

DATE: February 9, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-25941

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Juan Rivera, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's two arrests for DUI are mitigated by the passage of time and by his moderated drinking habits. The incidents occurred seven years apart and do not indicate a pattern of alcohol abuse. Although he omitted the earlier of his two arrests from his SF-86 and his response to interrogatories, his omissions were not deliberate. However, Applicant was cited for 13 traffic violations between 1992 and 2003, an indication he is unwilling or unable to follow rules and regulations. He has not mitigated his conduct, disqualifying under Guideline E. Clearance is denied.

STATEMENT OF THE CASE

On August 11, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant. The SOR informed Applicant that DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to continue Applicant's security clearance. ⁽¹⁾ The SOR alleges facts that raise security concerns under Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct).

On August 26, 2003, Applicant responded to the SOR (Answer), wherein he denied the allegation in paragraph 1.a and subsequent references thereto in paragraphs 2.a, 2.b and 2.c. He admitted the remaining SOR allegations and requested a hearing. The case was originally assigned to a different administrative judge, but was re-assigned to me on October 16, 2003. On October 20, 2003, DOHA issued a Notice of Hearing setting this case to be heard on November 13, 2003. All parties appeared as scheduled. The government submitted five exhibits and Applicant submitted one exhibit. Applicant testified in his own behalf, but neither side called other witnesses. DOHA received the transcript (Tr) on November 24, 2003.

PROCEDURAL ISSUE

At the outset of the hearing, I addressed the following procedural issues:

(1) Department Counsel moved to amend the SOR by striking subparagraph 1.a. and subsequent references to that allegation in SOR subparagraphs 2.a, and 2.c. This motion was made in response to the information Applicant submitted with his Answer that was sufficient to refute the allegation in 1.a. ⁽²⁾

(2) Department Counsel also moved to strike subparagraph 2.b because it alleged falsification of the arrest described in 1.a - stricken - and because it alleged falsification of an event outside the seven year scope of the question. ⁽³⁾ I granted both motions as provided for in the Directive at E3.1.17.

The remaining allegations - SOR subparagraphs 1.b, 1.c, 2.a (as amended), 2.c (as amended), and 2.d - are the subject of this decision.

FINDINGS OF FACT

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant is a 31-year-old software engineer employed by a defense contractor. He seeks a security clearance in connection with his duties under his employer's contract with DoD. In June 1996, he received a bachelor's degree from a university in State A, where he grew up. He lived in State A until January 2000. He then moved to State B where he found work with his current employer. Between his graduation from college and his move to State B, Applicant worked various jobs in the computer industry. ⁽⁴⁾ This is his first application for a clearance.

On June 2, 1991, Applicant got drunk at his high school graduation party. Rather than drive himself home, he gave his keys to a friend so the friend could drive them both home. Unfortunately, Applicant's friend was also too drunk to drive. They were pulled over by the police and both were charged with operating a motor vehicle under the influence of alcohol (DUI). Applicant was also charged with having an open container of alcohol in a motor vehicle because he was still drinking a beer on the ride home. Applicant pled guilty to both charges and his driver's license was suspended for six months. He was also fined \$250.00 and ordered to attend 12 hours of an alcohol and driving awareness class.

On February 28, 1998, Applicant went to a friend's house where he drank between three and five beers. Earlier in the day, Applicant had also taken painkillers prescribed for him after a dental procedure earlier in the week. The combination caused Applicant to pass out while he was driving home. He lost control of his car and hit a tree, but escaped serious injury. A breathalyzer test showed he had a blood alcohol content of .11%. He was charged with DUI and, on May 6, 1998, was convicted, fined, and ordered to attend alcohol counseling and another alcohol and driving awareness class. His license was suspended for six months.

Since 1991, Applicant has been cited for 13 traffic violations, 11 of which occurred in State A through 1999. Applicant was also cited twice for speeding in State B in 2003. ⁽⁵⁾ Of the 13 violations, five were for speeding. He has also been cited for careless driving, improper passing, obstructing the passage of other vehicles, and driving the wrong way on a one way street. He was also cited for having fictitious license plates. Between 1991 and 1999, Applicant's driving privileges have been suspended for a total of nearly 20 months. ⁽⁶⁾

On February 21, 2001, Applicant completed a Security Clearance Application (SF-86). In response to question 24, which asked whether Applicant had "ever been charged with or convicted of any offense(s) related to alcohol or drugs," ⁽⁷⁾ he disclosed his 1998 DUI arrest, but did not list his 1991 DUI arrest. On April 25, 2003, Applicant submitted a notarized response to interrogatories from DOHA adjudicators about his alcohol use. In response to question 5, which asked him to "[l]ist all arrests, regardless of whether or not it was covered by the Defense Security Service during [his subject] interview." ⁽⁸⁾ Applicant again omitted his 1991 DUI arrest and listed his 1998 DUI arrest. As for the omission of the 1991 arrest from his SF-86, Applicant asserts he was told by his employer's security officer that Applicant need only disclose information from the preceding five years (since February 1996). ⁽⁹⁾ He has offered essentially the same explanation for his response to interrogatories; namely, even though the question asked him to list any arrests regardless of whether they were addressed in the SF-86, Applicant still thought the scope of the question was for the preceding five years.

POLICIES

The Directive sets forth adjudicative guidelines⁽¹⁰⁾ to be considered in evaluating an Applicant's suitability for access to classified information. The Administrative Judge must take into account both disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having considered the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are Guideline E (Personal Conduct) and Guideline G (Alcohol Consumption).

BURDEN OF PROOF

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁽¹¹⁾ for an Applicant to either receive or continue to have access to classified information. The government bears the initial burden of proving, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If the government meets its burden it establishes a *prima facie* case that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden then shifts to the Applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, the Applicant bears a heavy burden of persuasion.⁽¹²⁾ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability, and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.⁽¹³⁾

CONCLUSIONS

Guideline E (Personal Conduct). Under this guideline, conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations indicate that the person may not properly safeguard classified information.⁽¹⁴⁾ Here the government's concerns are about Applicant's honesty and his willingness to obey everyday rules and regulations. The government has established that Applicant omitted his 1991 arrest from both his SF-86 and in his response to interrogatories. However, the applicable disqualifying condition (DC 2⁽¹⁵⁾) requires that the conduct be deliberate. I accept Applicant's explanation for both omissions simply because, if he intended to mislead the government about his arrest record or his alcohol use, it would make little sense for him to omit the older arrest and list the more recent one. Therefore, I conclude Applicant lacked the intent to mislead the government and that he did not deliberately omit relevant and material information from his SF-86 or his response to interrogatories.

However, the government has proven its case regarding the Guideline E concerns attendant to Applicant's multiple traffic violations between 1992 and 2003. Generally, minor moving violations are not security significant. However, the conduct alleged in SOR paragraph 2.d, and fully supported by both Exhibit 5 and Applicant's testimony, is unacceptable in a security context because it reflects Appellant's disdain for basic societal requirements. The government cannot be expected to trust a person to protect classified information if that person cannot obey traffic laws or heed a direct order of the courts. Guideline E DC 5⁽¹⁶⁾ applies here. In light of Applicant's admission at hearing that he has received two more speeding tickets in the past year, I conclude that Applicant's judgment, as he approaches his mid-30s, is unlikely to change. I conclude Guideline E against the Applicant.

Guideline G (Alcohol Consumption). 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.⁽¹⁷⁾ A security concern arises from adverse alcohol-related conduct by an Applicant or from a clinical diagnosis of alcohol dependence or addiction. The government has satisfied its burden by showing that Applicant has been arrested and convicted twice for driving under the influence of alcohol. Based on these facts,

Guideline G disqualifying condition (DC) 1-(18) applies. By contrast, Guideline G MC 1-(19) and MC 2-(20) apply. The arrests occurred seven years apart and the latter arrest was over five years ago. Further, Applicant's drinking habits have moderated to the point where he rarely drinks, and when he does, he drinks very little. Absent information indicating he is dependent on alcohol or that he still drinks to excess or intoxication, it is unlikely he will repeat his earlier alcohol-related conduct. I conclude Guideline G for the Applicant.

I have carefully weighed all of the evidence in this case, and I have applied the aforementioned disqualifying and mitigating conditions as listed under each applicable adjudicative guideline. I have also considered the whole person concept as contemplated by the Directive in Section 6.3, and as called for by a fair and commonsense assessment of the record before me as required by Directive Section E2.2.3. The record evidence as a whole presents an unacceptable risk to the government's compelling interest in ensuring its classified information is properly safeguarded. Applicant's continuing disregard for rules and regulations intended to support public safety indicates he cannot be relied on to subordinate his own interests to the government's. I conclude that Applicant should not be granted access to classified information.

FORMAL FINDINGS

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1, Alcohol Consumption (Guideline G): FOR THE APPLICANT

Subparagraph 1.a: Withdrawn

Subparagraph 1.b: For the Applicant

Subparagraph 1.c: For the Applicant

Paragraph 2, Personal Conduct (Guideline E): AGAINST THE APPLICANT

Subparagraph 2.a: For the Applicant

Subparagraph 2.b: Withdrawn

Subparagraph 2.c: For the Applicant

Subparagraph 2.d: 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 or continue a security clearance for the Applicant. Clearance is denied.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. Tr., p. 13 - 14.
3. Tr., p. 15.
4. Ex. 1.
5. Tr., p. 41.

6. Ex. 5.
7. Ex 1.
8. Ex. 3.
9. Ex A.
10. Directive, Enclosure 2.
11. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
12. *See Egan*, 484 U.S. at 528, 531.
13. *See Egan*; Directive E2.2.2.
14. Directive, E2.A5.1.1.
15. Directive, 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; (emphasis added)
16. Directive, E2.A5.1.2.5. a pattern of dishonesty or rule violations;
17. Directive, E2.A7.1.1.
18. Directive, E2.A7.1.2.1. 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;
19. E2.A7.1.3.1. The alcohol related incidents do not indicate a pattern;
20. Directive, E2.A7.1.3.2. The problem occurred a number of years ago and there is no indication of a recent problem;