

DATE: September 23, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-08163

DECISION OF ADMINISTRATIVE JUDGE

JOHN R. ERCK

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was discharged from U.S. military service in November 1992 as an "Alcohol Abuse - Rehabilitation Failure" after four alcohol-related incidents (three arrests) and revocation of his security clearance. His explanations for not disclosing this relevant, material, and adverse information in response to pertinent questions on his SF 86 (completed in January 2000) are not persuasive. Clearance is denied.

STATEMENT OF THE CASE

On November 14, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, "*Safeguarding Classified Information Within Industry*," dated February 20, 1960, as amended, and modified, and Department of Defense Directive 5220.6, "*Defense Industrial Personnel Security Clearance Review Program*" (Directive) dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make the preliminary finding under the Directive that it is clearly consistent with the national interest to grant a security clearance to Applicant and recommended referral to an Administrative Judge to determine whether a security clearance should be granted.

Applicant answered the SOR on January 18, 2002 and requested his case be decided without a hearing. He received the File of Relevant Material (FORM) consisting of 16 items on May 23, 2002. He did not submit a response. The case was assigned to this Administrative Judge on July 16, 2002.

FINDINGS OF FACT

The SOR alleges a security concern is raised under Guideline E (Personal Conduct) by Applicant's falsifying relevant and material facts on his SF 86 (*Security Clearance Application*) and in a signed, sworn statement. In his answer, Applicant admitted--with an explanation--falsifying information about his alcohol-related arrests, but denied he had falsified information about the revocation of his security clearance and the circumstances of his discharge from the U.S. military. After a complete and thorough review of Applicant's admissions, denials, and the evidence of record, and upon

due consideration of the same, I make the following additional findings of fact:

Applicant is a 43-year-old technician who has been employed by a DoD contractor since August 1998. He had served in the U.S. military (active duty) from 1979 until he was discharged as an "Alcohol Abuse -Rehabilitation Failure" in November 1992. Before his discharge, Applicant was involved in four incidents of alcohol-related misconduct:

- He was arrested in May 1983 (while serving in an overseas assignment) and charged with traffic accident - major, excessive speed, and driving under the influence. He received non judicial punishment under Article 15, UCMJ; his driving privileges were suspended for one year and he was ordered to forfeit \$428.00 pay for two months.
- After being involved in a domestic dispute in February 1989, he was referred to the Alcohol and Drug Abuse Prevention and Control Program, Track II. He completed the program in January 1990.
- He was arrested in June 1991 and charged with driving under the influence, driving with excessive blood alcohol concentration, speeding, and no child restraints. He received non judicial punishment under Article 15, UCMJ; he was ordered to forfeit \$350.00 pay, and his driving privileges were suspended for one year. He was again referred to the Alcohol and Drug Abuse and Prevention and Control Program, Track II.
- He was arrested in January 1992 and charged with driving under the influence, drunk and disorderly, and obstructing justice. He received non judicial punishment under Article 15, UCMJ; he was ordered to forfeit \$749.00 pay for two months, reduced in rank from E-6 to E-5, required to perform extra duties for 45 days, restricted for 45 days, and his driving privileges were suspended for one year.

These alcohol-related incidents also resulted in adverse consequences beyond the punishment imposed under Article 15, UCMJ. In March 1989, Applicant received a memorandum from the central personnel security clearance facility (of his service branch) informing him that he was ineligible for SCI access. In arch 1992, he received a memorandum from the same clearance facility informing him of its intent to revoke his security clearance because of his alcohol-related misconduct. Applicant acknowledged being informed of the action proposing the revocation of his SCI eligibility and collateral security clearance in a memorandum dated April 1992. In the same memorandum, he indicated he did not intend to respond. In June 1992, the military clearance facility informed Applicant his security clearance was revoked. And as stated above, Applicant was discharged from military service as an "Alcohol Abuse - Rehabilitation Failure" in November 1992.

When Applicant completed his SF 86 in January 2000, he answered "no" to question 20 which asked him if in the last 10 years he had been:

- fired from a job
- quit a job after being told you'd be fired
- left a job by mutual agreement following allegations of misconduct
- left a job by mutual agreement following allegations of unsatisfactory performance
- left a job for other reason under unfavorable circumstances.

Applicant also answered "no" to question 24 which asked him if he had "**ever** been charged with or convicted of any offense(s) related to alcohol or drugs?"(emphasis added). And Applicant answered "no" to question 32, which asked him if he had "ever had a clearance or access authorization denied, suspended, or revoked..."

Later when Applicant was questioned by the Defense Security Service (DSS) in August 2001, he explained he had answered "no" to the question 24 "regarding (his) police record" because the question "was for the last seven years," and listed "law enforcement officer, prosecutor, or courtroom official," and he understood the "question not to include me." [\(1\)](#) He explained that he answered "no" to question 32--which asked if his security clearance had ever been revoked--because he was "not aware that (his) security clearance had been revoked." He did not know his clearance had been

revoked because he continued to work and have access to classified materials until he was discharged from the military. Applicant did not offer an explanation for his "no" answer to question 20. In the same sworn statement, Applicant stated his most recent arrest for an alcohol-related incident occurred in June 1991, when his most recent alcohol-related arrest had actually occurred in January 1992. Misstating the date of an arrest by seven months more than nine years after the event is not found to be a material misrepresentation.

When Applicant answered the SOR, he admitted omitting information about his alcohol-related arrests from his SF 86, but explained he did not think he had to provide information that was already in his records. He further explained that he based his response "on all my records and outstanding civilian achievements and good personal conduct in the civilian community." He repeated the explanation for his "no" answer to question 32--that he had given DSS in his August 2001 signed, sworn statement: he "never received a final notification that (his) clearance was revoked while in military service....(he) performed all the military duties, worked with classified equipment and material.....until (his) discharge in November 1992." He explained that he did not remember the date of his last alcohol-related incident when he provided information of that incident in his signed, sworn statement.

The record does not include any information about Applicant's professional expertise or competence.

POLICIES

The Adjudicative Guidelines of the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case by case basis with an eye toward making decisions with reasonable consistency which are clearly consistent with the interests of national security. In making these overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but also in the context of the factors set forth in Section 6.3 of the Directive. In that vein, the Government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate the facts proven have a nexus to Applicant's lack of security worthiness.

The following Adjudicative Guidelines are deemed applicable to this case:

PERSONAL CONDUCT

(Guideline E)

The Concern: 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 include:

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.

Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination.

Conditions that could mitigate security concerns include:

None Applicable

Burden of Proof

The Government has the burden of proving any controverted facts alleged in the SOR. If the Government established its

case, the burden of persuasion shifts to Applicant to establish his security suitability through evidence which refutes, mitigates, or extenuates the disqualifying conduct and demonstrates it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubt about Applicant's judgment, reliability, or trustworthiness, Applicant has a heavy burden of persuasion to demonstrate he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against an Applicant.

CONCLUSION

Having considered the record evidence in accordance with appropriate legal precepts and factors, this Administrative Judge concludes the Government has established its case under Guideline E. In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in Section E2.2. dealing with Adjudicative Process.

A security concern is raised by Applicant's deliberate omission of relevant and material facts from the SF 86 he completed in January 2000. His dishonesty and lack of candor could indicate he may not properly safeguard classified information.

Applicant's answers to questions 20, 24, and 32 were material falsifications. These questions are intended to elicit information about alcohol-related arrests, an employment termination under unfavorable circumstances, and the past revocation of a security clearance. And Applicant's "no" answer to each question was misleading and false. His attempts to explain why he did not list any or all of his three arrests for alcohol-related misconduct are inconsistent and incredible. Question 24 is straightforward and simple, and begins with the words "have you ever..." This question does not impose parameters of time (in the last 7 years; questions 25, 26, 27) or limit the inquiry to specific vocations (law enforcement officer, prosecutor, or courtroom official: question 28). Applicant's explanations for not answering this question truthfully are a transparent effort to avoid disclosing the information he knew had provided the basis for revoking his security clearance in 1992, and which Applicant may have reasonably believed would prevent him from being granted a security clearance in 2000.

Similarly, Applicant's "no" answer to question 20 which asked if he had ever been terminated from a job under unfavorable circumstances, was also a material falsification. His claim that the circumstance of his discharge from military service was not responsive to this question because it was under honorable conditions is dishonest and disingenuous. Applicant had served in the U.S. military from age 21 to age 34; he had held this "job" longer than any he had held before or after military service. It is not credible he would have forgotten that he left military service under unfavorable circumstances, after being involved in four alcohol-related incidents, and before the term of his enlistment had expired.

Finally, Applicant claims he answered "no" to question 32 because he did not know his security clearance had been finally revoked as he continued to work with classified equipment and materials. This answer too, is dishonest, disingenuous and not credible since Applicant admits receiving the memoranda informing him of his ineligibility to access SCI, and of the intent to revoke his security clearance. If as Applicant claims, he continued to work in the same area and perform the same duties, he would also have received the memorandum informing him that his security clearance had been revoked. Guideline E is concluded against Applicant.

FORMAL FINDINGS

Formal findings as required by Section 3, paragraph 7, of enclosure 1 of the Directive, are hereby rendered as follows:

Paragraph 1 (Guideline E) AGAINST THE APPLICANT

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. Against the Applicant

Subparagraph 1.e. For the 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 Applicant's security clearance.

John R. Erck

Administrative Judge

1. Questions 25 and 26 ask "in the last 7 years" and question 28 asks an applicant if he had "ever illegally used a controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official; while possessing a security clearance; or while in a position directly and immediately affecting public safety?" If Applicant did not understand the questions on the SF 86 because of a language barrier, he does not indicate this difficulty in his subsequent signed, sworn statement, or in his SOR answers. Because of Applicant's 13 years of service in the U.S. military, a presumption arises he was sufficiently proficient in English to read and understand the questions on the SF 86.