2. His omission of his 1983 felony charge on the same application (SOR ¶ 3.b) also raises Disqualifying Condition 2.

Applicant has failed to mitigate his deliberate omissions of alcohol related driving offenses from his security clearance application. The omitted offenses are material to a determination of his security worthiness. The omissions were recent and Applicant never provided correct information voluntarily before being confronted by his omissions by a DSS special agent. Moreover, his admission that embarrassment could cause him to act in such a way that is detrimental to the Government's interest does not demonstrate the degree of reliability required of a person to whom the Government grants a clearance. I find against Applicant with regard to SOR ¶ 3.a.

With regard to the omission of the 1983 felony theft charge from his SF 86, Applicant told the DSS special agent that he did not recall it. In his response to the SOR, Applicant says that he did not know the theft was a felony. His explanations are not consistent. Although he might not have known his offense was a felony, it is questionable whether he would not recall his first offense at an early age. Moreover, his admitted deliberate omissions in response to question 24 raise doubt as to whether his omission in response to question 21 was also deliberate. Such doubt must be resolved in favor of national security. Consequently, I find against Applicant with regard to SOR ¶ 3.b.

FORMAL FINDINGS

Formal findings, as required by section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: Against Applicant

Subparagraph 1.f: Against Applicant

Paragraph 2. Guideline G: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Paragraph 3. Guideline E: AGAINST APPLICANT

Subparagraph 3.a: Against Applicant

Subparagraph 3.b: Against Applicant

DECISION

In light of the evidence of record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Signed

Roger E. Willmeth

Administrative Judge

1. Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified.
3. "Have you ever been charged with or convicted of any felony offense?"
4. "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?"