

DATE: October 31, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-07218

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Ms. Nygina T. Mills, Esquire, Department Counsel

FOR APPLICANT

Mr. Andrew B. Golkow, Esquire

SYNOPSIS

Applicant's alcohol consumption has resulted in five arrests between 1973 and 1998. In his most recent security questionnaire (SF-86), he disclosed his arrests in 1982, 1994 and 1998, but omitted earlier arrests in 1973 and 1975. Because he did not intend to mislead the government about his arrests, he has mitigated alleged security concerns under Guideline E (Personal Conduct). However, his history of alcohol-related arrests, and his conflicting statements and conduct relative to his current drinking habits preclude mitigation of the security concerns under Guideline G (Alcohol Consumption). Clearance is denied.

STATEMENT OF THE CASE

On March 21, 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. [\(U\)](#) The SOR alleges facts which raise security concerns under Guideline E (Personal Conduct), and Guideline G (Alcohol Consumption).

On April 9, 2003, Applicant answered the SOR (Answer), wherein he provided information about each allegation and requested a hearing. Subsequent to his Answer, Department Counsel moved to amend the SOR to delete the allegations in subparagraphs 1.d, 1.e, and 1.h. The motion also requested the necessary modification of paragraph 2.a to conform to the aforementioned changes to paragraph 1. At hearing, there being no objection from Applicant, and it appearing that the motion was in conformity with the evidence, I granted the Government's motion.

The case was assigned to me on May 13, 2003. On June 4, 2003, DOHA issued a Notice of Hearing setting this case to be heard on June 26, 2003. All parties appeared as scheduled, and DOHA received the transcript (Tr) on July 7, 2003.

FINDINGS OF FACT

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

Applicant is a 48-year-old employee of a defense contractor. He has at least 25 years' experience in information network management and related information technology skills. He possesses an associates degree in computer science and is studying toward a bachelors degree in that same field. He has worked for his current employer since about May 2002.

Applicant was 18-years-old when he was arrested in September 1973 for being drunk in public. On that occasion, he had driven to a party where he had too much to drink. He was lying on the hood of his car when a policeman approached and determined Applicant was intoxicated.

Applicant was arrested again four months later, this time for driving while intoxicated. The only known disposition of this case consists of Applicant being ordered to attend an alcohol safety awareness program.

In 1982, when he was 27-years-old, Applicant was arrested and charged with driving while intoxicated. A police officer found him asleep at the wheel of his parked and running car. Applicant was ordered to attend another alcohol safety awareness class, and his operator's license was restricted whereby he could only drive to and from work until February 1983.

In 1994, Applicant was again arrested for being drunk in public. He had been drinking at home, conduct which upset his live-in girlfriend. They began to argue and their fight escalated to the point his girlfriend feared for her safety. Applicant's girlfriend's daughter's boyfriend also became involved in this incident and the police were called. Applicant was arrested, spent one night in jail, and paid a \$15.00 fine.

Applicant's last arrest occurred in September 1998. He had been to a local restaurant / club and had too much to drink. Police again found him intoxicated and asleep in his car, this time parked and not running. He was charged with being drunk in public, spent a night in jail, and paid a small fine.

Beginning in 1975, Applicant's chief avocation has been dancing at clubs and in formal competitions. He is accomplished in several complex dance steps, particularly a dance known as "the hustle." The dances at which he is most proficient are fairly precise in their execution and are physically demanding. He has structured much of his social life around his interest in dancing, has worked as a dance instructor, and met his wife through his landlady who also dances. Applicant has asserted in his defense to the allegations regarding alcohol consumption that he would not be able to dance at a high level if he was intoxicated.

Applicant and his wife were married in 1999. They have known each other since about 1985. Applicant's wife forbids him to drink alcohol at any time, and he claims to "adhere to her wishes."⁽²⁾ Applicant has not been intoxicated since his September 1998 arrest. However, between about February 2002 and January 2003, he drank wine three to five times monthly, apparently without his wife's knowledge. She was extremely displeased with Applicant when she learned he had been drinking.⁽³⁾ He last consumed alcohol on January 8, 2003, drinking two martinis with dinner at the same restaurant where he was arrested in 1998.⁽⁴⁾

Applicant was first granted a security clearance in 1988. While holding a security clearance, he used marijuana with varying frequency between 1989 and 1999.⁽⁵⁾ He submitted his most recent security questionnaire in October 2000. Contrary to the allegation in SOR subparagraph 2.a as amended, he answered "yes" to question 24, but disclosed only his three most recent arrests. He credibly asserted that he did not think he was required to list his arrests from 1973 and 1974 due to the passage of time. He did not intend to omit relevant and material information from his SF-86.

Applicant is highly regarded by both his current and previous employers. He is characterized as an able, hard working and reliable network engineer. There are no indications either at work or at home that Applicant has a drinking problem.

POLICIES

The Directive sets forth adjudicative guidelines⁽⁶⁾ 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⁽⁷⁾ 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.⁽⁸⁾ 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.⁽⁹⁾

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 could indicate that the person may not properly safeguard classified information.⁽¹⁰⁾ Of note in this case is the government's concerns about Applicant's honesty. The government has not proven its case, as alleged in SOR paragraph 2, that Applicant deliberately omitted relevant information from his SF-86 by answering "no" to question 24. GE 1 and GE 2 taken together show he answered "yes" to question 24. It appears that Applicant opted to suppress Part II of his electronic personnel security questionnaire (EPSQ; GE 1) to ensure any adverse information he disclosed would only be visible to DSS in their electronic database. The entire EPSQ, including Applicant's disclosure of his three most recent arrests, is presented as GE 2. Further, if Applicant intended to deceive or mislead the government about his alcohol-related arrests, it does not follow that he would omit only those events most remote in time. I conclude, therefore, that Applicant did not deliberately omit, conceal or falsify relevant and material facts from his SF-86 as contemplated by the only Guideline E disqualifying condition (DC) potentially applicable to these facts.⁽¹¹⁾ There being no disqualifying conditions applicable, I conclude Guideline E for Applicant.

Guideline G (Alcohol Consumption). Excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, or failure to control impulses. Such conduct may also increase the risk of unauthorized disclosure of classified information due to carelessness.⁽¹²⁾ Department Counsel has established its case as alleged in the amended SOR that Applicant has a history of alcohol-related incidents outside work. Guideline G DC 2-⁽¹³⁾ applies to the facts established in this case. Applicant's claims to the contrary notwithstanding, five alcohol-related arrests are indicative of an inability to handle alcohol in a reasonable and mature fashion. The fact that three of the arrests were only for being drunk in public as opposed to driving under the influence lessen the security significance of those events. In two of Applicant's drunk in public arrests, he was in or on his car but passed out from too much alcohol.

The government having established a *prima facie* case against Applicant, the burden falls to him to show by substantial evidence that one or more of the Guideline G mitigating conditions apply. I conclude he has failed to meet his burden. At the outset, I do not accept Applicant's argument that his success in a highly demanding form of ballroom dancing means that it is unlikely that he has a drinking problem. His argument means nothing more than he was not intoxicated when he danced. It does not preclude a conclusion that Applicant has consumed alcohol, at times to excess, and that his alcohol consumption has proved problematic for him over the past 30 years. Further, the sincerity of his argument is undercut by the fact of his extensive use of marijuana from 1989 until 1999, at times while he also held a security clearance. Such conduct demonstrates a tendency toward substance abuse and cannot be ignored.

It is uncontroverted that Applicant has not been intoxicated since his last arrest. A question remains, however, as to the likelihood his alcohol-related conduct may recur in the future. Guideline G MC 2-⁽¹⁴⁾ is potentially available to Applicant, but it presents a two-part test, of which Applicant has satisfied only the first half. The government is rightly concerned that there may still be a problem here. Applicant's responses to adjudicator-issued interrogatories clearly show he still drinks although not to intoxication as alleged in subparagraph 1.j.⁽¹⁵⁾ He has also demonstrated that he will continue to drink despite telling his wife otherwise. He tried to conceal his drinking from her, but recently claims to have given up drinking only after she found out about it. This is Applicant's second known relationship with a woman who has objected to his drinking. Lastly, Applicant has not presented sufficient evidence of positive changes in his behavior which would engender confidence that he can manage his consumption of alcohol.⁽¹⁶⁾ Absent such information, it is apparent that Applicant does not fully grasp the import of his alcohol-related conduct, and I am not confident Applicant will not repeat the conduct that has characterized most of his adult life. I conclude Guideline G against 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. Applicant appears to be a pleasant and well-meaning person who is also a valued employee. However, the record evidence as a whole in this case presents an unacceptable risk to the government's compelling interest in ensuring its classified information is properly safeguarded. I conclude that Applicant's access to classified information should not be continued.

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): AGAINST THE APPLICANT

Subparagraph 1.a Against the Applicant

Subparagraph 1.b Against the Applicant

Subparagraph 1.c Against the Applicant

Subparagraph 1.d Withdrawn

Subparagraph 1.e Withdrawn

Subparagraph 1.f Against the Applicant

Subparagraph 1.g Against the Applicant

Subparagraph 1.h Withdrawn

Subparagraph 1.i Against the Applicant

Subparagraph 1.j Against the Applicant

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

Subparagraph 2.a: For 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.

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. 118.
3. Applicant's wife lives in another nearby state so she can operate her small business, while Applicant rents a small apartment and continues his defense contractor work. It is unclear how often they see each other.
4. Government's Exhibit (GE) 5.
5. GE 2. While not alleged in the SOR, I believe Applicant's illegal use of an intoxicating drug is relevant in that it tends to undermine his position that he could not have become an accomplished dancer had he had a drinking problem. It is apparent that Applicant used both substances, but probably did not use them while he was dancing. I also consider this a relevant fact as it sheds light on Applicant's overall judgement.

6. Directive, Enclosure 2.

7. See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

8. See *Egan*, 484 U.S. at 528, 531.

9. See *Egan*; Directive E2.2.2.

10. Directive, E2.A5.1.1.

11. 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)

12. Directive, E2.A7.1.1.

13. 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;

14. Directive, E2.A7.1.3.2. The problem occurred a number of years ago *and* there is no indication of a recent problem; (emphasis added)

15. GE 5; I accept Applicant's explanation at Tr., p. 121 - 122 that his answer to question 1.b(3) was a mistake.

16. Directive, E2.A7.1.3.3. Positive changes in behavior supportive of sobriety;