

DATE: February 13, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-21340

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esq., Deputy Chief Department Counsel

FOR APPLICANT

James Logan Jr., Esq.

SYNOPSIS

Applicant, a 51-year-old computer scientist/engineer, was arrested for driving while intoxicated (DWI) in September 1999. In February 2000, he deliberately omitted mention of the DWI arrests in a security clearance application. In March 2001, Applicant was convicted of driving under the influence of alcohol or drugs (DUI) in January 2001. Applicant failed to establish it was clearly in the national interest to grant him a clearance. Clearance is denied.

STATEMENT OF THE CASE

Applicant, an employee of a defense contractor, applied for a security clearance so he could work with classified information. The Defense Office of Hearings and Appeals (DOHA), the federal agency tasked with determining an applicant's eligibility for access to classified information, declined to grant the Applicant a clearance. In accordance with the applicable Executive Order⁽¹⁾ and Department of Defense Directive,⁽²⁾ DOHA issued a Statement of Reasons (SOR) on 1 November 2002 detailing why a clearance was not granted and recommending Applicant's case be referred to an administrative judge to determine whether the clearance should be denied/revoked. In the SOR, DOHA alleged Applicant failed to meet the excessive alcohol consumption (Guideline G) and personal conduct (Guideline E) personnel security guidelines.

Applicant answered the SOR in writing on 18 October 2002. The case was originally assigned to Administrative Judge John Erck on 21 November 2002, was transferred to Administrative Judge Paul Mason because of Judge Erck's caseload, and was finally transferred to me on 21 December 2002 due to consolidation and region rotation of the judges. On 22 January 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government's case consisted of four exhibits. Applicant testified on his own behalf and submitted six exhibits. A transcript (Tr.) of the proceeding was received on 29 January 2003.

FINDINGS OF FACT

On 24 September 1999, a police officer using radar clocked Applicant's vehicle traveling 69 mph in a 40 mph zone and observed it cross over the double yellow center line some six to eight inches into the oncoming travel lane. When the officer stopped the vehicle, he detected the odor of alcohol on Applicant's breath. Applicant told the officer that he had stopped on the way home from work for a few drinks. Applicant's speech was slurred. When the officer asked for his driving credentials, Applicant fumbled through the papers. Applicant failed to recite the alphabet correctly and failed to successfully complete some coordination tests. Applicant was charged with DWI, speeding, and reckless driving Ex. 4. Because he was unable to post bail, Applicant spent the night in jail. *Id.*; Tr. 40.

On 20 October 1999, Applicant pled guilty to, and was found guilty of, reckless driving and speeding. The DWI charge was dismissed. Applicant was fined \$300, ordered to pay court costs of \$60, and had his driver's license suspended for 60 days. SOR ¶ 1b; Answer.

Less than five months after the arrest and only four months after his court appearance, on 21 February 2000, Applicant completed a security clearance application. Ex. 1. Question 24 of the application asked if the applicant had "ever been charged with or convicted of any offense(s) related to alcohol or drugs." Applicant answered, "no." Ex. 1.

On 25 January 2001, Applicant was arrested for DUI of alcohol or drugs. Ex. 3. In March 2001, he pled guilty and was found guilty of DUI. The court sentenced him to pay a fine, have his license suspended for six months, and to receive attend the country Intoxicated Driver Resource Center (IDRC). Applicant attended two, six-hour courses at the IDRC and 15 hours of group counseling. The counselor required Applicant to attend weekly Alcoholic Anonymous meetings and to completely refrain from consuming alcoholic beverages for the duration of the counseling. In August 2001, Applicant's license was reinstated.

In August 2001, prior to the reinstatement of his driver's license, Applicant met with a Defense Security Service agent to discuss his security clearance application. When the agent asked to see his driver's license (as a form of identification), Applicant told him he had lost his license for six months as a result of his conviction for the January 2001 DUI. Applicant also advised the investigator about the court-ordered counseling. Tr. 25-26. Applicant did not tell the investigator about his DWI arrest in 1999. Tr. 35-36.

Apparently as a result of his revelations to the investigator about his DWI, DOHA issued interrogatories concerning Applicant's alcohol consumption. Applicant completed these interrogatories on 28 June 2002. Question number 5 asked if Applicant had "been arrested, charged or held by any law enforcement authorities for any reason?" Applicant answered that he had. In an attachment, Applicant detailed his conviction for the January 2001 DUI. He never mentioned the 1999 arrest for DWI.

Applicant is a 51-year-old computer expert who works as a computer scientist/systems engineer for a defense contractor. Exs. 1, B. He had a clearance from about 1990 until about 1997. Ex. 1; Tr. 19. In his answer to the SOR and interrogatories, Applicant admitted he was still drinking alcoholic beverages. At his hearing, Applicant claimed to have completely stopped drinking alcoholic beverages in September or October 2002. The social worker who counseled Applicant after the March 2001 conviction does not believe Applicant "is at risk for any alcohol related problems in the future." Ex. B at 4.

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.

Or. 12968, *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. Or. 10865 § 2. *See* Exec. Or. 12968 § 3.1(b).

Initially, the Government must establish, by substantial 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. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "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. Or. 12968 § 3.1(b).

Under Guideline G of the Directive, excessive alcohol consumption is a security risk because it "often leads to 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. Under Guideline E of the Directive, personal conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations is a security risk because it could indicate that the person may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

CONCLUSIONS

Guideline G-Excessive Alcohol Consumption

In the SOR, the Government alleged three issues raising a security concern under Guideline

G: (a) Applicant's 2001 arrest and conviction for DUI; (b) Applicant's 1999 arrest for DWI; and (c) the group alcohol counseling he attended as a result of the 2001 conviction. Under Guideline G, the conditions that could raise a security concern in Applicant's case are as follows:

- (1) Alcohol incidents away from work, such as DWI. Directive ¶ E2.A7.1.2.1.
- (2) 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.

Mitigating conditions that may apply to Applicant's case are as follows:

- (1) The alcohol related incidents do not indicate a pattern. Directive ¶ E2.A7.1.3.1.
- (2) Positive changes in behavior supportive of sobriety. Directive ¶ E2.A7.1.3.3.

In his answer, Applicant admitted (a) and (b), but denied (c) and the overall applicability of Guideline G to his case. At the hearing, Applicant insisted that he received alcohol education and awareness training, not counseling. Tr. 28, 42. Nevertheless, the evidence supports a finding that there was an evaluation of his alcohol abuse by a licensed clinical social worker who was a staff member at an alcohol treatment program recognized by the courts. Ex. B. The Government met its burden of proving by substantial evidence the allegations under Guideline G.

Applicant testified that he "doesn't wish to drink again" (Tr. 29) and "has abstained completely [from consuming alcohol] since September or October [2002]" (Tr. 42). *See* mitigating condition, Directive ¶ E2.A7.1.3.3. I found Applicant tentative about not drinking again. After observing his demeanor and listening carefully to his statement, I am not convinced even Applicant believes he will not drink again.

Applicant's attorney asserts that Applicant's alcohol incidents do not indicate a pattern. *See* mitigating condition, Directive ¶ E2.A7.1.3.1. I disagree. Two arrests for driving under the influence of alcohol in the space of 16 months is a pattern. It shows the Applicant did not learn from his first arrest.

Guideline E-Personal Conduct

In the SOR, the Government alleged as a security concern Applicant's deliberate failure to disclose his arrest for DWI in 1999 on his security clearance application. In his answer, Applicant denied both the allegation and the applicability of Guideline E to his case.

Under Guideline E, the deliberate omission, concealment, or falsification of relevant and material facts from a security clearance application could raise a security concern and may disqualify an applicant from receiving a clearance. Directive ¶ E2.A5.1.2.2. None of the mitigating conditions listed under Guideline G appear to apply to Applicant's case.

During the hearing, Applicant was unable to adequately explain why he failed to include the September 1999 arrest in his answer to question 24 on the security clearance application. He claimed he did not intend to make a false report (Tr. 26) and "didn't relate [his arrest for DWI] to being an alcohol or drug offense" (Tr. 23). He claims he failed to notify the interviewing agent about his 1999 arrest because the agent "didn't ask." Tr. 35-36. He also failed to list that arrest on the interrogatories when he was again asked if he had ever been arrested for an alcohol related offense. Under the circumstances, I am convinced Applicant did intend to deliberately omit his September 1999 arrest from his security clearance application.

FORMAL FINDINGS

Conclusions as to each of the allegations in the SOR as required by Executive Order No. 10865 § 3, ¶ 7 and the Directive ¶ E3.1.25, are as follows:

Paragraph 1. Guideline G: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: Against 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

1. Exec. Or. 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), as amended and modified.

2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.