

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant is a cost estimator for a defense contractor. He was found guilty of public intoxication in 1998. He was found guilty of criminal trespass while intoxicated in July 2001. He was arrested for driving while intoxicated in November 2001 and December 2001, and sentenced for both offenses in November 2003. In filing his security clearance application in May 2002, Applicant did not list the charges pending for driving while intoxicated in response to question 23. Applicant also did not list the four alcohol-related offenses in response to question 24. Clearance is denied.

CASENO: 02-29507.h1

DATE: 01/04/2005

DATE: January 4, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-29507

DECISION OF ADMINISTRATIVE JUDGE

THOMAS M. CREAN

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a cost estimator for a defense contractor. He was found guilty of public intoxication in 1998. He was found guilty of criminal trespass while intoxicated in July 2001. He was arrested for driving while intoxicated in November 2001 and December 2001, and sentenced for both offenses in November 2003. In filing his security clearance application in May 2002, Applicant did not list the charges pending for driving while intoxicated in response to question 23. Applicant also did not list the four alcohol-related offenses in response to question 24. Clearance is denied.

STATEMENT OF THE CASE

On August 17, 2004, the Defense Office of Hearing and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to not grant a security clearance to Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb 20, 1990), 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). Applicant acknowledged receipt of the SOR on August 23, 2004. The SOR alleges security concerns under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of the Directive.

Applicant answered the SOR in writing on August 24, 2004. He admitted all of the allegations under Guideline J. He admitted the allegations under Guideline E but provided an explanation for his actions. 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 October 18, 2004. Applicant received a complete file of relevant material (FORM) on November 2, 2004, and was provided the opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. His response was due December 2, 2004. As of December 6, 2004, he had not responded. The case was assigned to me on December 10, 2004.

FINDINGS OF FACT

Applicant is a 25-year-old cost estimator for a defense contractor. In July 1998, Applicant was found guilty of public intoxication and sentenced to pay a fine. In July 2001, Applicant was found guilty of criminal trespass for entering a motel room belonging to another person while intoxicated, and sentenced to community service, a fine, and pay court costs. In November, 2001, and again in December 2001, Applicant was arrested for driving while intoxicated. He was sentenced for both offenses in November 2003, to a suspension of his driver's license, to probation for six months, and to pay a fine and court costs. All four events took place while Applicant was a college student.

Applicant submitted his security clearance application on May 5, 2002. In response to question 23 requesting if there were any current pending charges against him, Applicant only listed the criminal trespass charge and not the two pending driving while intoxicated charges. In response to question 24 requesting if he was ever charged with or convicted of any offenses involving alcohol or drugs, Applicant responded "No." All four of the criminal charges against Applicant were alcohol related.

Applicant admits to alcohol problems in his college days and that the use of alcohol was a big mistake. He states he has learned from the mistakes and they will never occur again. He stated he did not intentionally provide incorrect information in response to questions 23 and 24. The failure to include the alcohol offenses on his security clearance application was because he thought the offenses were misdemeanors and not serious crimes to be listed on the form. In an October 16, 2003 statement to OPM security agents, Applicant stated he initially completed the security clearance application in the summer or fall of 2001 before the two driving while intoxicated offense happened. He was asked to update the form in the spring of 2002 after the offenses happened. He was told to update the contact information and was not asked about the information on the rest of the form.

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.

CONCLUSION

I carefully considered all of the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR:

Under Guideline J (Criminal Conduct), a security concern exists for a history or pattern of criminal activity which creates doubt about a person's reliability or trustworthiness. Directive ¶ E.2.A10.1.1. Under Guideline E (Personal Conduct), a security concern exists for conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules or regulations. Any of these characteristics in a person could indicate the person may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

Applicant's arrests and convictions for public intoxication, criminal trespass, and driving while intoxicated as well as the failure to list the offenses in the appropriate sections of the security clearance application brings the matters within Criminal Conduct Disqualifying Conditions Directive ¶ E2.A10.1.2.1. (*allegations or admission of criminal conduct, regardless of whether the person was formally charged*); and, Directive ¶ E2.A10.1.2.2. (*a single serious crime or multiple lesser offenses*). Applicant admits to the criminal conduct and evidence in the file supports the establishment of the four criminal offenses. While the offenses may not be considered serious criminal offenses, they are multiple offenses of criminal activity. Applicant failed to list all of the offenses in response to the requests for information on the Security Clearance Application. This failure leads to the criminal offense of violating 18 U.S.C. § 1001, for knowingly and willfully making a materially false, fictitious, or fraudulent statement or representation in a security investigation. I conclude the disqualifying conditions have been established.

The mitigating conditions that may be applicable to Applicant are: Directive ¶ E2.A10.1.3.1. (*the criminal behavior was not recent*); Directive ¶ E2.A10.1.3.2. (*the crime was an isolated incident*); Directive ¶ E2.A10.1.3.6. (*there is clear evidence of successful rehabilitation*). The criminal behavior is recent. Three of the four offenses happened less than a year before Applicant submitted his security clearance application. The fourth event was less than four years before the submission of the application. The offenses are not isolated since three of the events happened within six months of each other. While Applicant said he has learned his lessons and is now alcohol free, he presented no evidence of counseling or rehabilitation. I conclude Applicant has not mitigated the disqualifying conditions under Guideline J.

Applicant's failure to list the alcohol-related offense and pending charges in response to questions 23 and 24 on the security clearance application brings the matter under Personal Conduct Disqualifying Condition 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 security eligibility or trustworthiness...*). Questions 23 and 24 are clear on the information required from an applicant. Applicant could not misunderstand the questions and conclude he needed only to list serious and not misdemeanor offenses. The offenses happened so close to the time he completed the application, he could not have forgotten them. The public intoxication and the criminal trespass while intoxicated offense happened before Applicant completed the initial application in the summer or fall of 2001 and those offenses should have been listed in response to question 24. Even if the driving while intoxicated offenses had not happened when Applicant first completed the application, he had a duty

to ensure the applications completeness when he signed the form in May 2002. I conclude the disqualifying condition has been established and Applicant deliberately omitted relevant and material facts from his security clearance applicant.

The Personal Conduct Mitigating Condition that may apply to Applicant is Directive E2.A5.1.3.3. (*the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*). Applicant provided the correct information concerning the alcohol related offenses and the pending driving while intoxicated offenses only after being requested by the OPM special agent. He did not correct the information on his own. I conclude Applicant did not mitigate the Personal Conduct Disqualifying Condition.

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

FORMAL FINDINGS

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

Paragraph 1, Guideline J AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Paragraph 2, Guideline E AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly not consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Thomas M. Crean

Administrative Judge