

DATE: September 15, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-00500

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Catherine Engstrom, Esq., Department Counsel

FOR APPLICANT

Albert W. Laisy, Esq.

SYNOPSIS

Applicant was arrested and convicted of offenses resulting from his excessive consumption of alcohol. Because he failed to perform the sentence to community service for assaulting a police officer, Applicant was sentenced to jail for one year and 15 days. Applicant deliberately falsified his security clearance application by failing to note that he was fired from a job, had been convicted of criminal offenses related to his use of alcohol, and had been treated for his alcohol abuse. Applicant failed to sufficiently mitigate the criminal conduct and personal conduct security concerns. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 12 February 2003, DOHA issued a Statement of Reasons (SOR) under the applicable Executive Order⁽¹⁾ and Department of Defense Directive⁽²⁾ detailing the basis for its decision—failure to meet the criminal conduct (Guideline J) and personal conduct (Guideline E) personnel security guidelines of the Directive. Applicant answered the SOR in writing on 7 March 2003 and elected to have a hearing before an administrative judge. The case was assigned to me on 21 July 2003. On 12 August 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. DOHA received the transcript (Tr.) of the proceeding on 20 August 2003.

FINDINGS OF FACT

Applicant, a 32-year-old data collector for a defense contractor, is married and has a 13-year-old son. Ex. 1 at 1; Tr. 24-26. He has been employed as a data collector since July 1999 and was promoted early to data collector coordinator. Tr. 29. In 1988, he received his GED (General Education Development) certificate before his high school class graduated. Applicant is well-respected for his work ethic and performance by supervisors and co-workers. He is known as an honest and truthful family man. Tr. 78-79, 86, 91, 92, 96, 101-104.

Applicant has a problem with alcohol. He started drinking in 1986, at the age of 16 and drank every day until 1994. As a result, Applicant was involved in several scrapes with the law.

(1) In 1987, when Applicant was 17 years old, he was arrested for driving while intoxicated (DWI). Applicant was convicted and ordered to complete alcohol counseling, perform community service, placed on probation, and ordered to pay court costs. Answer.

(2) In May 1992, applicant was arrested and charged with disorderly conduct. Answer.

(3) In August 1992, Applicant and a friend drank until they were intoxicated; then, they both committed battery upon Applicant's wife. She called the police. When the police arrived, Applicant became belligerent. The police tried to assist Applicant's wife in leaving the premises. Applicant became belligerent and pushed the police officer. After Applicant was arrested, he resisted all the way to the police station. Applicant received probation before judgment and was ordered to perform community service. Applicant did not perform the community service in a timely manner and was subsequently brought back to court, found guilty of the offense, and sentenced to one year and 15 days confinement. Answer; Ex. 2 at 2-3; Tr. 52-56.

(4) In June 1993, Applicant was arrested for assault and battery. Ex. 5 at 2.

(5) In December 1994, applicant became intoxicated, poked his wife in the cheek with his fingers and hit her on the forehead with a wooden spoon. She called the police. Applicant was arrested and charged with battery. He was convicted, sentenced to one year in jail (suspended), placed on two years of supervised probation, and ordered to complete classes at the Spousal Abuse Resource Center. Ex. 2 at 3; Tr. 57-58; Answer.

(6) On 1 April 1996, Applicant, who was intoxicated, was arrested and charged with disorderly conduct. He had gone to one of the alcohol rehabilitation centers and became rowdy when they would not admit him. He refused to leave the premises, shouted obscenities, and caused a disturbance. The case was placed on the stet docket (indefinitely postponed). Ex. 2 at 3; Tr. 59; Answer.

Between 1994 and June 1996, Applicant tried to stop drinking. In 1994, he enrolled himself in a 30-day treatment program, but left after only eight days. He admitted himself to another program in 1995, but within eight hours called his wife to take him home. After his arrest outside the rehabilitation center in April 1996, Applicant decided to quit drinking. Except for a relapse on 31 May 1996, Applicant has not consumed alcohol since then or been in trouble with the law. Tr. 60.

As part of the orientation process required of new employees, Applicant was given a stack of papers, including a security clearance application (SCA), and told he had two weeks to complete them. Applicant's wife assisted him in completing the SCA. The SCA is dated 11 August 1999.

Question 20 on the SCA asked Applicant if he had ever been fired from a job, left a job by mutual agreement following allegations of misconduct or unsatisfactory performance, or left a job for other reasons under unfavorable circumstances. Applicant answered "no." Ex. 1 at 5. In fact, in 1993, Applicant was fired from his job at a hotel for going to work drunk. Ex. 2 at 4; Tr. 62-63.

Question 24 on the SCA asked Applicant if he had ever been charged with or convicted of any offenses related to alcohol or drugs. Applicant answered "no." Ex. 1 at 5. In fact, Applicant's several arrests were all alcohol related. Tr. 63.

Question 26 on the SCA asked Applicant if, in the previous seven years, he had been arrested for, charged with, or convicted of any offenses not listed in the previous questions. Applicant answered "no." Ex. 1 at 6. Ex. 2 at 2-3.

Question 30 on the SCA asked Applicant if, in the past seven years, his use of alcohol had resulted in any alcohol-related treatment or counseling. Applicant answered "no." Ex. 1 at 6. Applicant admits falsifying his SCA concerning alcohol treatment. He received treatment for his alcohol problems at least twice. He did not list his attempts at alcohol treatment because he "was ashamed of it, and did not want anyone to know about it." Ex. 2 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.

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 the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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.

CONCLUSIONS

In the SOR, DOHA alleged Applicant was arrested in November 1988, and then convicted of driving/attempting to drive while intoxicated (DWI) (¶ 1.a.), was arrested for disorderly conduct in May 1992 (¶ 1.b.), was convicted of assault on a police officer in August 1992 (¶ 1.c.), was arrested and charged with assault and battery in June 1993 (¶ 1.d.), was arrested and convicted for battery in December 1994 (¶ 1.e.), was arrested and charged with disorderly conduct in April 1996 (¶ 1.f.), violated 18 U.S.C. § 1001 by falsifying his SCA (¶ 1.g.), and was barred from a security clearance by application of 10 U.S.C. § 986 (¶ 1.h.). A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1.

The government established through its evidence and Applicant's admissions that Applicant has a history of criminal conduct including at least one felony and several lesser offenses. DC 1 and DC 2. Although most of the offenses are not recent (MC 1), Applicant admits knowingly and willfully lying on his SCA, which is a violation of 18 U.S.C. § 1001. None of the mitigating conditions under this guideline apply to Applicant's case. Although his alcohol-related offenses were not recent, his falsification of the SCA was. Under the circumstances, Applicant has failed to show mitigation or extenuation sufficient to overcome the weight of his criminal conduct. Finding is against Applicant on ¶¶ 1.a. - 1.g.

Absent a waiver from the Secretary of Defense, the Department of Defense (DOD) may not grant or renew a security clearance for an applicant who has been convicted in a state or federal court and sentenced to imprisonment for a term exceeding one year. 10 U.S.C. § 986. As a result of his sentence to one year and 15 days in prison, Applicant is ineligible for a security clearance absent a waiver from the Secretary of Defense. 10 U.S.C. § 986(d). As 10 U.S.C. § 986 is not the sole reason Applicant is being denied a security clearance, a recommendation for waiver of the clearance bar is not appropriate. *See* DOHA Operating Instruction 64, *Processing Procedures for Cases Subject to 10 U.S.C. § 986* ¶ 3.e. (Jul. 10, 2001). Finding is against Applicant on ¶ 1.h.

In the SOR, DOHA alleged Applicant falsified his SCA by failing to honestly answer questions about his employment record (§ 2.a), his alcohol/drug offenses (§ 2.b.), his police record (§ 2.c.), and his alcohol treatment record (§ 2.d.). 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 established by substantial evidence that Applicant failed to correctly answer questions 20, 24, 26, and 30 on his SCA. The question is whether those omissions were deliberate falsifications. In determining Applicant's credibility, we must look at the whole record. After reviewing the record, listening to Applicant's testimony, and observing his demeanor, I am convinced Applicant deliberately falsified his answers to questions 20, 24, and 30 on the SCA.

In his statement to the DSS agent, Applicant admitted being fired from a job because he went to work drunk. At the hearing, he claimed he did not annotate this fact in his answer to question 20 on his SCA because he did not "think it's on record there that I was fired for drinking." Tr. 62. Question 20 does not refer to drinking. It asks if he had ever been fired from a job or left by mutual agreement. Finding is against Applicant on ¶ 2.a.

In his statement to the DSS agent, Applicant claimed he did not list his DWI offense (see ¶ 1.a.) in answer to question 24 because he did not think he had to list juvenile offenses. Ex. 2 at 2. At the hearing, he asserted he "must have checked the wrong box" in error. Applicant failed to convince me that is failure to accurately answer the question was not deliberate. Finding is against Applicant on ¶ 2.b.

Applicant testified, and the evidence suggests, that all of his offenses were alcohol related. Tr. 63. Thus, he should have listed all of his offenses under question 24. Question 26 requires an applicant to provide information that was not covered by question 24. As all the offenses were alcohol related, finding is for Applicant on ¶ 2.c.

Applicant admits deliberately falsifying his answer to question 30 concerning treatment resulting from his use of alcohol. Ex. 2 at 4. Finding on ¶ 2.d. is against Applicant.

FORMAL FINDINGS

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

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: Against Applicant

Subparagraph 1.h.: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.b.(1): Against Applicant

Subparagraph 2.b.(2): Against Applicant

Subparagraph 2.b.(3): Against Applicant

Subparagraph 2.c.: For Applicant

Subparagraph 2.d.: Against Applicant

Subparagraph 2.d.(1): Against Applicant

Subparagraph 2.d.(2): 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. Clearance is denied.

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.