

KEYWORD: Criminal Conduct; Alcohol; Personal Conduct

DIGEST: Applicant has a history of criminal incidents from 1976 to 1995, much of it related to his excessive alcohol consumption. While the Alcohol Consumption concerns are mitigated by the passage of time since the alcohol-related incidents and moderation of his consumption levels, he was not candid about his assault and alcohol-related offenses on his April 1991 and May 2001 security clearance applications. His repeated falsifications and assault offenses raise significant doubts for his security worthiness. Clearance is denied.

CASENO: 02-07040.h1

DATE: 08/09/2004

DATE: August 9, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-07040

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Stephanie Hess, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has a history of criminal incidents from 1976 to 1995, much of it related to his excessive alcohol consumption. While the Alcohol Consumption concerns are mitigated by the passage of time since the alcohol-related incidents and moderation of his consumption levels, he was not candid about his assault and alcohol-related offenses on his April 1991 and May 2001 security clearance applications. His repeated falsifications and assault offenses raise significant doubts for his security worthiness. Clearance is denied.

STATEMENT OF THE CASE

On January 8, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. ⁽¹⁾ DOHA recommended referral to an administrative judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked. The SOR was based on Criminal Conduct (Guideline J), Alcohol Consumption (Guideline G), and Personal Conduct (Guideline E).

On June 7, 2003, Applicant submitted an initial Answer to the SOR in which he responded to the factual allegations under Guideline J only, and requested a hearing before an administrative judge. On August 27, 2003, he furnished a response to the specific allegations, and the case was assigned to me on January 15, 2004. Pursuant to notice of January 28, 2004, a hearing was held on February 26, 2004. At the hearing, the Government submitted nine exhibits that were entered into the record without any objections. Applicant testified on his behalf, as reflected in a transcript received on March 5, 2004.

FINDINGS OF FACT

Alleged Criminal Conduct concerns involve assaultive behavior in 1980 (convicted of disorderly person), 1992, and 1995; operating a motor vehicle under the influence (OUI) offenses in 1977, 1978, and 1980 (conviction revoked on appeal); and larceny from a building and use without authority charges in 1976. The Government also alleged Applicant is statutorily disqualified from having his clearance granted or renewed under 10 U.S.C. § 986 because he was sentenced to two years for the 1980 OUI, notwithstanding the finding was revoked and revised on appeal in 1981 and he was found not guilty. Alcohol Consumption concerns were alleged because the OUI and 1980 disorderly offenses were alcohol-related. Raised Personal Conduct issues revolve around Applicant's failure to report accurately his alcohol and criminal conduct offenses on his security clearance applications completed in 1991 and 2001. ⁽²⁾ Applicant admitted the allegations of the SOR, excepting the alleged applicability of 10 U.S.C. § 986 to which he filed no response. His admissions are accepted and incorporated as findings of fact. After a thorough review of the evidence, and on due consideration of the same, I render the following additional findings of fact:

Applicant is a 47-year-old assembler/material handler who worked the same defense contractor from January 1978 until January 2004. He was laid off because of the issuance of the SOR and is subject to recall should he be granted a confidential security clearance.

When Applicant was 19, he was involved with his friends in two incidents that he now dismisses as adolescent pranks. In about April 1976, while walking down the street, Applicant and his companions pushed and then entered a vehicle that did not belong to them. Applicant was arrested on a charge of use without authority. His case was continued without a finding and then dismissed. In mid-November 1976, Applicant was charged with misdemeanor larceny from a building after he and some friends took a fire extinguisher from a closed school building. His case was continued without a finding on payment of fines and court costs totaling \$200.

An admitted abuser of alcohol on weekends (six to seven beers or more per sitting) from 1974 to 1985, Applicant allowed alcohol to negatively affect his judgment and reliability on several occasions. After drinking beer to intoxication in about November 1977, Applicant was observed operating his motor vehicle erratically. He was arrested for OUI after failing a field sobriety test. In court, he pleaded guilty to misdemeanor OUI and was sentenced to a one-year loss of license and was required to attend an alcohol safety action program that lasted for six weeks. Shortly after his first OUI, Applicant in January 1978 went to work for company A where he was granted a confidential security clearance for his duties.

In late April 1978, Applicant was pulled over by police for failing to stay within travel lines.

As he exhibited signs of intoxication (unsteady on feet, slurred speech, a strong odor of alcohol on breath), Applicant was arrested for OUI, possession of a class D substance (marijuana), and no registration. He was fined \$50 for OUI and the other charges were filed.

In about 1980, Applicant was arrested for OUI after he was caught in a speed trap. He was convicted and sentenced to two years in jail. Since he had consumed no more than two beers before his arrest, Applicant appealed his conviction. The finding was revised and revoked on appeal in 1981, and he was adjudged not guilty of OUI.⁽³⁾

In early October 1980, Applicant was arrested for assault and battery on a police officer after he pushed a law enforcement official who had stopped the vehicle in which he had been riding. In court that November, Applicant pleaded guilty to an amended charge of misdemeanor disorderly conduct and was fined \$25. Applicant had consumed a few beers before the incident.

Applicant's drinking moderated in 1985 as his social acquaintances changed. He limited his consumption of alcohol to three beers on a weekend once a month after playing golf or three beers on an occasional evening. This pattern of drinking continued to at least January 1994.

In April 1991, Applicant completed a National Agency Questionnaire (DD 398-2) for his confidential security clearance. He responded "NO" to question 18 regarding any arrests ("Have you ever been arrested, charged, cited, held, or detained by Federal, State, or other law enforcement or juvenile authorities regardless of whether the charge was dropped or dismissed or you were found not guilty?"), and to question 20.d. concerning whether his use of alcohol had ever resulted in arrest by police or alcohol related counseling. He deliberately concealed his criminal arrests, including repeated OUI charges, from the Department of Defense and his employer.

In November 1992, Applicant was involved in an incident with his neighbor which started when Applicant yelled at the neighbor's teenage son and another youth about playing basketball early in the morning and waking him.⁽⁴⁾ When the neighbor came over to complain about Applicant's behavior, including the use of profanity toward his son, Applicant punched his neighbor in the face and grabbed him by the neck. The police were called to the residence and a complaint was lodged against Applicant for assault. His physical assault of the neighbor was observed by another neighbor from across the street as well as by the victim's spouse. In mid-December 1992, Applicant was arrested on a charge of simple assault. Applicant pleaded not guilty, but was found guilty and sentenced to 30 days confinement (suspended) and fined \$250. His conviction was upheld on appeal.

On January 27, 1994, Applicant was interviewed by a special agent of the Defense Security Service (DSS) about his arrests, alcohol use, and illicit drug involvement. Applicant admitted he had consumed alcohol to excess at times until 1985, and was intoxicated on the occasions of his arrests for OUI in 1977 and April 1978. He denied he had been drunk on the occasion of his last alcohol-related arrest, which he indicated was in approximately 1983,⁽⁵⁾ and his conviction had been overturned on appeal. Applicant also acknowledged he had smoked marijuana once a week between 1976 and 1981, but maintained he had no intent to use any illicit drug in the future. As for his 1992 arrest for simple assault, Applicant admitted he had "punched [his neighbor] in the nose." In response to why he had not listed his arrests on his NAQ, Applicant stated, "I lied and falsified the security questionnaire. I tried to conceal the information because it

occurred so long ago and consider it part of my past."

In 1995 Applicant was charged with assault of a minor after another altercation with his teenage neighbor who was playing basketball, this time in the middle of the day. Applicant pleaded not guilty but was convicted and sentenced to a suspended sentence, and placed on probation where he had to report four or five times to his probation officer.

Applicant has since moved from the condominium complex. ⁽⁶⁾

On May 31, 2001, Applicant completed a security clearance application (SF 86) for his confidential clearance. Applicant did not list any of his criminal arrest record on his SF 86, responding negatively to inquiries into whether he had ever been charged with or convicted of any offense related to alcohol or drugs (question 24) and whether he had been arrested, charged with, or convicted of any offense within the past 7 years (question 26).

On February 6, 2002, Applicant was interviewed by a DSS special agent about his arrest record. Concerning the 1992 assault, Applicant indicated the condominium rules should have prohibited his neighbor from installing a basketball hoop that proved a nuisance to him. He admitted he had punched the neighbor, but only after the neighbor had kicked his door. In the 1995 incident, Applicant admitted pushing a neighbor boy in the chest with his index finger. As for his omission of his OUI and assault offenses from his recent SF 86, Applicant responded he had not listed the OUI offenses because they had already been addressed by another agent. He attributed the omission of his assault offenses from his SF 86 because they were misdemeanors and he thought they had occurred more than seven years before.

Applicant's priorities are helping his son with his homework and attending soccer games on the weekends. He cannot recall when he was last intoxicated as it had been so long ago. (Tr. 50) Concerning his relationship with his former neighbors, Applicant considers himself a victim, not only of the neighbor and his son, who "were bothering [him], they were tormenting [him]," but of the condominium association who gave permission to his neighbors to place the basketball hoop "in [his] front yard." (Tr. 45) When asked about his failure to list his 1992 and 1995 assaults on his SF 86, Applicant initially testified he thought they occurred more than 7 years before. Yet when asked why he had then admitted the alleged falsifications, Applicant responded, "I just wanted to come clean, I figured that, you know, it was time to-they knew everything anyway, I might as well just admit everything." It was not until he was asked directly whether he was admitting to deliberate falsification or to just the underlying conduct that he seized on the latter to explain his omission of his 1995 arrest, which occurred within seven years of his May 2001 SF 86. Based on the facts presented, I find he deliberately falsified his SF 86 by failing to report his most recent assault and his albeit dated alcohol offenses.

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.

Considering the evidence as a whole, I find the following adjudicative guidelines to be most pertinent to this case: [\(7\)](#)

GUIDELINE J

Criminal Conduct

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

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

- a. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.
- b. A single, serious crime or multiple lesser offenses.
- c. Conviction in a Federal or State court, including a court-marital of a crime and sentenced to imprisonment for a term exceeding one year. [\(8\)](#)

Conditions that could mitigate security concerns include:

- a. The criminal behavior was not recent;
- e. Acquittal.

GUIDELINE G

Alcohol Consumption

The Concern: 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.

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

Alcohol-related incidents away from work, such as driving under the influence, fighting or other criminal incidents related to alcohol use; (E2.A7.1.2.1.)

Conditions that could mitigate security concerns include:

The problem occurred a number of years ago and there is no indication of a recent problem; (E2.A7.1.3.2.)

Positive changes in behavior supportive of sobriety. (E2.A7.1.3.3.)

GUIDELINE E

Personal Conduct

The Concern: 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.

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

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. (E2.A5.1.2.2.)

Conditions that could mitigate security concerns include:

None.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility of the Applicant, I conclude the Government established its case with respect to Guideline J, Criminal Conduct, Guideline G, Alcohol Consumption, and Guideline E, Personal Conduct. While Applicant has successfully mitigated the Alcohol Consumption concerns and alcohol-related Criminal Conduct concerns by significantly moderating his drinking levels after 1985, corroborated in part by the absence of any alcohol-related criminal incidents since 1980, Personal Conduct and Criminal Conduct concerns persist, as follows:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. While he has a pattern of criminal conduct that falls within disqualifying conditions (DC) a. *Allegations or admission of criminal conduct*, and b. *A single serious crime or multiple lesser offenses*, under Guideline J, some of it is now dated and not likely to recur. His 1976 use of a car without authority and larceny from a school building offenses were more than just juvenile pranks, but they were committed more than 25 years ago, when Applicant was only 19 years old. Applicant's repeated OUI offenses during the late 1970s, and his October 1980 assault on a police officer were more serious, but are clearly attributable to a pattern of abusive drinking that is not recent and is not likely to recur. As of 1986, Applicant's circle of friends had changed to where he was no longer socializing with those with whom he drank in the past or used marijuana. There is no objective evidence of any social, occupational, or legal impairment because of alcohol since 1980. DC E2.A7.1.2.1. *Alcohol-related incidents away from work*, under Guideline G, apply to those criminal incidents attributable to alcohol. However, Guideline G mitigating conditions E2.A7.1.3.2. *The problem occurred a number of years ago and there is no indication of a recent problem*, and E2.A7.1.3.3. *There are positive changes in behavior supportive of sobriety*, are satisfied. Favorable findings are returned as to subparagraphs 1.c., 1.e., 1.f., 1.g., 1.h., and 2.a. of the SOR.

Applicant does not dispute that he was also arrested for OUI in 1980, but he contends he was not guilty. The Government does not contest that Applicant's conviction was reversed on appeal, and he was found not guilty. Acquittal is a significant mitigating factor (*see* MC e.) that warrants a favorable finding with respect to subparagraph 1.d. Furthermore, given the revocation on appeal *de novo* of Applicant's conviction and sentence of two years' commitment, the Government's case for the applicability of 10 U.S.C. § 986 (P.L. 106-398), ⁽⁹⁾ fails as well, as conceded by Department Counsel at the hearing. Accordingly, subparagraph 1.i. is also resolved in Applicant's favor.

Applicant's more recent criminal assaults of his neighbors in 1992 and 1995 continue to raise Criminal Conduct concerns, however, not only because his actions were excessive in proportion to the harm, but also because he continues to minimize his culpability. The police reported Applicant struck the neighbor with a closed fist and grabbed the neighbor's neck, the latter corroborated by eyewitness account and physical redness observed by the responding officer. Although Applicant was convicted of the offense, affirmed on appeal, he indicated in response to the SOR that the neighbor attacked him at his front door and then lied in court. Concerning the 1995 assault, Applicant maintains the teen was verbally abusive to him, that he did nothing more than push the teen in the chest with his index finger, and that the

neighbors again lied in court. His conviction and supervised probation indicate otherwise. While there has been no recurrence of similar conduct since 1995, reform of criminal conduct requires acceptance of responsibility and meaningful expression of remorse, as well as a demonstrated track record of compliance with the law. Although he had admitted to the DSS agent back in 1994 that he had punched his neighbor in the nose, his recent efforts to shift blame to the neighbors casts sufficient doubts about his reform to find against him as to subparagraphs 1.a. and 1.b. of the SOR.

Security significant Personal Conduct, Guideline E concerns are raised when an applicant has not been completely candid with the Government about matters relevant and material to his or her personnel security application and investigation. (See DC 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*). On his April 1991 NAQ, Applicant falsely denied that he had ever been arrested or that his use of alcoholic beverages had ever resulted in his arrest. While he admitted his various arrests and deliberate falsification of his NAQ to a DSS agent in January 1994, he elected again not to disclose any of his arrests on his more recent security clearance application completed in late May 2001. Even assuming Applicant in good faith thought he did not need to disclose his now dated alcohol offenses, his latest arrest for assault occurred after his 1994 interview and it was within the seven-year scope of the SF 86 inquiry. While Applicant told a DSS agent in February 2002 that he thought the offense had occurred more than seven years before he completed his SF 86, his burden of proving the offense was outside of the seven-year scope is certainly not met by his admission to SOR subparagraph 1.a., in which May 1995 is alleged as the date of commission.

Although Applicant's 1991 falsification is now distant in time and he subsequently provided information about his arrests during his 1994 interview, his subsequent misrepresentations in late May 2001 preclude the favorable application of mitigating condition E2.A5.1.3.2., which requires that the falsification be isolated in addition to remote in time. While Applicant disclosed during his February 2002 interview that he had been arrested for assaulting a minor in either 1994 or 1995, this effort at rectification was not sufficiently timely to satisfy E2.A5.1.3.3. *The individual made prompt, good faith efforts to correct the falsification before being confronted with the facts*. The Government can ill afford having individuals decide for themselves the timing and extent of disclosure. SOR subparagraphs 3.a., 3.b., 3.c., and 3.d. are resolved against Applicant due to the doubts for his judgment, reliability, and trustworthiness caused by his knowing and willful falsifications.

FORMAL FINDINGS

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

Paragraph 1. Guideline J: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: For the Applicant

Subparagraph 1.e.: For the Applicant

Subparagraph 1.f.: For the Applicant

Subparagraph 1.g.: For the Applicant

Subparagraph 1.h.: For the Applicant

Subparagraph 1.i.: For the Applicant

Paragraph 2. Guideline G: FOR THE APPLICANT

Subparagraph 2.a.: For the Applicant

Paragraph 3. Guideline E: AGAINST THE APPLICANT

Subparagraph 3.a.: Against the Applicant

Subparagraph 3.b.: Against the Applicant

Subparagraph 3.c.: Against the Applicant

Subparagraph 3.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 Applicant. Clearance is denied.

Elizabeth M. Matchinski

Administrative Judge

1. The SOR was issued under the authority of Executive Order 10865 (as amended by Executive Orders 10909, 11328, and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4).
2. The Government alleged, and Applicant admitted, deliberately falsifying an August 1991 National Agency Questionnaire (NAQ). The NAQ submitted by the Government as exhibit 2 bears a typewritten date of April 9, 1991.
3. The Government presented no arrest or court records pertaining to this incident. At the hearing, Department Counsel conceded Applicant's position that 10 U.S.C. § 986 does not apply since he was found not guilty on appeal in a jurisdiction where the conviction and sentence are "in limbo" until after the case is heard on appeal de novo. Tr.57-58.
4. Applicant testified he had an infant son who was awakened by the noise caused by the teens playing basketball around 8:00 a.m. On his SF 86 completed in ay 2001, Applicant did not indicate that he had ever been married or that he has a child. The discrepancy was not addressed at the hearing.
5. The Government alleged in SOR subparagraph 1.d., and Applicant admitted, this offense was in 1980 and he was found not guilty on appeal in 1981.
6. The police or court records of this offense are not of record. When interviewed, Applicant indicated the offense occurred in 1994/95, although the Government alleged the arrest was in May 1995, and Applicant admitted the allegation. It is noted that Applicant did not indicate anywhere on his recent SF 86 that he had lived at the condominium where the assault incidents involving the neighbors took place.
7. The adjudicative factors considered most pertinent are identified as set forth in guideline J following the implementation of 10 U.S.C. § 986.
8. Under the provisions of 10 U.S.C. §986 (P.L. 106-398) a person who has been convicted in a Federal or State court, including courts marital, and sentenced to imprisonment for a term exceeding one year, may not be granted or have renewed access to classified information. In a meritorious case, the Secretary of Defense or the Secretary of the Military Department concerned, may authorize a waiver of this prohibition.
9. 10 U.S.C. §986 was implemented within the Department of Defense by a June 7, 2001, memorandum from the Deputy Secretary of Defense titled *Implementation of Restrictions on the Granting or Renewal of Security Clearances as Mandated by the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001*, and incorporated in the Directive under Guideline J (see DC c. Conviction in a Federal or State court, including a court-marital of a crime and sentenced to imprisonment for a term exceeding one year).