

DATE: October 30, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-27240

DECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

APPEARANCES

FOR GOVERNMENT

Robert J. Tuidor, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, who is 25 years old, has a history of multiple arrests for criminal behavior deriving

primarily from driving under the influence of alcohol. He falsified his security clearance application by failing to report his criminal history fully and accurately. In 1997, he was found guilty of leaving the scene of an accident involving personal injury or death, a felony for which he received a prison sentence of three years. By operation of law, the provisions of 10 U.S.C. § 986 preclude a grant of clearance, absent meritorious waiver by the Secretary of Defense. Applicant has failed to mitigate disqualifying conduct under the Criminal Conduct and Personal Conduct Guidelines. Clearance is denied. Waiver is not recommended.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On November 7, 2002, 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 J (Criminal Conduct) and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on December 10, 2002 and elected to have a hearing before an administrative judge. The case was initially assigned to Administrative Judge Roger Willmeth, but due to caseload considerations, was subsequently assigned to me on March 17, 2003. On June 19, 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 seven exhibits (Ex.) and Applicant submitted none. At the conclusion of the hearing, the record was left open for 10 days so that Applicant could submit copies of records of his educational attainments and professional certifications. Applicant submitted nine exhibits. DOHA received the transcript (Tr.) of the proceeding on June 26, 2003.

FINDINGS OF FACT

The SOR in this case contains 12 allegations of disqualifying conduct. Eight allegations relate to conduct charged under Guideline J, Criminal

Conduct and four allegations relate to allegations charged under Guideline E, Personal Conduct.

Applicant admitted the factual allegations as set forth in subparagraphs 1.a., 1.b., 1.c., 1.d., 1.e, and 1.g. of the SOR, involving Criminal Conduct under Guideline J. In his response to the SOR, Applicant denied the facts alleged in subparagraph 1.f., identified as two charges of failing to appear on misdemeanor charges. In testimony he did not dispute the allegations in subparagraph 1.f. and stated that the events described could have happened but he did not remember them. (Tr. 18.) Applicant denied the allegations in subparagraph 1.h. and in subparagraphs 2.a., 2.b., 2.c., and 2.d., 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 is 25 years old and has been employed for nearly two years as a computer network administrator by a Defense contractor. He recounts an abusive home life and parental separation and divorce when he was in his late teenage years. As the first born son, he helped to support his mother and siblings after the divorce. His problem drinking began when he was approximately seventeen. In 1997, at the age of 19, Applicant was arrested three times for driving under the influence of alcohol. One of the arrests included a charge of eluding police, and another included a charge of driving on a suspended license. In April 1997, Applicant was arrested for driving under the influence of alcohol and leaving the scene of an accident involving personal injury or death. (3) He was found guilty and sentenced to three years imprisonment for this felony. Applicant's prison term was suspended to six months, with three years of probation. While serving his suspended prison term, Applicant entered a substance abuse program and learned that he was an alcoholic. He was released from prison, and in October 1998, a bench warrant for his arrest was issued for failure to comply with the terms of his suspended sentence. In September 2000 the court revoked the suspension of Applicant's sentence, ordered him to serve the unserved portion of his sentence in jail, and once again suspended that sentence on the condition that he complete three years of probation and pay court costs. In March 2001, Applicant was charged with two counts of failure to appear on a misdemeanor charge. One of the charges was dismissed. Applicant was found guilty on the other charge, received a sentence of 60 days in jail, with 58 days suspended, and was assessed a fine.

In October 2001, Applicant completed a security clearance application, identified as a Standard Form 86 (SF-86). (Ex. 1.) Question 21 on the SF-86 asks: "Have you ever been charged with or convicted of any felony offense?" Applicant answered "No" to Question 21. Question 24 on the SF-86 asks: "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." Applicant answered "yes" to question 24, but listed only one arrest for driving under the influence, which he identified as occurring on October 27, 1997. His response failed to indicate that he had been arrested for driving under the influence of alcohol three times in 1997, and he failed to indicate that as a result of his arrest for driving under the influence of alcohol and leaving the scene of an accident involving personal injury or death, he was sentenced on October 27, 1997, to incarceration for a term of three years. (Ex. 4.)

Question 26 on the SF-86 completed by Applicant reads as follows: "In the past 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23,

24, or 25? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.)

For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the record." Applicant responded "no" to Question 26 and failed to list his arrest in 1998 for failure to appear on a misdemeanor charge (subparagraph 1.d. of the SOR), his arrest in 2000 for failure to appear on a misdemeanor and revocation of a suspended license and probation (subparagraph 1.e. of the SOR), and his arrest in 2001 on two counts of failure to appear on a misdemeanor charge (subparagraph 1.f. of the SOR).

Question 30 on the SF-86 completed by Applicant asks: "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)? Applicant responded "no" to question 30, even though he had enrolled in a substance abuse program while in prison and had graduated from the program in the winter of 1998. (Ex. 2, at 4-5.)

The SF-86 admitted into evidence contains a section identified as "Certification By Person Completing Form." The certification reads as follows: "My statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both. (See section 1001 of title 18, United States Code)." A writing appears on the signature line beneath the certification, but it is illegible. The date line next to the signature line is blank. I am unable to conclude that the Applicant read the certification and signed it.

Applicant asserts that he has worked hard to change his life for the better, and he cites several recent accomplishments. Since serving time in prison, Applicant has completed a course of study at a technical college and has been recognized by his department head for high academic achievement. (Applicant's exhibits) He has earned special certifications in computer programs and has subsequently moved forward as a computer network administrator. He acknowledges that he is an alcoholic and abstains from alcohol. He attends weekly meetings of Alcoholics Anonymous. (Tr. 18-19.) He has paid off old debts and bills and has earned the privilege of a driver's license again. (Tr. 25.). He is engaged to be married and plans to complete his bachelor's degree. He requests a waiver pursuant to 10 U.S.C. §986.

POLICIES

General Policy Considerations and Whole Person Concept

"[No] 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 the 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.

Paragraph E2.2.1 of Enclosure 2 to the Directive, as amended, provides adjudicative guidelines for determining eligibility for access to classified information and defines the adjudicative process as "the careful weighing of a number of variables known as the whole person concept." In following this policy precept, adjudicators must examine a sufficient period of a person's life to determine whether the individual is eligible for a security clearance and they should consider available and reliable past and present information about the applicant that is both favorable and unfavorable. In evaluating the relevance of an individual's conduct, the adjudicator 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 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. *See* Directive, Enclosure E2, Part E2.2.

Criminal Conduct and 10 U.S.C. § 986

In addition to the policy guidelines discussed above, adjudicators must follow additional guidance on the granting or renewal of security clearances mandated by more recent legislative action. By Memorandum dated June 7, 2001, the Deputy Secretary of Defense promulgated policy guidance for implementing Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, which amended Chapter 49 of Title 10 of the United States Code by adding a new section, enumerated 10 U.S.C. § 986. 10 U.S.C. § 986(1) provides, in pertinent part, that a person is disqualified from being granted a security clearance if "[t]he person has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year." The Deputy Secretary's memorandum specifies that the provisions of 10 U.S.C. § 986(1) apply "to any DoD [Department of Defense] officer or employee, officer, director, or employee of a DoD contractor, or member of the Army, Navy, Air Force, or Marine Corps on active duty or in inactive status, who is under consideration for the issuance or continuation of eligibility for access to classified information."

Attachment 1 to the Deputy Secretary's Memorandum of June 7, 2001, provides general guidance for DoD adjudicators charged with making determinations of an individual's suitability for a security clearance under the provisions of 10 U.S.C. § 986. That guidance states that the disqualification from eligibility for security clearance under 10 U.S.C. § 986 applies to "persons with convictions in State courts, "with sentences imposed of more than one year, regardless of the amount of time actually served."

Also attached to the Deputy Secretary's Memorandum of June 7, 2001, are revised adjudication guidelines, originally promulgated by the Special Assistant to the President for National Security Affairs in March 1997, pursuant to Executive Order 12968, which pertain to criminal conduct. The Deputy Secretary's memorandum states that these adjudication guidelines have been revised to reflect the provisions of 10 U.S.C. § 986. [\(4\)](#)

The relevant adjudication guidelines pertaining to the instant case are revised Guideline J, Criminal Conduct, and Guideline E, Personal Conduct.

The Government's concern under revised Guideline J is that a history or pattern of criminal activity creates doubt about a person's judgement, reliability and trustworthiness.

Guideline J 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-martial of a crime and

sentence to imprisonment for a term exceeding one year [footnote omitted];

Conditions that could mitigate Guideline J security concerns include:

- a. The criminal behavior was not recent;
- b. The crime was an isolated incident;
- f. There is clear evidence of successful rehabilitation.
- g. Potentially disqualifying condition... c. ... above, may not be mitigated unless, where meritorious circumstances exist, the Secretary of Defense or the Secretary of the Military Department concerned has granted a waiver.

Footnote 1 in revised adjudication Guideline J reads: "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 martial, 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." An Administrative Judge may recommend that an applicant's case be considered or not considered for a grant of Secretarial waiver only if the Judge's decision to deny or revoke a clearance is based solely on the provisions of 10 U.S.C. § 986.

In addition to revised Guideline J, Adjudicative Guideline E, Personal Conduct (Attachment 5 to Enclosure 2), is also pertinent to this case

Under Guideline E, 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. E2.A5.1.1.

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

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.A5.1.2.4. Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail.

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.

Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. 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 security concern under Guideline J is that an individual's history or pattern of criminal activity raises doubts about his judgment, reliability and trustworthiness. Applicant denied the allegation in subparagraph 1.f. of the SOR that he had been charged in March 2001 with failure to appear on two misdemeanor charges. At his hearing, he admitted the allegation could be true but he could not remember whether it was so. (Tr. 17-18.) The Government presented a Federal Bureau of Investigation record which showed the charges alleged in subparagraph 1.f., thus rendering Applicant's

denial unpersuasive.

Allegations set forth in Subparagraphs 1.a., 1.b., 1.c., 1.d., 1.e., and 1.g. 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 a history or pattern of criminal activity, including arrests and charges for driving under the influence of alcohol, eluding the police, driving on a suspended license, failure to appear, and violation of probation, bring his conduct under disqualifying conditions **a.** and **b.** of revised adjudication Guideline J. His admission of allegation 1.b. of the SOR that he was arrested, convicted, and sentenced to three years of incarceration for the felony of leaving the scene of an accident involving personal injury or death brings his conduct under disqualifying condition **c.**

Applicant's conduct under subparagraphs 1.a., 1.b., 1.c. of Guideline J occurred six years ago, in 1997, and the conduct alleged and admitted in subparagraph 1.d. occurred five years ago, in 1998. The conduct described in these subparagraphs meets mitigating condition **a** under revised Criminal Conduct Guideline J because it was not recent. However, the conduct under subparagraphs 1.e. and 1.f. occurred in 2000 and 2001, making it closer to the present time and therefore causing it to fall short of meeting mitigating condition **a.** Even though some of the Guideline J conduct was not recent, it demonstrates that Applicant's crimes were not isolated incidents, but a pattern of behavior carried out during his late adolescence and young adulthood, and thus mitigating condition **b** does not apply. While Applicant's case in mitigation is strengthened because there has been no criminal conduct since 2001, and he has demonstrated responsible behavior in the recent past, the fact remains that not enough time has passed for Applicant to demonstrate clear evidence of rehabilitation. Thus, it is not possible to make a positive finding under mitigating factor **f** at this time.

Applicant's admitted criminal behavior under allegation 1.b. of the SOR falls within disqualifying condition **c** of the revised Criminal Conduct Guideline J. Allegation 1.g. of the SOR advises Applicant that disqualifying condition **c** applies to allegation 1.b. and thus precludes him, by operation of law, from receiving a security clearance under these facts unless, pursuant to mitigating condition **g**, he can present meritorious circumstances for consideration by the Secretary of Defense or his designee. Applicant's case in mitigation does not demonstrate sufficient meritorious circumstances, and I therefore find against Applicant on allegations in subparagraphs 1.a. through 1.g. in the SOR under revised Guideline J, and I do not recommend that the Secretary consider a waiver of the disqualifying condition **c** conduct pursuant to mitigating factor **g.** As the remaining discussion demonstrates, the denial of Applicant's security clearance is also based on disqualifying conduct under Guideline E and not solely on the Guideline J conduct which disqualifies him under the provisions of 10 U.S.C. § 986.

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. E2.A5.1.1.

Applicant appears to deny the allegation at subparagraph 1.h. under Guideline J of the SOR, which characterizes the falsifications on his SF-86 as criminal felonious conduct under 18 U.S.C. §1001. I find insufficient evidence in the record to conclude that Applicant falsified his answers to Questions 21, 24, 26, and 30 on his SF-86 with criminal intent, and accordingly, I find for the Applicant as to the allegation in subparagraph 1.h. of the SOR.

Applicant denies conduct alleged under subparagraphs 2.a., 2.b., 2.c., and 2.d. under Guideline E, Personal Conduct. The Government supplied prima facie evidence that Applicant falsified material facts in response to Questions 21, 24, 26, and 30 on his SF-86 and thus demonstrated disqualifying conduct under Guideline E, ¶¶ E2.A5.1.2.2 and E2.A5.1.2.4. Applicant supplied no evidence that would mitigate the allegations of falsification on the SF-86 he completed in October 2001. Mitigating condition E2.A5.1.3.1 does not apply to the facts of this case: the information withheld by Applicant is pertinent to a determination of his judgment, trustworthiness, and reliability. While Applicant's falsifications were not recent, they are not isolated incidents, and Applicant did not supply correct information voluntarily. Thus, mitigating condition E2.A5.1.3.2 is inapplicable. I find against Applicant on allegations 2.a., 2.b, 2.c., and 2.d of the SOR under Guideline E.

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, Criminal Conduct (Guideline J): 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

Subparagraph 1.f.: Against the Applicant

Subparagraph 1.g.: Against the Applicant

Subparagraph 1.h.: For the Applicant

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

Subparagraph 2.a.: Against the Applicant.

Subparagraph 2.b.: Against the Applicant

Subparagraph 2.c.: Against the Applicant

Subparagraph 2.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 the Applicant. Clearance is denied. Waiver is not recommended.

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 statutory definition of the offense was "leaving the scene of an accident involving personal injury or death." Applicant testified that his hit and run conduct resulted in injury to and not death of another person. (Tr.16.)
4. The revised adjudication guidelines modify Guideline H (Drug Involvement), Guideline I (Emotional, Mental, and Personality Disorders), and Guideline J (Criminal Conduct). The modified Guidelines reflect Department of Defense policy relating to 10 U.S.C. §986. The modified Guidelines identify disqualifying and mitigating conduct by alphabetical letters and not by the Enclosure 2 code of alphabetical letters and numbers found in DoD Directive 5220.6. (*See, e.g.,* Guideline E disqualifying and mitigating conditions, *supra.*) The policy promulgated in the revised adjudication guidelines changes DoD 5200.2-R, and, according to the July 7, 2001, memorandum of the Deputy Secretary of Defense, will be codified in the next revision of the regulation.