

DATE: November 26, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-11032

DECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

APPEARANCES

FOR GOVERNMENT

Marc Curry, Esq., Department Counsel

FOR APPLICANT

Robert Kassel, Personal Representative

SYNOPSIS

Applicant is 27 years old and has a history of alcohol-related arrests and drug use. He falsified his security clearance application regarding his arrests for drug and alcohol-related criminal conduct. Despite a diagnosis of alcohol abuse and dependence and completion of a court-ordered alcohol awareness program, he continues to drink alcohol. 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 April 23, 2003, under the applicable Executive Order⁽¹⁾ and Department of Defense Directive,⁽²⁾ DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision--security concerns raised under Guideline G (Alcohol Consumption), Guideline H (Drug Involvement), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on May 13, 2003, and elected to have a hearing before an administrative judge. The case was initially assigned to Administrative Judge Matthew Malone, but due to caseload considerations, was subsequently assigned to me on July 2, 2003. A Notice of Hearing was issued on July 8, 2003, scheduling the hearing for July 29, 2003. On July 29, 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government submitted eleven exhibits (Ex.) and Applicant submitted one. The transcript (Tr.) was received on August 6, 2003.

RULINGS ON PROCEDURE

The Parties stipulated, and I approved, three amendments to the SOR to conform to the record evidence. (Tr. 79-83.) Because the amendments were concurred in by both parties, they will not be discussed in detail here.

FINDINGS OF FACT

The SOR contains 12 allegations of disqualifying conduct. Five allegations relate to conduct charged under Guideline G, Alcohol Consumption.

Two allegations relate to conduct charged under Guideline H, Drug Involvement. Three allegations relate to conduct charged under Guideline J, Criminal Conduct. Two allegations relate to conduct charged under Guideline E, Personal Conduct.

Applicant admitted the factual allegations as set forth in subparagraphs 1.a., 1.c., 1.d., and 1.e of the amended SOR, involving alcohol consumption under Guideline G. He admitted that part of the allegation at 1.b of the amended SOR relating to his attendance at an alcohol awareness program, but denied that he had a diagnosis of alcohol abuse and dependence. He admitted the factual allegations as set forth in subparagraphs 2.a. and 2.b. of the amended SOR involving drug involvement under Guideline H. He admitted to the facts alleged in items 3.a., 3.b., and 3.c. of the amended SOR involving criminal conduct under Guideline J, and he denied the allegations set forth in subparagraphs 4.a. and 4.b. involving personal conduct under Guideline E. Applicant's admissions are incorporated as findings of fact.

After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact: Applicant, who is unmarried, was born in 1975 and is now 27 years old. He is employed as a traffic specialist by a government contractor. He began drinking alcohol at age 16. (Ex. 11, at 1.) He admitted to using marijuana approximately 20 times between 1993 and 2000. (Ex. 1.) In 1998, he was cited for providing alcohol to a minor. In February 1999, he was arrested and charged with driving under the influence of alcohol. At the time of his arrest, he had marijuana in his possession. The driving under the influence of alcohol charge was dismissed, and Applicant pled guilty to marijuana possession. He was ordered by the court to undertake a drug education program and to pay \$225. His driver's license was suspended for 6 months. After release from the drug education program, Applicant used marijuana until late January 2000. (Ex. 9, at 3.)

In April 1999, Applicant was arrested and charged with grand larceny. He pled guilty to a reduced charge of destruction of property (petty larceny) and was sentenced to perform community service. (Ex. 9, at 3.) In January 2000 and in March 2000 Applicant was arrested in two separate jurisdictions for driving under the influence of alcohol. For each arrest, his driver's license was suspended for one year, and the suspensions ran concurrently. Also, as a consequence of the second arrest, Applicant was ordered by the court into an alcohol safety program. The director of the alcohol safety program, a credentialed medical professional, (3) signed an initial intake report diagnosing Applicant as "alcohol abuse/dependent." (Ex. 4 and Ex. 5.) Applicant completed and was discharged from the alcohol safety program. Applicant asserts that he does not abuse alcohol and he is not alcohol dependent. He says he drinks beer and wine.

Applicant's responses on his SF-86, which he signed a certified on December 24, 2001, show that he failed to report, accurately and fully, his criminal history, including his felony arrest in April 1999, his multiple alcohol-related criminal offenses, and his drug-related criminal offense. Applicant was interviewed on January 18, 2002, January 23, 2002, and February 5, 2002 by a special agent of the Defense Security Service (DSS) to gather a complete history of his police record and drug and alcohol-related offenses.

Question 24 on the SF-86 asks if an applicant has ever been charged with or convicted of any offenses related to alcohol or drugs. Further, Question 24 requires the applicant to report information on such charges or convictions "regardless of whether the record in your case has been 'sealed' or otherwise stricken from the record." (4) In response to Question 24, Applicant answered "yes" and listed the two driving under the influence convictions in January and March of 2000. He did not list the citation for providing alcohol to a minor, nor did he list his driving under the influence charge in February 1999, nor the conviction for possession of marijuana and his required attendance at the drug education program. Question 21 on the SF-86 asks whether an applicant has ever been charged with or convicted of any felony offense. In response to question 21 on his SF-86, Applicant answered "no" and did not list the grand larceny charge of April 1999. Instead, he listed the reduced petty larceny charge and the community service sentence he received.

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.

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted on to safeguard classified information and material 24 hours a day. The Government is therefore properly concerned where available information indicates that an applicant for a security clearance may be involved in conduct that demonstrates poor judgment, untrustworthiness, lack of candor, or unreliability. These concerns include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

An evaluation of whether the applicant meets the security guidelines includes consideration of a number of variables known as the whole person concept. In evaluating the relevance of an individual's conduct, the administrative judge must consider the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; (9) the likelihood for continuation or recurrence. Directive, ¶ E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Exec. Or. 10865 § 2. See Exec. Or. 12968 § 3.1(b).

The relevant adjudication guidelines pertaining to the instant case are Guideline G, Alcohol Consumption, Guideline H, Drug Involvement, Guideline J, Criminal Conduct, and Guideline E Personal Conduct.

Guideline G, Alcohol Consumption, is concerned with excessive alcohol consumption which 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.

The following conditions could raise a security concern in this matter and could be disqualifying:

E2.A7.1.2.1. Alcohol-related incidents away from work, such as driving while under the

influence;

E2.A7.1.2.3. Diagnosis by a credentialed medical professional (e.g. physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence, and

E2.A7.1.2.5: Habitual or binge consumption of alcohol to the point of impaired judgment.

Guideline G identifies conditions that could mitigate security concerns deriving from excessive alcohol consumption. Mitigating conditions that might be relevant in the instant case are:

E2.A7.1.3.1. The alcohol-related incidents do not indicate a pattern;

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

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

E2.A7.1.3.4. Following diagnosis of alcohol abuse or alcohol dependence, the individual has successfully completed inpatient or outpatient rehabilitation along with aftercare requirements, participates frequently in meetings of Alcoholics Anonymous or a similar organization, has abstained from alcohol for a period of at least 12 months, and received a favorable prognosis by a credentialed medical professional or licensed social worker who is a staff member of a recognized alcohol treatment program.

Guideline H is concerned with improper or illegal involvement with drugs. Guideline H conduct raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information.

Guideline H conduct is any drug abuse, defined as any illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction, and illegal drug possession, including purchase. E2.A8.1.1.3, E2.A8.1.2.1, and E2.A8.1.2.2.

Conditions that could mitigate security concerns regarding drug involvement include:

E2.A8.1.3.1. The drug involvement was not recent;

E2.A8.1.3.2. The drug involvement was an isolated or aberrational event;

E2.A8.1.3.3. A demonstrated intent not to abuse any drugs in the future.

Guideline J is concerned with a history or pattern of criminal activity which creates doubt about a person's judgment, reliability and trustworthiness.

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

E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;

E2.A10.1.2.2. A single serious crime or multiple lesser offenses;

Conditions that could mitigate security concerns include:

E2.A10.1.3.1. The criminal behavior was not recent;

E2.A10.1.3.2. The crime was an isolated incident;

E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

The security issues identified under Guideline E which apply to the facts of this case include

conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. This conduct could indicate that the person may not properly safeguard classified information.

Conditions that could raise security concerns and may be disqualifying are:

E2.A5.1.1.2. Refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials or other official representatives in connection with a personnel security or trustworthiness investigation.

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;

E2.A5.1.2.3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination.

E2.A5.1.2.5. A pattern of dishonesty or rule violations,

E2.A5.1.2.6. Association with persons involved in criminal activity.

In this case, the following conditions could mitigate security concerns:

E2.A5.1.3.1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability;

E2.A5.1.3.2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily;

E2.A5.1.3.3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts;

E2.A5.1.3.7. Association with persons involved in criminal activities has ceased.

Under the Directive, a decision to grant or to continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall commonsense determination required, the administrative judge can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. *See* Directive, 5 and 6.

Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the SOR. If the Government meets its burden and establishes conduct cognizable as a security concern 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 criterion conduct, it is clearly consistent with the national interest to grant or continue applicant's security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government, predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability, or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nevertheless security worthy. The U.S. Supreme Court has held that the "clearly consistent with the interests of national security" test indicates that "security clearance determinations should err, if they must, on the side of denials." *Department of the Navy v. Egan, supra*, at 531.

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 following with respect to each allegation set forth in the SOR:

The Government's concern, under Guideline G, is that excessive alcohol consumption results in impaired judgment, unreliability, and failure to control impulses. Excessive alcohol consumption increases the risk of unauthorized disclosure of classified information due to carelessness.

Applicant's use of alcohol began when he was 16, and he reported binge drinking while in high school, a disqualifying condition under E2.A7.1.2.5. His first alcohol-related citation occurred in 1998, when he was 23 years old. He admits to alcohol-related incidents away from work, such as driving under the influence, thus raising a disqualifying security concern under E2.A7.1.2.1. In 2000, when he was almost 25 years old, Applicant was diagnosed by a credentialed medical professional as an abuser of alcohol and alcohol dependent and ordered to attend Alcoholics Anonymous meetings twice a week, thus raising a disqualifying security concern under subparagraph E2.A7.1.2.3. of Guideline G. Despite the diagnosis as alcohol abuse/dependent and participation in and release from an alcohol awareness program, Applicant continues to drink alcohol, thus making mitigating condition E2.A7.1.3.4. inapplicable here.

Applicant argues that his last alcohol-related incident occurred three years ago, and his past alcohol-related conduct was an atypical time in his life and will not be repeated. Applicant's last alcohol-related arrest took place in 2000, over three years ago, and thus mitigating condition E2.A7.1.3.2. applies. Additionally, it is to Applicant's credit that he is thought well of by his current supervisor, with whom he has worked since May 2001. (Ex. A.) However, the alcohol-related incidents in his past indicate a pattern and lifestyle choice for a significant part of his adolescence and young adult life, thus making mitigating condition E2.A7.1.3.1. inapplicable. While Applicant argues that he has changed, he continues to drink alcohol after a diagnosis of alcohol abuse/dependence and after participating in court-ordered substance abuse counseling and mandatory attendance at Alcoholics Anonymous meetings. He offers no persuasive evidence of positive behavioral changes that would make similar alcohol-related episodes in the future unlikely. *See* Guideline G, ¶¶ E2.A7.1.3.1., E2.A7.1.3.3., and E2.A7.1.3.4. Accordingly, the allegations, as amended, in subparagraphs 1.a. through 1.e. of the SOR are concluded against the Applicant.

With respect to Guideline H, the Government has established its case. Applicant has admitted the Guideline H drug involvement specified in the amended SOR and identified as disqualifying conditions under paragraphs E2.A8.1.1., E2.A8.1.1.3., and E2.A8.1.2.1. of Guideline H. He used marijuana from approximately 1993 through the end of January 2000. He continued to use marijuana, after completing a court-ordered drug education course. Applicant offers in mitigation his assertions that his drug use ended in 2000 and therefore is not recent (E2.A8.1.3.1). He states that his drug use, during the nearly seven years over which it occurred, was episodic and not regular and that he used marijuana in only in social settings. While Applicant's last drug use was not recent, it was not an isolated or aberrational event but a lifestyle choice that continued for over seven years. Applicant states that he has matured and does not plan to use drugs in the future, although he admits to having used drugs after completion of a court-ordered drug treatment program. Thus, while mitigating condition E2.A8.1.3.1. applies to the facts of Applicant's case, mitigating condition E2.A8.1.3.4. does not, nor has sufficient time passed to evaluate the applicability of mitigating condition E2.A8.1.3.3. Accordingly, I find against the Applicant on allegations 2.a. and 2.b under Guideline H of the amended SOR.

The security concern under Guideline J is that an individual's history or pattern of criminal activity raise doubts about his judgment, reliability and trustworthiness. Allegations set forth in Subparagraphs 3.a., 3.b., and 3.c. of the SOR and admitted by the Applicant raise a concern under Guideline J that Applicant lacks sufficient judgment, reliability, and trustworthiness to be entrusted with classified material. Applicant's admissions of his arrest for grand larceny, a charge later reduced to petty larceny, his citation for providing alcohol to a minor, his arrests for driving under the influence of alcohol, and his conviction for possession of marijuana bring his conduct under disqualifying conditions E2.A10.1.2.1 and E2.A10.1.2.2. Applicant's criminal behavior is not recent, and there is evidence of rehabilitation. Thus mitigating conditions E2.A10.1.3.1 and E2.A10.1.3.6 apply. However, his crimes are numerous and not isolated (E2.A10.1.3.2.). After weighing all of the evidence, I find against the Applicant on the three allegations of criminal conduct under Guideline J.

The security concern under Guideline E, Personal Conduct, is with conduct or behavior which demonstrates questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty or unwillingness to comply with rules and regulations. Individuals who exhibit such conduct may not possess the personal qualities required to properly safeguard classified information.

With respect to Guideline E, the Government has also established its case. Applicant denies disqualifying personal conduct under paragraph E2.A5.1.1 of Guideline E that puts in question his judgment, trustworthiness, reliability, honesty and willingness to properly safeguard classified information. The record gives reason for concern, however, under disqualifying conditions E2.A5.1.1.2., E2.A5.1.2.2 and E2.A5.1.2.3. regarding Applicant's security clearance eligibility and trustworthiness. When he completed his SF-86 in December 2001, Applicant failed to reveal, in response to Question 24, his 1999 arrest for driving under the influence and marijuana possession. He did not reveal the arrest for marijuana possession in his first signed, sworn statement to a DSS investigator on January 18, 2002, and he did not discuss the matter until a second interview with the investigator on January 23, 2002. The record also showed that Applicant did not list in response to Question 24 a citation he received in 1998 for purchasing alcohol and distributing it to a minor. Additionally, the record showed that Applicant falsified his response to Question 21 and did not list his arrest for grand larceny in 1999.

Four mitigating conditions under Guideline E might be applicable to the instant case. In his signed, sworn statement of January 18, 2002, Applicant supplies evidence in mitigation under E2.A5.1.3.7. when he states that he no longer associates with the individual with whom he was arrested on the grand larceny charge. Additionally, the security concern raised by Applicant's Guideline E disqualifying conduct could be mitigated under E2.A.5.1.3.1. if the information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability. However, because the information was substantiated and was pertinent to a determination of the Applicant's judgment, trustworthiness or reliability,

mitigating condition E2.A5.1.3.1. does not apply to the facts of his case. Mitigating condition E2.A5.1.3.2 also is inapplicable, for his falsifications were recent, were not isolated incidents, and he did not provide correct information voluntarily. Mitigating condition E2.A5.1.3.3. is also inapplicable, since Applicant did not make prompt good faith efforts to correct the falsification before being confronted with the facts. Accordingly, the allegations in subparagraphs 4.a. and 4.b. of the SOR are concluded against the Applicant.

The combination of drug and alcohol related criminal conduct and the falsification of that conduct on his security clearance application and in his interviews with investigators establish Applicant's current ineligibility for access to the nation's secrets. However sincere Applicant may now be in his intentions, he has not established his ability to conform and sustain his conduct to the standards of good judgment, reliability, and trustworthiness required of anyone seeking a security clearance.

In my evaluation of the record, I have carefully considered each piece of evidence in the context of the totality of evidence and under all of the Directive guidelines that were generally applicable or might be applicable to the facts of the case. Under the whole person concept, I conclude that Applicant has not successfully overcome the Government's case opposing his request for a DoD security clearance.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive are:

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.: Against the Applicant

Subparagraph 1.e.: Against the Applicant

Paragraph 2, Drug Involvement (Guideline H): AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant.

Subparagraph 2.b.: Against the Applicant

Paragraph 3, Criminal Conduct (Guideline J): AGAINST THE APPLICANT

Subparagraph 3.a.: Against the Applicant

Subparagraph 3.b.: Against the Applicant

Subparagraph 3.c.: Against the Applicant

Paragraph 4, Personal Conduct (Guideline E): AGAINST THE APPLICANT

Subparagraph 4.a.: Against the Applicant

Subparagraph 4.b.: 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.

Joan Caton Anthony

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.
3. The diagnosis was made by the Director, Outpatient Treatment Program for Mental Health/Alcoholism and Drug Addiction, of the alcohol safety action program to which the Applicant was assigned by the court after his second arrest for driving under the influence of alcohol in 2000. The Director's professional credentials include the following: Registered Nurse, Bachelor of Science Degree in Nursing, Master of Science Degree in Nursing, Certified Chemical Dependence Nurse, Certified Alcohol and Drug Abuse Counselor, Certified Clinical Supervisor of Certified Alcohol and Drug Abuse Counselors. (Ex. 5.)
4. The only exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607.