

DATE: September 30, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-21242

DECISION OF ADMINISTRATIVE JUDGE

CAROL G. RICCIARDELLO

APPEARANCES

FOR GOVERNMENT

Nicole L. Noel, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant had two alcohol related driving incidents, one in 1985 and the other in 1999. He received a sentence of probation before judgment in both cases. Applicant falsified information on his security clearance application by denying any alcohol-related incidents, arrests or probation. Applicant failed to disclose this information in previous security applications and subsequent written interrogatories. Applicant's inability to recognize the importance of truthfulness and honesty is paramount. He has failed to meet the ultimate burden of persuasion. Clearance is denied.

STATEMENT OF THE CASE

On December 30, 2003 the Department of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline G for alcohol consumption and Guideline E for personal conduct.

In a sworn answer, dated January 16, 2004 Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the government's written case on July 16, 2004. A complete copy of the file of relevant material (FORM) was mailed to Applicant and he received it on July 27, 2004. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. No additional material was submitted. The case was assigned to me on September 16, 2004.

FINDINGS OF FACT

Applicant has admitted the factual allegations in subparagraphs 1.a. and 1.b., pertaining to Guideline G. Applicant denies the factual allegation in subparagraph 2.a., pertaining to Guideline E. Those admissions are incorporated herein as findings of fact.

After a complete and thorough review of the record evidence as a whole, I find it sufficient to establish the conduct

alleged in the SOR. I make the following additional findings of fact:

Applicant is a 58-year-old employee of a federal contractor. He has been married since 1971 and has one grown child and three grown stepchildren. Applicant served two years in the Army from 1966 to 1968 and was honorably discharged.

Applicant was employed by a federal contractor from 1984 to 1993 as a supervisor. From 1993 to 2000 he was employed by a different federal contractor as a security guard. Applicant has been employed as security guard by his current employer, also a federal contractor, since 2000.

Applicant was arrested and charged with driving under the influence of alcohol on September 5, 1985. He pled guilty, was awarded probation before judgment and was placed on unsupervised probation for three six months.

Applicant was arrested and charged with driving while intoxicated on December 24, 1999. He pled guilty, was given probation before judgement, unsupervised probation from the date of the sentence and was fined. Applicant consumes alcohol, mostly on weekends and in moderate amounts. Applicant no longer drinks and drives.

Applicant has completed four security clearance questionnaires between 1987 and 2001. In November 2001, he completed a Personnel Security Questionnaire. Question 17 of that questionnaire contained four subparts. Subpart (a) asked: *Have you ever been arrested, charged, cited or held by Federal, state, or local law enforcement or juvenile authorities regardless of whether the citation was dropped or dismissed, or you were found not guilty?* Applicant answered "No." Subpart (d) asked: *Have you ever been awarded, or are you now under suspended sentence, parole, or probation or awaiting any action on charges against you?* Applicant answered "No." Question 18 (c) asked: *Have you ever been charged with or convicted of any offense(s) related to alcohol?* Applicant answered "No." Applicant lied when he failed to disclose his probation status for an alcohol-related incident.

Applicant completed a Questionnaire for Non-Sensitive Positions in July 1992. Question 23, Subpart (d) asked: *Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?* Applicant answered "No."

Applicant completed a Questionnaire for Public Trust Position (SF 85P) in March 1998. Applicant was only required to list alcohol-related arrests occurring within the last seven years. No disclosure was required.

Applicant signed a security clearance application (SF 86) on January 31, 2001 in which he answered "No" to Question 24: *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 was interviewed by a special agent of the Defense Security Service (DSS) on April 11, 2002, and provided a written, signed, sworn statement admitting his alcohol arrests. Applicant states that he was confused when answering Question 24 and thought that the question said, *Have you ever been charged with and convicted of any offense (s) related to alcohol and drugs?* Applicant claims he believed that his sentence of "probation before judgment" meant he did not have to report his offenses because they were not convictions. Applicant acknowledged in his statement to DSS that he now understood his alcohol related arrests required reporting.

Applicant was provided written interrogatories regarding his alcohol history. He provided a sworn answer to the interrogatories on June 24, 2003. Applicant answered "No" to Question 5: *Have you been arrested, charged or held by any law enforcement authorities for any reason?* Applicant lied when he did not disclose his alcohol related arrests.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of

the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

Considering the evidence as a whole, Guideline G, pertaining to alcohol consumption and Guideline E, pertaining to personal conduct, with their respective DC and MC, are most relevant in this case.

Under Guideline G, alcohol consumption is a security concern because 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. Those who abuse alcohol are more likely than others to engage in high risk, thoughtless, and sometimes violent behavior. Recurrent use of alcohol to the point of intoxication may affect an individual's ability to exercise the care, judgment, and discretion necessary to protect classified information.

Personal conduct under Guideline E is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Personal 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.

BURDEN OF PROOF

The sole purpose of a trustworthiness determination is to decide if it is clearly consistent with the national interest for an applicant to be granted eligibility to hold a position requiring such trust. The government has the burden of proving controverted facts. The burden of proof is something less than a preponderance of evidence, although the government is required to present substantial evidence to meet its burden of proof. Substantial evidence is more than a scintilla, but less than a preponderance of the evidence. Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him. Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.

The clearly consistent standard indicates that trustworthiness determinations should err, if they must, on the side of denials. Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.

CONCLUSIONS

Applicant was arrested and charged with two traffic violations involving alcohol, one in 1985 and one in 1999. He pled guilty to both offenses and was awarded probation before judgment. Applicant only drinks on the weekends now and no longer drives after he has been drinking. Disqualifying condition (DC) 1: *Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use* applies in this case.

Addressing mitigating conditions, under Guideline G, MC 1: *The alcohol related incidents do not indicate a pattern;* and MC 2: *The problem occurred a number of years ago and there is no indication of a recent problem,* apply in Applicant's favor. It has been 19 years since Applicant's first alcohol incident and almost 5 years since his second incident. Neither incident is recent nor do they establish a pattern. In addition, Applicant no longer drives after he has been drinking. Under the circumstances presented I find Applicant has mitigated the security concern caused by his alcohol consumption, and Guideline G is decided for Applicant.

Applicant failed to disclose his alcohol related incidents on his SF 86 in 2001 and his sworn interrogatories on June 24, 2003. Under Guideline E, DC 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 qualification, or award fiduciary responsibilities,* and DC 5: *A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency,* apply in this case.

Applicant submitted four different personnel security questionnaires from 1987 through 2001. Each questionnaire had alcohol related questions. The November 1987 questionnaire, specifically Question 17 (a) asked: *Have you ever been arrested, charged, cited or held by Federal, state, or local law enforcement or juvenile authorities regardless of whether the citation was dropped or dismissed, or you were found not guilty?* This question is quite specific and direct in attempting to solicit any information regarding potential criminal activity. Applicant answered "No" and therefore did not answer this question honestly. Subpart (d) asked: *Have you ever been awarded, or are you now under suspended sentence, parole, or probation or awaiting any action on charges against you?* Applicant answered "No" and therefore failed to disclose his probationary status or his probation before judgment determination.

On Applicant's 1992 Non-Sensitive Position Questionnaire he failed to disclose that he had been charge with an alcohol related offense and its disposition. Again, Applicant was less than forthright.

Applicant claims he was confused as to the wording on his 2001 SF 86 and misunderstood Question 24 when he answered "No." He believed the question asked if he had been charged *and* convicted of any offense related to alcohol or drugs vice charged *or* convicted. The November 1987 personnel security questionnaire does not contain the *and/or* language that Applicant claims were confusing. After acknowledging his interpretation of Question 24 was wrong and indicating he understood that all incidents and dispositions must be disclosed, Applicant failed to disclose his alcohol related incidents on the written interrogatories that he provided under oath on June 24, 2003.

I have specifically considered MC 2: *The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily;* and MC 3: *The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts;* and conclude neither apply in this case. Applicant has consistently failed to disclose his alcohol-related incidents on security questionnaires. On his 2001 questionnaire he claims he was confused because of the wording of the question. There have been several other questions that are quite direct and specific in soliciting information, yet he failed to disclose the pertinent information. Applicant could have asked for clarification regarding the question, but it appears he did not. Finally, after given specific guidance that his alcohol-related incidents had to be divulged, he again did not divulge this information on his sworn interrogatories in June, 2003.

Applicant's omissions are recent and not isolated and he has established a pattern of dishonesty in failing to provide the requested information. When directly confronted with the facts by DSS Applicant provided the information, but later omitted the same facts on his written interrogatories. Applicant's history of dishonesty compounded by his most recent omission is a security concern, and Guideline E is decided against Applicant.

Considering all relevant and material facts and circumstances present here, the whole person concept, the applicable disqualifying and mitigating conditions, and other appropriate factors and guidelines in the Directive, allegations 1.a. and 1.b. of the SOR are decided for the Applicant. Allegation 2.a. is decided against the Applicant. I find that Applicant has failed to overcome the case against him and satisfy his ultimate burden of persuasion. It is not clearly consistent with the national interest to grant Applicant a 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. Guideline G FOR THE APPLICANT

Subparagraph 1.a. For the Applicant

Subparagraph 1.b. For the Applicant

Paragraph 2. Guideline E AGAINST THE APPLICANT

Subparagraph 2.a. 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 Applicant. Clearance is denied.

Carol G. Ricciardello

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).