

KEYWORD: Alcohol; Personal Conduct; Criminal Conduct

DIGEST: Applicant was arrested for driving under the influence (DUI) in December 1998 and convicted of reckless driving. He was convicted of driving while intoxicated (DWI) in April 1999, and sentenced to 60 days in jail, suspended for three years. In May 2000 he was sentenced to a six-month revocation of his driver's license for failure to comply with the terms of his suspended sentence. Applicant did not disclose past marijuana use on his security clearance application (SF 86), and he told a security investigator he had never used marijuana. Security concerns based on alcohol consumption are mitigated, but concerns based on falsification are not mitigated. Clearance is denied.

CASENO: 02-29952.h1

DATE: 02/08/2005

DATE: February 8, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-29952

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Stephanie C. Hess, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was arrested for driving under the influence (DUI) in December 1998 and convicted of reckless driving. He was convicted of driving while intoxicated (DWI) in April 1999, and sentenced to 60 days in jail, suspended for three years. In May 2000 he was sentenced to a six-month revocation of his driver's license for failure to comply with the terms of his suspended sentence. Applicant did not disclose past marijuana use on his security clearance application (SF 86), and he told a security investigator he had never used marijuana. Security concerns based on alcohol consumption are mitigated, but concerns based on falsification are not mitigated. Clearance is denied.

STATEMENT OF THE CASE

On March 25, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to deny Applicant a security clearance. This action was taken 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 SOR alleges security concerns under Guidelines G (Alcohol Consumption), E (Personal Conduct), and J (Criminal Conduct). Under Guideline G, it alleges excessive alcohol use that continued after diagnosis and treatment for alcohol abuse (§§ 1.a., 1.e., 1.g.); an arrest for driving under the influence and refusing to give a breath or blood sample, and conviction of reckless driving (§ 1.b.); arrests for and conviction of driving while intoxicated and driving outside the limits of a restricted license (§ 1.c.); and twice failing to comply with the conditions of a suspended sentence (§§ 1.d., 1.f.). Under Guideline E, the SOR alleges falsification of a security clearance application (SF 86) by failing to disclose marijuana use, and falsely denying marijuana use during an interview by a security investigator (§§ 2.a., 2.b.). Under Guideline J, it alleges the conduct under Guideline E was a felony (§ 3.a.).

Applicant answered the SOR in writing on April 28, 2004. He admitted the allegations in part and denied them in part, and he requested a hearing. The case was assigned to me on September 10, 2004. On October 13, 2004, DOHA issued a notice of hearing setting the case for November 2, 2004. The case was heard as scheduled. DOHA received the transcript (Tr.) on November 15, 2004.

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I also make the following findings:

Applicant is a 42-year-old senior engineer for a defense contractor. He has worked for his present employer since May 2000. He is respected among his colleagues and supervisors as a trustworthy, honest, reliable, and an ethical person. His friends regard him as kind, loving, and helpful. He is actively involved in community and civic activities.

Applicant started consuming alcohol in 1982, consuming an average of two to six beers at a time, usually on weekends, in bars and restaurants and at social events. His alcohol consumption now consists of a total of three or four beers during a weekend. He does not drink wine or hard liquor.

On December 15, 1998, Applicant was arrested for driving under the influence (DUI) and refusing to give a breath or blood sample. He was convicted of reckless driving, and his driver's license was suspended for one year. He was given a restricted driver's license, and ordered to attend an alcohol safety action program.

On April 24, 1999, Applicant was charged with driving while intoxicated (DWI) and violating the limits of his restricted driver's license. He was convicted and sentenced to 60 days in jail, suspended for three years. His driver's license was suspended and he was given a restricted license and ordered to attend an alcohol safety action program.

On October 18, 1999, a show-cause summons was issued because Applicant failed to comply with the terms of his suspended sentence after his arrest in December 1998. On November 22, 1999, a capias was issued, ordering Applicant's arrest. In May 2000, Applicant was sentenced to a six-month revocation of his driver's license for his failure to comply with the terms of the suspended sentence.

Applicant entered the alcohol safety action program on October 6, 1999. He completed ten weeks of alcohol education classes and 14 weeks of counseling.

On June 13, 2000, Applicant executed a SF 86. He gave a negative response to question 27, asking if he had used a

controlled substance such as marijuana in the last seven years. In a sworn statement to a Defense Security Service (DSS) investigator on August 9, 2002, Applicant stated, "I have never used marijuana or any illegal substance in my life." In a subsequent sworn statement to an investigator on August 22, 2002, Applicant admitted he smoked marijuana about two times a year from about 1990 or 1992 until 1995, and twice during a two-week period ending around October 1999. He admitted he was not truthful on his SF 86 and previous interview because he was afraid he would not receive a security clearance and would lose his job. At the hearing, he admitted intentionally omitting any mention of his marijuana use on his SF 86 (Tr. 38).

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.

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 a fair, impartial, and 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.

In evaluating an applicant's conduct, 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 or 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 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 determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

Guideline G (Alcohol Consumption)

Excessive alcohol consumption 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. Directive ¶ E2.A7.1.1. A disqualifying condition (DC 1) may arise from alcohol-related incidents away from work, such as driving under the influence. Directive ¶ E2.A7.1.2.1. Applicant's two alcohol-related driving offenses establish DC 1.

Applicant has not been diagnosed or evaluated as an alcohol abuser or alcohol dependent by a credentialed medical professional or a licensed clinical social worker. Thus, I conclude the allegations in the SOR ¶¶ 1.e. and 1.g. are not substantiated.

Security concerns based on alcohol consumption can be mitigated (MC 1) by showing that [t]he problem occurred a number of years ago and there is no indication of a recent problem." Directive ¶ E2.A7.1.3.2. Applicant's last alcohol-related driving offense was in April 1999, almost six years ago. He has had no further arrests or convictions. He continues to consume alcohol, but in moderation. I conclude MC 1 is established, and the security concerns based on Applicant's alcohol consumption are mitigated.

Guideline E (Personal Conduct)

Under Guideline E, conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate the person may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

When a falsification allegation is controverted, Department Counsel has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An Administrative Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

Two disqualifying conditions (DC) apply to this case. DC 2 applies where there has been a deliberate omission or falsification of relevant and material facts from any personal security questionnaire. Directive ¶ E2A5.1.2.2.. DC 3 applies when an applicant deliberately provides false or misleading information concerning relevant and material matters to an investigator or security official in connection with a personnel security or trustworthiness determination. Directive ¶ E2A5.1.2.3. Applicant admitted deliberately omitting the information about his marijuana use from his SF 86 and persisting in his falsification in his sworn statement of August 9, 2002. I conclude DC 2 and DC 3 are established.

Deliberate falsification can be mitigated if an applicant makes prompt, good-faith efforts to correct the falsification before being confronted with the facts. Directive ¶ E2.A5.1.3.3. Applicant disclosed his marijuana use only after being confronted with his falsification. He admitted he provided false information because he was afraid he would not receive a security clearance if he revealed his marijuana use. I conclude the security concerns arising from Applicant's falsifications are not mitigated.

Guideline J (Criminal Conduct)

Under Guideline J, a single serious offense can raise a security concern (DC 2). It is a felony, punishable by a fine or imprisonment for not more than five years, or both, to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of the executive branch of the Government of the United States. 18 U.S.C. § 1001. Security clearances are within the jurisdiction of the executive branch of the Government of the United States. *See Egan*, 484 U.S. at 527. A deliberately false answer on a security clearance application or in response to questions by a security investigator is a serious crime within the meaning of Guideline J. Applicant admitted deliberately omitting material facts from his SF 86 and making a false statement to a security investigator on August 9, 2002. Candor is important, and Applicant was unable or unwilling to be candid about his background. Because of this serious misconduct, compelling reasons to grant a clearance are required.

Applicant's fear of losing his job does not justify or excuse the making of deliberate falsifications to the government in connection with a security questionnaire or a written statement to a federal investigator. *See, e.g.*, ISCR Case No. 96-0685 (November 14, 1997) at p. 2. ISCR Case No. 99-0442, 1999 DOHA LEXIS 164 at *4 (App. Bd. Apr. 22, 1999). Insufficient time has passed since his most recent falsification to mitigate the security concerns raised by his criminal conduct. I conclude DC 2 is established, and no mitigating conditions are established.

FORMAL FINDINGS

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

Paragraph 1. Guideline G (Alcohol Consumption): FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: For Applicant

Subparagraph 1.g.: For Applicant

Paragraph 2. Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Paragraph 3. Guideline J (Criminal Conduct): AGAINST APPLICANT

Subparagraph 3.a.: Against 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 a security clearance for Applicant. Clearance is denied.

LeRoy F. Foreman

Administrative Judge