

KEYWORD: Personal Conduct

DIGEST: After being arrested and convicted for DUI in 1992, 1994, and 1995, Applicant answered "no" to the question on the SF 86 that asked if he had ever been arrested or convicted of any offense related to alcohol or drugs, and "no" to the investigator's questions about whether he had ever been arrested or had ever had problems with alcohol. His explanation that his arrests and alcohol abuse had occurred so long ago that he had forgotten about them was not credible. Clearance is denied.

CASENO 01-09719.h1

DATE: 06/14/2002

DATE: May 14, 2002

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 01-09719

DECISION OF ADMINISTRATIVE JUDGE

JOHN R ERCK

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

After being arrested and convicted for DUI in 1992, 1994, and 1995, Applicant answered "no" to the question in the SF 86 that asked if he had ever been arrested or convicted of any offense related to alcohol or drugs, and "no" to the investigator's questions about whether he had ever been arrested or had ever had problems with alcohol. His explanation that his arrests and alcohol abuse had occurred so long ago that he had forgotten about them was not credible. Clearance is denied.

STATEMENT OF THE CASE

On November 19, 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 for Applicant and recommended referral to an Administrative Judge to determine whether a security clearance should be granted, denied or continued.

Applicant answered the SOR in writing on January 25, 2002, and requested a hearing before a DOHA Administrative Judge. The case was assigned to this Administrative Judge on April 16, 2002. On May 20, 2002, a hearing was convened for the purpose of considering whether it is clearly consistent with the national interest to grant Applicant's security clearance. Because Applicant does not speak English fluently, the services of a qualified interpreter were used throughout the proceeding. The Government's case consisted of 10 exhibits and one witness. Applicant relied on his

own testimony and six exhibits--two of which were admitted after the hearing adjourned. A transcript (Tr.) of the proceeding was received on May 30, 2002.

FINDINGS OF FACT

The Statement of Reasons (SOR) charges Applicant with dishonesty and a lack of candor because he deliberately omitted relevant and material facts from his SF 86 (*Security Clearance Application*) when he answered "no" to the question which asked if he had been charged or convicted of any offense related to drugs or alcohol, when in fact, he had been arrested and convicted for driving under the influence (DUI) in April 1992, September 1994, and February 1995. In his answer to the SOR, Applicant admitted he had been arrested on the occasions alleged, but denied he had deliberately omitted, concealed or falsified information of these arrests. After a complete and thorough review of Applicant's admissions and denials and the evidence of record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is a 39-year-old employee of DoD Contractor--for whom he has worked since August 1999. He received an electronics degree in August 1987. He has not previously applied for a security clearance. He has been married since July 1996.

As previously noted, Applicant was arrested and convicted of DUI on three occasions in the early to mid-1990's. These arrests and alcohol consumption are not alleged as a security concern; apparently, because the most recent arrest occurred in February 1995, and there is no evidence Applicant has abused alcohol since that arrest. However, a security concern is raised by Applicant's omission of these arrests from his SF 86 and by his providing false and misleading information during an interview with an investigator. His explanation for omitting information of his arrests is not credible in view of the circumstances surrounding each arrest and conviction.

On April 9, 1992, Applicant was arrested for driving under the influence (DUI). A test was administered and disclosed Applicant's blood-alcohol level to be .11 (Gov. Exh. 4, Tr. 50). He subsequently appeared in court with an attorney; he was found guilty of the offense, sentenced to 15 days in jail (suspended) and fined \$100.00 plus costs (Tr. 53). Also Applicant's driver's license was restricted for one month, and he was required to attend a "rehabilitation course for drivers" offered by the Department of Transportation and Public Works (Tr. 55).

On September 15, 1994, Applicant was arrested a second time for DUI. On this occasion, he was involved in an accident when the car he was driving rear-ended another vehicle (Gov. Exh 6). A test administered at the time disclosed Applicant's blood alcohol level to be .21.⁽¹⁾ The police officer investigating the accident found Applicant to have been negligent (Tr. 62, 69). The passengers in the car Applicant hit received minor injuries (Tr. 63). Approximately six weeks

later when Applicant appeared in court with his attorney (Tr. 78), he was found guilty of DUI, sentenced to pay a fine of \$125.00 plus costs, and he was again referred to the rehabilitation course run by the Department of Transportation and Public Works. Applicant's driver's license was suspended until he complied with the rehabilitation program (Tr. 73).

Applicant was arrested for a third DUI on February 21, 1995. In early April 1995, he appeared in court with his attorney (Tr. 80); he was found guilty of DUI and sentenced to pay a fine of \$300.00 plus costs, and he was referred to an "alcoholism rehabilitation program." And again, Applicant's driver's license was suspended for the duration of the rehabilitation program (Tr. 81).

There is no evidence Applicant has been arrested on any other occasion for misconduct that did not involve alcohol. And there is no evidence he has been involved in civil legal proceeding where he was represented in court by an attorney. He appeared in the DOHA proceedings without the assistance of counsel.

Applicant was hired by his current employer in October 1999. In March 2000, his employer requested him to complete an SF 86. He completed this form and certified:

My statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both.

In answer to question 24 which asked if he had "~~ever~~⁽²⁾ been charged or convicted of any offense(s) related to alcohol or drugs," Applicant answered "no".⁽³⁾ Later when he was interviewed by a contract investigator for the Defense Security Service (DSS), Applicant also answered "no" repeatedly to questions about whether he had ever been arrested, or had had any trouble with alcohol or drugs (Tr. 94). He explained he did not list the DUI arrests because they had occurred so long ago. He claimed to have only a vague memory of what had happened (Tr. 123). Applicant did not indicate (to the investigator) he had trouble understanding any of the questions on the SF 86 (Tr. 121).

In his answer to the SOR, Applicant admitted he had been arrested and convicted three times for DUI; but denied that he had deliberately omitted information of these arrests from his SF 86. At his administrative hearing, Applicant repeated the explanation he had first provided to the investigator: "all these had happened more than 10 years prior to this and I just didn't have any of it on my memory....I have been sober for a long, long time...it was not an intentional mistake....I answered no because I didn't recall...(Tr. 148-150, 154). Applicant attempted to create the impression the DUI arrests had occurred so long ago he had completely forgotten about them when he completed the SF 86.

According to letters submitted by his character references, Applicant performs his assigned tasks with satisfactory results, is an asset to his employer, and is an individual with sound judgment. In May 2002, he received a Certificate of Appreciation from the Commander of a battalion on the military installation where he is employed.

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 national interest. 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 the instant matter:

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. The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility.

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.

E2.A5.1.2.3. Deliberately providing false and 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 the security concerns include:

None Applicable

Burden of Proof

The Government has the burden of proving any controverted facts alleged in the Statement of Reasons. If the Government establishes 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 doubts 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 under the appropriate legal precepts and factors, this Administrative Judge concludes the Government has established its case with regard to Guideline E. In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in Section E2.2., as well as those referred to in the section dealing with the Adjudicative Process.

A security concern is raised by Applicant's "deliberate omission...of relevant and material facts" from his SF 86. Facts are considered relevant and material when they are capable of influencing a federal agency's decision, e.g., a decision to grant or deny a security clearance. In this instance Applicant's "no" answers to questions on the SF 86 intended to elicit information about whether he had ever been charged with or convicted of any offenses related to drug or alcohol abuse, fall well within the definition of materiality. Applicant's explanation that he answered "no" to question 24 because he had forgotten about these events is not credible. The facts and circumstances surrounding his arrests and convictions for DUI were not typical occurrences in Applicant's life. These arrests, convictions, and the accompanying events were truly atypical occurrences: they represented the only times in his life when he was arrested, the only times he was tested for alcohol, the only times he appeared in court with an attorney, the only times he was required to attend a rehabilitation program, and the only times he was sentenced for misconduct. And contrary to his attempt to relegate these events to some remote historical epoch, the most recent arrest had occurred less than five years before he completed the SF 86.

The most conclusive evidence Applicant's attempt to withhold information from the Government was deliberate, was his repeatedly answering "no" to the investigator's direct and specific questions about whether he had ever been arrested, or had ever had trouble with drugs or alcohol. Even if had forgotten about the specific arrests and convictions, he would still have remembered the problems he experienced with alcohol within the previous 5 years. If he is sober and abstinent today--and Applicant repeatedly referred to the length of time he has been sober-- he would also remember the reasons for his being sober and abstinent. It is highly improbable this Applicant, or anyone else who has not been the victim of some traumatic injury or debilitating disease, would not remember the arrests, court appearances, convictions, and license suspensions recorded in Government Exhibits 3 through 9. Guideline E is concluded against Applicant.

FORMAL FINDINGS

Formal findings are 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

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. It is not clear from the records whether this blood-alcohol test (administered on the Island of Puerto Rico) was identical to those administered in the Continental U.S. (Tr. 65).
2. Emphasis added.
3. Applicant was further instructed to "report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the record.