

DATE: May 22, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-23260

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Seth L. Hibbert, Esq.

SYNOPSIS

Thirty-seven-year-old applicant with five convictions for drunk driving deliberately omitted information on his security clearance application concerning medical and mental health treatment for his alcohol problems and deliberately provided false information about his recent return to drinking alcohol to an agent investigating his security worthiness. Finding is against Applicant on personnel security guidelines for alcohol consumption, criminal conduct, and personal conduct. Clearance is denied.

STATEMENT OF THE CASE

Applicant, an employee of a defense contractor, applied for a security clearance. 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 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 23 September 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 alcohol consumption (Guideline G), criminal conduct (Guideline J), personal conduct (Guideline E) personnel security guidelines of the Directive.

Applicant answered the SOR in writing on 22 October 2002. The case was assigned to Administrative Judge John Erck on 8 November 2002 and was subsequently transferred to Administrative Judge Wilford Ross. Judge Ross scheduled a hearing for 8 January 2003. At the request of Applicant's counsel, Judge Ross granted a delay in the hearing on 3 January 2003 due to Applicant's medical condition. The case was reassigned to me on 9 January 2003 and the case was postponed indefinitely while awaiting Applicant's recovery from surgery. On 21 March 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 three exhibits. DOHA received the transcript (Tr.) of the proceeding on 31 March 2003.

At the hearing, the Government moved to amend the 8 April 2000 date reflected in the SOR ¶¶ 3.a., b., c., and d., to 5 April 2000. Applicant did not object and the motion was granted.

FINDINGS OF FACT

Applicant is a 37-year-old storekeeper who works for a government contractor on an Air National Guard base. Ex. 1 at 1, 2. He is well-liked and is an excellent worker. Exs. A, B, C. He has been married over five years and has two children under the age of 3. Tr. 25; Ex. 1 at 4.

Applicant began drinking alcoholic beverages at the age of 15. Ex. 2 at 1. At times, he would drink up to 24 beers a night. Ex. 2 at 1. In June 1984, he was arrested for the misdemeanor of driving under the influence (first offense). Ex. 4 at 7. He was found guilty, paid fines, lost his license for six months, and was required to attend alcohol education classes. Ex. 2 at 2. In November 1984, Applicant was again arrested and charged with the misdemeanor of driving under the influence (first offense). He pled guilty to the offense of operating a motor vehicle while impaired by alcohol (an infraction), was convicted, paid fines, lost his license, and attended alcohol education classes. Ex. 3 at 2-3; Ex. 4 at 6.

In May 1990, Applicant was arrested and charged with operating a motor vehicle with an alcohol/blood concentration greater than .10 (1st offense). He was convicted after a trial and was sentenced to 60 days in jail, which he served, paid a fine of \$500, served a year on probation, and attended alcohol outpatient treatment weekly for several months. Ex. 2 at 3; Ex. 4 at 5.

He was arrested in August 1994 for driving while intoxicated (1st offense), a misdemeanor. He pled guilty, was given three years' probation, was fined \$750, had his license revoked, and attended outpatient treatment three times a week for six months. Ex. 4 at 4-5; Ex. 2 at 3-4.

Applicant stopped using alcohol after his 1994 arrest. He resumed consuming alcoholic beverages sometime around 1998. Tr. 29. He started off with one beer and progressed to drinking once a month and then more frequently.

Applicant completed his security clearance application on 5 April 2000. To question number 21, Applicant answered that he had never been charged with, or convicted of, any felony offenses. Ex. 1 at 6. To question number 24, Applicant answered that he had only been charged or convicted of one offense related to alcohol, his August 1994 arrest and subsequent conviction. Ex. 1 at 7. To question number 19, Applicant answered that he had consulted a mental health professional in the previous seven years but that the consultations involved only marital, family or grief counseling, when in fact he had received counseling for alcohol abuse. Ex. 1 at 6.

As a result of questions concerning answers on his security clearance application, a Defense Security Service agent interviewed Applicant. On 25 January 2001, Applicant completed a signed, sworn statement in which he claimed he "stopped using alcohol in Aug 94 and have not had any alcohol since." Ex. 2 at 1.

In March 2001, Applicant's wife became concerned that his drinking, which had resumed in 1998, was getting out of hand. Tr. 31. He was drinking a 12-pack of beer three times a week. Tr. 33. She convinced Applicant to enter an outpatient rehabilitation program. Tr. 32. Nevertheless, on 23 April 2001, while enrolled in the program, Applicant was arrested and eventually indicted for driving while intoxicated (2nd offense), a felony. Upon his plea of guilty, Applicant was convicted, placed on probation for five years, had his license revoked, and was required to complete four phases of an alcohol rehabilitation program. Ex. 3 at 1; Ex. 4 at 2-3.

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.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and Secretary of Defense have established for issuing a clearance.

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. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *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. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

Guideline G-Alcohol Consumption

In the SOR, DOHA alleged under Guideline G that Applicant consumed excessive amounts of alcohol to the point of intoxication from the age of 15 until 1994, and had been arrested multiple times for alcohol related incidents (SOR ¶ 1.a.), and continued to consume excessive amounts of alcohol up to at least November 2001, resulting in an arrest and conviction for an alcohol related incident (SOR ¶ 1.b.). Under Guideline G, 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. Directive, ¶ E2.A7.1.1.

The Government established by substantial evidence that Applicant was involved in alcohol-related incidents away from work, such as driving under the influence (DC 1), and in habitual or binge consumption of alcohol to the point of impaired judgment (DC 5) up until 2001. Applicant claims he has abstained from drinking alcohol for two years and has attended Alcoholics Anonymous (AA) programs on a regular basis. This would suggest that Applicant has taken positive steps toward rehabilitation (MC 3) and there is no likelihood of recurrence (MC 2). However, in light of Applicant's past history, two years without drinking is not sufficient to conclude that recurrence is unlikely. After all, his last drunk driving incident occurred while he was enrolled in an alcohol rehabilitation program. Furthermore, I am not convinced Applicant's alleged participation in AA amounts to weighty mitigation. He admits he only goes when he feels the need to do so and does not know the prayer or any of the 12 steps in the program. Even if I had found mitigating conditions 2 and 3 applicable, they do not outweigh the disqualifying conditions. The finding is against Applicant.

Guideline J-Criminal Conduct

In the SOR, DOHA alleged under Guideline J that Applicant was arrested and charged with drunk driving on five different occasions between 1984 and 2001. SOR ¶¶ 2.a., b., c., d., e. A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. Directive ¶ E2.A10.1.1.

The Government established by substantial evidence that Applicant was arrested for, or convicted of, drunk-driving related offenses five times between 1984 and 2001. DC 1 and 2. However, of the SOR is incorrect in alleging that the drunk driving offenses which are the subject of ¶¶ 2.c. and 2.d. were felonies. The evidence supports a finding that

Applicant was charged with, and convicted of, a felony only once-his 9 November 2001 conviction for driving drunk on 23 April 2001. SOR ¶ 2.a.

Despite his numerous attempts at alcohol rehabilitation, I am not convinced Applicant has been successfully rehabilitated such as to warrant application of MC 6. No other mitigating conditions listed under Guideline J apply. The findings is against Applicant.

Guideline E-Personal Conduct

In the SOR, DOHA alleged under Guideline E that Applicant falsified material facts on his security clearance application in answer to questions about his police record-felony offenses (SOR ¶ 3.a.), his police record-alcohol/drug offense (SOR ¶ 3.b.), his medical record (SOR ¶ 3.c.), and his use of alcohol (SOR ¶ 3.d.). The SOR also alleged Applicant made a false statement to a Defense Security Service (DSS) agent by claiming he had ceased drinking in August 1994. SOR ¶ 3.e. Under Guideline E, 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.

The Government failed to establish by substantial evidence that Applicant omitted relevant and material facts from question 21 on his personal security clearance application in relation to his felony arrests. Applicant completed his security clearance application on 5 April 2000. The evidence of record is that Applicant was not charged with a felony until 2001. The finding is for Applicant on SOR ¶ 3.a.

Likewise, I am convinced the evidence does not support a conclusion that Applicant deliberately omitted all of his drunk driving arrest, except the latest, in answering question 24. I am convinced that Applicant was under the impression that he only had to list his arrests in the past seven years. Most of the questions in that part of the security clearance application are limited to the past seven years. The Finding is for Applicant on SOR ¶ 3.b.

I am convinced that Applicant deliberately omitted information about his consultations with mental health professionals (question 19) and participation in alcohol rehabilitation programs (question 30) from his security clearance application. DC 2. Furthermore, Applicant deliberately provided false information to a DSS agent in connection with a security worthiness determination (DC 3), by claiming he had not consumed any alcohol since 1994. The finding is against Applicant on SOR ¶¶ 3.c., d., e.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline G: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: Against Applicant

Subparagraph 2.e.: Against Applicant

Paragraph 3. Guideline E: AGAINST APPLICANT

Subparagraph 3.a.: For Applicant

Subparagraph 3.b.: For Applicant

Subparagraph 3.c.: Against Applicant

Subparagraph 3.d.: Against Applicant

Subparagraph 3.e.: 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.