

DATE: December 17, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-13636

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Twenty-nine year old Applicant with 10-year history of criminal conduct and alcohol consumption failed to establish that it is clearly consistent with the national interest to grant him a security clearance. Security clearance is denied.

STATEMENT OF THE CASE

On June 7, 2002, pursuant to Executive Order No. 10,865, *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, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant that detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA recommended referral to an administrative judge to determine whether clearance should be granted, continued, denied, or revoked. DOHA based its recommendation on allegations, detailed in the SOR, that Applicant's alcohol consumption (Guideline G), criminal conduct (Guideline J), and personal conduct (Guideline E) create doubt about his judgment, reliability, and trustworthiness.

Applicant answered the SOR in writing on August 5, 2002 and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's written case on September 16, 2002. A complete copy of the file of relevant material (FORM) was provided to Applicant, and he was afforded the opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's case. Applicant received the FORM on October 7, 2002, but failed to respond within the 30 days allotted by the Directive, ¶ E.3.1.7. The case was assigned to me on November 26, 2002.

FINDINGS OF FACT

After a thorough review of the evidence, including Applicant's admissions, I find the following facts.

Applicant is a 29-year-old native-born citizen of the U.S. who is employed by a defense contractor. On December 30, 1991, Applicant was arrested at his parents house after fleeing from a beer distributorship he had broken into. He was intoxicated and was trying to steal more beer. During police questioning, he admitted committing additional crimes on December 29, 1991. He was charged with two counts of burglary (a felony), two counts of criminal trespass (a felony), two counts of theft by unlawful taking (a misdemeanor), one count of possessing instruments of crime (a misdemeanor), three counts of disorderly conduct (a misdemeanor), two counts of receiving stolen property (a misdemeanor), and three counts of criminal mischief (a misdemeanor). He pled guilty to one count of burglary and was sentenced to between 2 days and 23 months imprisonment, and ordered to pay court costs and a \$500.00 fine. The prosecutor declined to prosecute (*nolle prosequi*) the other offenses. Applicant served the minimum two-day jail sentence and was placed on probation. From January through June 1992, Applicant received weekly outpatient alcohol treatment.

On November 7, 1992, Applicant was arrested for being intoxicated and ripping wires out of a circuit breaker at a local arcade. He was charged with criminal mischief and the illegal purchase or possession of alcohol by a minor. The charges were dismissed when the arresting officer failed to appear on the court date.

On May 12, 1995, Applicant was arrested and charged with driving under the influence of liquor or a controlled substance (DUI), reckless driving, and speeding. Applicant pled guilty to the DUI and was sentenced to between 2 days and 23 months in jail. The remaining charges were *nolle prosequi*. Applicant served the minimum 2-day jail sentence and was fined \$300.00 plus costs. As a result of this conviction, Applicant was found to be in violation of his probation from his burglary conviction in December 1991 and further incarcerated for 3 months.

In September 1995, while at a party at his university, Applicant became intoxicated, broke a light, and damaged other property. As a result of this incident, Applicant was convicted, pursuant to his guilty plea, of public intoxication, criminal mischief, and disorderly conduct. He was sentenced to pay a fine and was placed on the university's probation program. From September 1995 until April 1997, Applicant received treatment for his alcohol problems at the university health center.

In January 1997, Applicant became intoxicated at his apartment building and broke windows and set off fire alarms. As a result, Applicant was convicted, pursuant to his guilty plea, of disorderly conduct. He was sentenced to pay a fine and restitution totaling \$3,534.00 and placed on probation for one year.

Applicant was arrested on May 25, 1999, for driving under the influence of alcohol. His blood alcohol content was at least .21. He was convicted pursuant to his guilty plea, paid \$505.00 in fines and costs, had his driver's license suspended for six months, and was directed to attend a two-day alcohol education program. During the alcohol education program, Applicant was referred to a 16-week alcohol abuse treatment program. Applicant asserts that he successfully completed the program and that he continues to voluntarily attend meetings of Alcoholics Anonymous.

By his own January 25, 2002, admissions to the DOHA interrogatories, Applicant continues to consume alcohol to excess and the point of intoxication.

The file contains a computer-generated security clearance application, Standard Form 86, on Applicant, dated August 24, 1999. Question 24 asks whether an applicant "has ever been charged with or convicted of any offense(s) related to alcohol or drugs?" The answer to question 24 was "yes," however, it does not list Applicant's arrest for DUI on May 25, 1999. Applicant specifically denied completing a security clearance application on that date, and the form itself does not bear his signature or any other indication that he authored or approved the information contained therein. Applicant's original security clearance application is dated September 9, 1998. In his January 25, 2002 response to DOHA interrogatories, Applicant voluntarily disclosed the May 25, 1999, DUI arrest and conviction.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to

"United States citizens . . . whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Order No. 12,968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 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. Directive, ¶ E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Exec. Order No. 10,865 § 2. *See* Exec. Order No. 12,968 § 3.1(b).

Initially, the Government must establish, by something less than a preponderance of the evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at *6-8 (App. Bd. May 9, 2001). The applicant then bears the burden of demonstrating that it is clearly consistent with the national interest to grant or continue the applicant's clearance. "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive, ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Exec. Order No. 12,968 § 3.1(b).

A security risk may exist under Guideline G when an individual consumes excessive amounts of alcohol because it "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." Directive, ¶ E2.A7.1.1. Applicable conditions that could raise a security concern under Guideline G and may be disqualifying include the following:

- (1) 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. Directive, ¶ E2.A7.1.2.1.
- (2) Diagnosis by a credentialed medical professional of alcohol abuse or alcohol dependence. Directive, ¶ E2.A7.1.2.3.
- (3) Evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program. Directive, ¶ E2.A7.1.2.4.
- (4) Habitual or binge consumption of alcohol to the point of impaired judgment. Directive, ¶ E2.A7.1.2.5.

Applicable conditions that could mitigate the security concerns include the following:

- (1) Positive changes in behavior supportive of sobriety. Directive, ¶ E2.A7.1.3.3.
- (2) Following diagnosis of alcohol abuse or alcohol dependence, the individual has successfully completed inpatient or outpatient rehabilitation along with aftercare requirements, participates frequently in meetings of Alcoholics Anonymous or a similar organization, has abstained from alcohol for a period of at least 12 months, and received a favorable prognosis by a credentialed medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program. Directive, ¶ E2.A7.1.3.4.

A security risk may exist under Guideline J when an individual has a history or pattern of criminal activity because it "creates doubt about a person's judgment, reliability and trustworthiness." Directive, ¶ E2.A10.1.1. Applicable conditions that could raise a security concern under Guideline J and may be disqualifying include the following:

(1) Allegations or admission of criminal conduct, regardless of whether the person was formally charged. Directive, ¶ E2.A10.1.2.1.

(2) A single serious crime or multiple lesser offenses. Directive, ¶ E2.A10.1.2.2.

Applicable conditions that could mitigate the security concerns include the following:

(1) The criminal behavior was not recent. Directive, ¶ E2.A10.1.3.1.

(2) There is clear evidence of successful rehabilitation. Directive, ¶ E2.A10.1.6.

A security risk may exist under Guideline E when an individual's 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. Directive, ¶ E2.A5.1.1. Applicable conditions that could raise a security concern and may be disqualifying include 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 security clearance eligibility or trustworthiness." Directive, ¶ E2.A5.1.2.2.

Applicable conditions that could mitigate security concerns under Guideline E include the following:

(1) "The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability." Directive, ¶ E2.A5.1.3.1.

(2) "The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts.." Directive, ¶ E2.A5.1.3.2.

CONCLUSIONS

Based on the evidence of record, including Applicant's admissions, the Government met its burden of establishing that conditions exist in the personal or professional history of Applicant, under Guidelines G, J, and E, that may disqualify him from being eligible for access to classified information. Applicant has a long history of binge consumption of alcohol impairing his judgment to the extent he has been involved in numerous criminal acts including burglary, driving under the influence of alcohol, disorderly conduct, public drunkenness, and criminal mischief. Furthermore, a security clearance application for Applicant, dated August 24, 1999, failed to report his DUI arrest of May 25, 1999.

Guideline G: Alcohol Consumption

Applicant admitted consuming an excessive amount of alcohol, at times to the point of intoxication, from 1989 until January 2002. Despite entering and completing alcohol treatment programs, he has been unable or unwilling to control his drinking. Although Applicant claims in his interrogatories that he is becoming more sober as he matures, the evidence does not convince me that he is reliable and able to control his impulses when he is drinking.

In ¶ 1.b., 1.c., and 1.e., the Government alleges as a disqualifying condition that Applicant received treatments for his alcohol problems on three different occasions. In order to be a disqualifying condition, the treatments must be as a result of a diagnosis or evaluation by a credentialed medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program. *See* Directive, ¶¶ E2.A7.1.2.3 and E2.A7.1.2.4. Although Applicant admitted receiving the treatments, he did not admit, and the Government neither alleged nor proved, that the treatments were as a result of such a formal diagnosis or evaluation by appropriately credentialed personnel. The Government failed to meet its burden on these counts.

The successful completion of an alcohol rehabilitation program may be a mitigating condition. Directive, ¶ E2.A7.1.3.4. However, in order for Applicant to take advantage of this mitigating condition, there must be evidence of a formal diagnosis of alcohol abuse or alcohol dependence and the applicant must have abstained from alcohol for a period of at least 12 months. There is no evidence of such a formal diagnosis or that Applicant has abstained from alcohol for a year.

In fact, Applicant admits continuing to consume alcoholic beverages.

Although the Government failed to meet its burden in establishing that the allegations in ¶¶ 1.b., 1.c., and 1.e. of the SOR were disqualifying conditions, Applicant's admissions to receiving such treatment and still not being able to control his use of alcohol demonstrates the depth of his problem and suggests a poor prognosis for the future.

Applicant denied, in part, the allegations in ¶ 1.d of the SOR. He claims he did not get drunk and run through his apartment building causing disruptions three to five times weekly and did not break his lease with the landlord. But, he does admit he committed such misconduct on one occasion in September 1995, also the subject of the allegation in the SOR, ¶ 2.d. As a result of this incident, he pled guilty to public drunkenness, criminal mischief, and disorderly conduct. He claims the lease was terminated by mutual agreement with the landlord. Even disregarding those parts of the allegation he denies, the one admitted incident is sufficient to find against Applicant on this reason.

Subparagraph 1.a. of the SOR incorporates by references all four of the allegations contained in ¶ 2. Applicant denies, in part, the allegation contained in ¶ 2.b. I will examine the allegation in more detail under Guideline J. However, as Applicant admits, and the evidence establishes, the allegations in other parts of ¶ 2., I find against Applicant on ¶ 1.a.

Guideline J: Criminal Conduct

Applicant has a history of criminal behavior. While most of the offenses may be considered minor, he was sentenced on two different occasions to imprisonment for up to 23 months. Although some of these offenses were not recent, there is no clear evidence of rehabilitation. Furthermore, although not alleged in the SOR, because of the sentences of up to 23 months imprisonment, it appears Applicant is barred from having access to classified information, under 10 U.S.C. § 986(c)(1), absent the Secretary of Defense or a secretary of a military department granting a waiver.

Applicant denied, in part, the allegation in ¶ 2.b. of the SOR. Applicant admits that he was arrested on November 7, 1992, and charged with criminal mischief and illegal purchase or possession of alcohol by a minor, for being intoxicated and ripping wires out of a circuit breaker at a local arcade. He asserts that he was not guilty of the offenses and that he did not have an opportunity to defend himself in court because the officer did not appear for trial and the charges were dismissed. There is no requirement that an applicant be convicted or even charged with an offense that is the basis of the denial or revocation of a security clearance. A bare allegation of criminal conduct may be sufficient to a disqualify an applicant from a security clearance. *See Directive, ¶ E2.A10.1.2.1.* Nevertheless, in this case, I find Applicant's denial credible and I find for him on this reason..

Applicant denies the allegations contained in ¶¶ 2.g. and 3.a. of the SOR. The Government contends Applicant (a) falsified material facts on his security clearance application, dated August 24, 1999, by failing to list his May 25, 1999, arrest for DUI, and (b) by doing so, he committed a felony. Applicant denies ever completing a security clearance application on that date, claims that he completed the security clearance application before the May 25, 1999 incident, and that he voluntarily disclosed the May 25th incident in interrogatories on January 25, 2002. The FORM contains a security clearance application, with Applicant's signature, dated September 27, 1998. There is no signature or other indication on the security application, dated August 24, 1999, that Applicant prepared or authorized it. Under the circumstances, Applicant has successfully refuted the Government's case on this issue.

Guideline E: Personal Conduct

As explained above, the Applicant has successfully refuted the Government's allegation that he falsified material facts on his security clearance application.

FORMAL FINDINGS

Formal Findings as required by the Executive Order No. 10,865 § 3, ¶ 7 (*See Directive, ¶ E3.1.25*), are as follows:

Paragraph 1. Guideline G: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: Against Applicant

Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: Against Applicant

Paragraph 3. Guideline E: FOR APPLICANT

Subparagraph 3.a.: For Applicant

DECISION

In light of all of 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.

James A. Young

Administrative Judge