

DATE: May 30, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-04529

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

This 31-year-old employee of a defense contractor was convicted of alcohol-related offenses in 1992 and 1993, theft in 1993, and Reckless Driving, Eluding a Police Officer, and Resisting Arrest in May 1999. He failed to mention the first three arrests in his March 2000 security clearance application. No mitigation was shown. Clearance is denied.

STATEMENT OF THE CASE

On October 25, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons

why DOHA could not make the preliminary affirmative finding required under the Directive that it

is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and

determine whether a clearance should be granted, denied or revoked.

On November 27, 2003, Applicant submitted a response to the allegations set forth in the SOR, and elected to have a decision made by a DOHA Administrative Judge on the written record, without a hearing. Department Counsel issued a File of Relevant Material (FORM) on February 6, 2003. The FORM instructed Applicant that any response to the FORM had to be submitted within 30 days of its receipt by Applicant. Any response was due by March 21, 2003, but no response to the FORM was received. The matter was assigned to me for resolution on March 25, 2003.

FINDINGS OF FACT

Applicant is a 31-year-old general helper at a shipyard in a United States possession. The SOR contains four allegations,

1.a. and 1.b., under Guideline J (Criminal Conduct), one allegation under Guideline G (Alcohol), and one allegation under Guideline E (Personal Conduct). and three allegations, 2.a., 2.b., and 2.c., under Guideline B (Foreign Influence). In his response to the SOR, Applicant admits SOR 1.a., 1.b., 1.c., and 1.d. He also admits SOR 2.a., by reference to his admissions as to 1.a. - 1.d., above. He denies SOR 3.a.

After considering the totality of the evidence derived from the contents of the FORM, I make the following FINDINGS OF FACT as to each SOR allegation:

Guideline J (Criminal Conduct)

1.a. - Applicant was arrested on March 28, 1992, and charged with Driving While Intoxicated (DWI). He was convicted of that offense and placed on one year probation, sentenced to ten days incarceration (suspended), and was fined \$1,000 plus court costs. His driver's license was suspended for 120 days, he was ordered to attend an alcohol treatment program, and to attend 12 Alcoholics Anonymous (AA) meetings.

1.b. - Applicant was arrested on November 5, 1993 and charged with Theft of Property. He was convicted of that offense, placed on one year probation, ordered to perform 50 hours of community service, and fined \$500. He was also ordered to attend a Theft Diversion Program and pay full restitution.

1.c. - Applicant was arrested on December 23, 1993 and charged with Driving Under the Influence (DUI) and Improper Storage of Open Container. He was convicted of both offenses, placed on three years probation, sentenced to 90 days incarceration (all but seven days suspended), fined \$2,000, and ordered to perform 150 hours of community service. His driver's license was suspended for one year, and he was ordered to attend an alcohol treatment program and 12 AA meetings.

1.d. Applicant was arrested on May 1, 1999 and charged with Reckless Driving, Eluding a Police Officer, and Resisting Arrest. He was convicted of all three offenses, sentenced to one year probation, 25 days in jail, and fined \$500.

Guideline G (Alcohol)

2.a. - Applicant has a history of excessive use of alcohol, as shown by the information in SOR 1.a. and 1.b., above.

Guideline E (Personal Conduct)

3.a. - Applicant falsified material facts on his Questionnaire for National Security Positions (SF 86), when he answered "No" to Question 23.b. Your Police Record, when he knew he had been convicted of alcohol-related offenses as alleged in SOR 1.a and 1.c., above

POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing participation; (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 pertinent 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, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Because Applicant chose to have this matter decided without a hearing and without submitting any additional

information in response to the FORM, all credibility determinations and findings of fact are necessarily based entirely on the contents of the FORM.

Considering the evidence as a whole, I find the following specific adjudicative guidelines to be most pertinent to this case:

GUIDELINE J (Criminal Conduct)

Conditions that could raise a security concern and may be disqualifying:

1. Any criminal conduct, regardless of whether the person was formally charged;
2. A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

None that are established by the record evidence.

GUIDELINE G (Alcohol)

Conditions that could raise a security concern and may be disqualifying:

1. Alcohol-related incidents away from work, such as driving under the influence . . .
4. Habitual or binge consumption of alcohol to the point of intoxication.

Conditions that could mitigate security concerns include:

None that are established by the record evidence.

GUIDELINE E (Personal Conduct)

Condition that could raise a security concern and may be disqualifying:

2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire . . .

Conditions that could mitigate security concerns include:

None that are established by the record evidence.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of

whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons.

If the Government meets its burden (either by the Applicant's admissions or by other evidence) and proves conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the Applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the Applicant.

CONCLUSIONS

SOR 1.a. - 1.d., and 2.a. are undisputed and are clearly established by the Government's exhibits. I conclude, therefore, that the above cited allegations are proven and also have a logical connection or nexus to the issue of Applicant's suitability to hold a DoD security clearance.

The remaining issue as to these allegations is whether Applicant has demonstrated mitigation or extenuation to the extent that he has overcome the negative impact of the proven criminal conduct and related alcohol abuse shown as to SOR 1.a. and 1.c. The evidence from Applicant himself is limited to his response to the SOR (GX 3), and his March 26, 2000 SF 86 (GX 6).⁽¹⁾ Neither of these documents contains any discussion of the facts and/or circumstances behind the four arrests/convictions or his alcohol abuse. The only information that could be deemed as relevant as possibly mitigation or extenuation is found in his answer to SOR 3.a., alleging falsification of his March 26, 2000 SF 86.

However, none of this information detracts from the seriousness of his four criminal convictions between 1992 and 1998, two of which (1992 and 1993) were alcohol-related. Under the Criminal Conduct guidelines, both Disqualifying Conditions (DC) 1 (any criminal conduct) and DC 2 (a single serious crime of multiple lesser offenses) apply but that none of the potential Mitigating Conditions (MC) have been established.⁽²⁾

SOR 3.a. is denied by Applicant. The SF 86 contains a "No" answer to Question 23.d., which asks whether Applicant has "ever been charged with or convicted of any offense related to alcohol or drugs (GX 6). This is a false answer. Question 23.f. asks: "in the last seven years, have you been arrested for, charged with, or convicted of any offenses not listed in response to a., b., c., d., or e., above," Applicant answered "Yes." and cited the May 1999 conviction cited in SOR 1.d. This conviction is the one of the two that were not alcohol-related, but which occurred within the previous seven years, so both should have been reported in answering Question 23.f. on the SF 86.

Applicant's only explanation for his conduct in completing the SF 86 is that:

I merely misunderstood the question and it was not my intent to hide or falsify my criminal record. In support of my contention, I attach my employment application with my former employer, . . . where I received my security clearance. . . I disclosed that I had a police record and, in fact, discussed extensively with [a company official] my police record.

GX 3 at page 2

Applicant stressed that he did disclose his police record when applying for the job he now holds, he has been working for his present employer for three years, he is a hard worker and exemplary employee, and has not been in trouble for nearly four years (*Id.*).

I have carefully considered Applicant's sparse explanation and conclude that even accepting his statement about the job interview described above, he does not explain what he misunderstood, why he answered no to Question 23.d., but yes to Question 23.f., and why he cited only one of the two convictions covered by the question. Speculation as to why and how Applicant made this distinctions and choices is not a valid basis for evaluating suitability for a security clearance.

Under the Personal Conduct guidelines, I conclude that DC 2 (falsification on security clearance application) is applicable but that Applicant has not established any of the potential mitigating conditions. Consequently, I find against Applicant as to SOR 3.a.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Guideline J (Criminal Conduct) Against the Applicant

Subparagraph 1.a.. Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. Against the Applicant

Guideline G (Alcohol) Against the Applicant

Subparagraph 2.a. Against the Applicant

Guideline E (Personal Conduct) Against the Applicant

Subparagraph 3.a. 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 Applicant.

BARRY M. SAX

ADMINISTRATIVE JUDGE

1. The record does not contain a sworn statement by Applicant.
2. In the context of four criminal conviction, in March 1992, November 1993, December 1993, and May 1999, Applicant's criminal conduct is deemed be "recent" under MC 1. Because of the series of convictions, the passage of some three years is not by itself adequate to constitute "clear evidence of successful rehabilitation" (MC 5)