

DATE: October 14, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-27207

ECISION OF ADMINISTRATIVE JUDGE

THOMAS M. CREAN

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Jr., Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 33-year-old computer system engineer working for a defense contractor. In his security clearance application, he answered in the negative when asked about being arrested or charged with an offence related to alcohol and if his use of alcohol resulted in treatment or counseling for alcohol abuse. In fact, he was arrested for driving while intoxicated and he also received alcohol related counseling or treatment. Clearance is denied.

STATEMENT OF THE CASE

Applicant submitted a security clearance application on March 15, 2002. Under Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan 2, 1992), as amended and modified (Directive), the Defense Office of Hearing and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On February 23, 2004, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. The SOR alleges security concerns raised under Guideline E (Personal Conduct) of the Directive.

Applicant answered the SOR in writing on March 2, 2004. He elected to have the matter decided on the written record in lieu of a hearing.

Department Counsel submitted the Government's written case on July 15, 2004. Department Counsel provided a complete copy of the file of relevant material (FORM) to Applicant on July 20, 2004. Applicant was informed he had an opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant received the FORM on July 29, 2004, and had 30 days until August 28, 2004 to submit any information. Applicant has not responded or submitted information as of September 24, 2004. The case was assigned to me on September 24, 2004.

FINDINGS OF FACT

Applicant is 33-years-old and employed as a computer systems engineer by a defense contractor. He was charged with driving while intoxicated in 1992. He was convicted of Careless and Reckless Driving. Applicant received a medical evaluation and counseling in 2000 resulting in a diagnosis of alcohol dependency.

As part of his employment with the defense contractor, Applicant submitted a Standard Form 86, Security Clearance Application, on March 15, 2002. (FORM, Item 4). Question 24 on the Security Clearance Application was:

Your Police Record - Alcohol or Drug Offenses

Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs? For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substance Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607.

Applicant answered "NO" to that question. He did not report his arrest for driving while intoxicated in 1992.

Question 30 on the same Security Clearance Application was:

Your Use of Alcohol

In the last 7 years has your use of alcoholic beverages (such as liquor beer, wine) resulted in any alcohol-related treatment or counseling (such as for alcohol abuse or alcoholism)? Do not repeat information reported in ESPQ module 19 (Section 21 from the SF86).

Applicant answered "NO" to the question. He did not report his medical treatment and counseling in 2000. (FORM, Item 6)

Question 19 on the Security Clearance Application dealt with mental health.

Your Medical Record

In the last 7 years, have you consulted a mental health professional (Psychiatrist, psychologist, counselor, etc.) or have you consulted with another health care provider about a mental health related condition? Did the mental health related consultation(s) involve only marital, family, or grief counseling not related to violence by you?

Applicant answered "YES" to both parts of question 19.

Applicant was interviewed by a special agent from Defense Security Service (DSS) on May 24, 2004. (FORM, Item 5). He acknowledged his arrest for driving while intoxicated. The date of the arrest is not clearly noted, but has been listed as either in the spring of 1991 by Applicant (FORM, Item 5) or in 1992 by the medical treatment clinical report. (Item 6, page 2). At best, the arrest was just over ten years before Applicant completed the Security Clearance Application in arch 2002. Applicant attributes his failure to report the arrest to his misunderstanding that he had to list only offenses from the last "five " years. (FORM, Item 5). The instructions from his company directed him to go back to his 18th birthday for any question that asked "have you ever been...?" (FORM, Item 2, Exhibit A). In his response to the SOR, Applicant contends he inaccurately read the instructions for question 24 as well as his company's directions and thought he only had to go back 10 years rather than to his 18th birthday.

Applicant sought counseling on the recommendation of his pastor because he was always tired and had no energy. He was seen by two different psychiatrists and was diagnosed with post dramatic stress disorder and manic depression. He states he was feeling poorly because of his relationship with his mother. (FORM, Item 5, p. 4). He was referred to a medical treatment clinic for evaluation of chemical dependency. (FORM, Item 6, p. 1) Applicant acknowledged the medical treatment to the DSS Special agent (FORM, Item 5, p. 4). The Center's diagnosis is alcoholic dependence. (FORM, Item 7). The report does not attribute his alcoholism to his relationship with his mother. The only reference to his mother in the report is that she is schizophrenic and was on medication most of Applicant's life. (FORM, Item 6, page 1). Applicant told the Center staff there is a family history of alcoholism with his brothers and grandparents.

Applicant determined he did not have to report his medical treatment resulting in a diagnosis of alcohol dependency in question 30 because of his reading of the instructions for question 30. Applicant's reads question 30 as not requiring him to repeat information used to answer question 19. Since he answered "YES" to question 19 that he had consulted with a mental health professional, he did not have to respond "YES" to question 30. Applicant determined the treatment was related to a family matter (relationship with his mother) and not covered by question 30. (FORM, Item 5, page 2). Applicant also acknowledged to the DSS Special Agent that he did not list his two brothers on the Security Clearance Application due to an oversight. (FORM, Item 5, page 2).

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 judgement, 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.

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be fair, impartial, and a commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶ 6.3.1 through ¶ 6.3.6

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." Directive ¶E2.2.1. An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. *Id.* An administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant'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 of recurrence. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

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, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

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 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determination should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶E2.2.2.

CONCLUSIONS

Under Guideline E (Personal Conduct (PC)), a security concern exists for conduct involving questionable judgment, untrustworthiness, unreliability, *lack of candor*, *dishonesty*, or unwillingness to comply with rules and regulations. Any of these characteristics in a person could indicate that the person may not properly safeguard classified information. E2.A5.1.1.

Applicant did not include any information concerning his arrest for driving while intoxicated on his security clearance application. He only revealed the information when questioned by the DSS special agent. The instructions on the security clearance application and the directions from his company were clear and unambiguous. Applicant could not be confused and misled on the requirement to note the arrest on the application. His explanation vacillated from his interpretation to report only those offenses under five years to those under ten years. Applicant answered "NO" to question 30 of the Security Clearance Application concerning the use of alcohol because he answered "YES" to question 19 concerning treatment by a mental health professional. Applicant also did not think he needed to list his mental health treatment on the Security Clearance Application because his treatment was all associated with his mother. Applicant has provided differing rationales for not including his mental health evaluation resulting in a diagnosis of alcohol dependence. A review of the clinical reports from medical treatment center (FORM Items 6, 7, 8), shows Applicant is alcohol dependent and has a history of personal and family alcohol abuse. It appears that Applicant, to obtain a security clearance, deliberately omitted or concealed his arrest for driving while intoxicated and medical treatment resulting in the diagnosis of alcohol dependency.

A disqualifying condition under Guideline E is the deliberate omission, concealment, or falsification of relevant and material facts from the 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 (PC DC) E2.A5.1.2.2. Applicant's failure to note the arrest in question 24 and the medical treatment in question 30 is a deliberate omission or concealment. The information concerning his arrest and medical treatment would seriously affect a grant of his security clearance. I conclude Applicant's failure to note the arrest and the medical treatment is a lack of candor and deliberate omission or concealment within the meaning of Guideline E.

The mitigating conditions under Guideline E that could apply in this case are the falsification was an isolated incident, not recent, and the individual has subsequently provided correct information voluntarily; the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts; or the omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided. (PC MC) E2.A5.1.3.2, E2A5.1.3.3, and E2.A5.1.3.4. Applicant provided different reasons for his failure to provide correct information to the DSS special agent and in response to the SOR. He never voluntarily provided information on his arrest or medical treatment until confronted by the DSS Special agent. The advice he received from his company was straight forward and easy to understand. I conclude that there are no conditions to mitigate the disqualifying conditions.

I carefully considered all the circumstances in light of the "whole person" concept. I conclude Applicant is not eligible for access to classified information.

FORMAL FINDINGS

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

Paragraph 1. Guideline E: AGAINST APPLICANT

Subparagraphs a and b 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.

Thomas M. Crean
Administrative Judge