

KEYWORD: Criminal Conduct, Alcohol; Personal Conduct

DIGEST: This 44-year-old employee of a defense contractor has a 26 year history of alcohol abuse, a 24 year history of arrests, falsified an answer on his security clearance application, and lied to a agent of the Defense Security Service. No mitigation has been established. Clearance is denied.

CASENO: 03-19302.h1

DATE: 10/28/2005

DATE: October 28, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-19302

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

This 44-year-old employee of a defense contractor has a 26 year history of alcohol abuse, a 24-year history of arrests, falsified an answer on his security clearance application, and lied to an agent of the Defense Security Service. No mitigation has been established. Clearance is denied.

STATEMENT OF THE CASE

On January 31, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons

why DOHA could not make the preliminary affirmative finding required under the Directive that it

is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and

determine whether a clearance should be granted, denied or revoked.

On March 25, 2005, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made by a DOHA Administrative Judge after a hearing. The matter was assigned to me on June 13, 2005. A Notice of Hearing was issued on June 22, 2005. The hearing was conducted on July 13, 2005. At the hearing, Department Counsel introduced nine exhibits (Government Exhibits (GX) 1-9). Applicant testified and introduced 10 exhibits (Applicant's

Exhibits (AX) A - J. Applicant also submitted four timely post hearing exhibits (AX K-N). All exhibits were admitted, without objection. The transcript was received by DOHA on July 21, 2005.

FINDINGS OF FACT

Applicant is a 44-year-old employee of a defense contractor. The SOR contains six allegations, 1.a.-1.f., under Guideline J (Criminal Conduct); three allegations, 2.a.-2.c., under Guideline G (Alcohol); and four allegations, 3.a.(1)-3.a.(3), and 3.b., under Guideline E (Personal Conduct). Applicant admits all SOR allegations, with explanations. All admissions are accepted and made Findings of Fact.

After considering the totality of the evidence of record, I make the following FINDINGS OF FACT as to each SOR allegation.

As alleged in the SOR, under:

Guideline J (Criminal Conduct)

1.a. - Applicant was arrested on September 17, 1981, in state A, and charged with Public Use of marijuana. He pleaded *nolo contendere* and was sentenced to pay a fine of \$50.00;

1.b. - Applicant was arrested on December 19, 1984, in State A, and charged with Count (1) Resisting Arrest and Count (2) Disorderly Conduct. He pleaded no contest to Count (2) and was sentenced to probation and to pay court costs. Count (1) was dismissed;

1.c. - Applicant was indicted on August 30, 1989, on two counts involving a Controlled Substance in the Third Degree, a felony. He pleaded no contest and the imposition of sentence was suspended for two years, contingent on his completion of probation, 120 hours of community service, payment of \$200 restitution, and submission of fingerprints;

1.d. - Applicant was arrested on February 4, 1996 in State B, and charged with two counts of Count (1) Operating a Motor Vehicle while Intoxicated; and Count (2) Unreasonable and Imprudent Speed. He pleaded guilty to Count (1) and was sentenced to pay fines and costs of approximately \$826, complete an alcohol assessment, and to have his driver's license suspended for six months. Count (2) was dismissed;

1.e. - Applicant was indicted on January 15, 2003 in State A and charged with Failing to Render Assistance to Injured Person after Accident, a felony. He entered a no contest plea and was sentenced to 12 months in jail, suspended, and two years' probation. He was ordered not to consume or possess alcohol, to obtain substance abuse screening and evaluation, to not consume or possess alcohol, and to remain on probation until July 2005;

1.f. - Applicant was arrested on April 17, 2004, in State A, and charged with Speeding and Violation of Probation. His blood Alcohol level was tested as .026% and he was found to have an opened bottle of wine in his vehicle. His probation was modified. He served four days in jail and was ordered to obtain a substance abuse evaluation within 60 days and comply with recommendations to not consume alcohol, and to remain on probation until July 2005. The period of probation ended on July 29, 2005 (AX L).

Guideline G (Alcohol)

2.a. Applicant consumed alcohol, at times to excess and to the point of intoxication from 1979 to at least December 8, 2004, and then again as late as June or July 2005, only a few weeks before the hearing (Tr at 63).

2.b. - the information in SOR 1.d., 1.e., and 1.f., above.

2.c. - Applicant continued to consume alcohol, notwithstanding the probation requirements that he abstain from alcohol, as set forth in SOR 1.e. and 1.f., above

I note the August 5, 2005 letter from a Mental Health Clinician who had just begun providing counseling services to Applicant, with a full assessment to be completed in 30 days. (AX M). This is certainly a positive move by Applicant, but the weight to be given it is minimized by the recency of the effort and the fact that Applicant's alcohol use continued until as recently as December 2004.

I also give considerable weight to the positive letters of recommendation from Applicant's friends and colleagues (AX A- J). In AX N, dated August 11, 2005, both writers had experience with family members with alcohol problems, as Applicant says he did, but neither cites any knowledge of Applicant's criminal history, which is a major part of the Government's concerns.

Guideline E (Personal Conduct)

3.a. - Applicant falsified material facts in response to Question **27 Your Use of Illegal Drugs and Drugs Activity - Illegal Use of Drugs** [since the age of 16 or in the last seven years]. He answered "No" and deliberately omitted any mention of his use of the following drugs, because "it was embarrassing" (Tr at 67):

- (1) his use of cocaine, including crack cocaine, with varying frequency, from about 1993 to at least February 1999;
- (2) his use of marijuana, with varying frequency, from about 1993 to at least February 1999, and again on his birthday on June 10, 2005, just a month before the hearing (Tr at 71).
- (3) his use of methamphetamine (speed), with varying frequency, from about 1996 to at least February 1997.

3.b. - Applicant falsified material facts on June 5, 2003 in a sworn statement given to an agent of the Defense Security Service (DSS).

POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing 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 (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics

and conduct that are reasonably related to the ultimate question of

whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either by the Applicant's admissions or by other evidence) and proves conduct that creates security concerns 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 conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the Applicant.

CONCLUSIONS

Applicant is 44 years old. His admitted conduct, as cited in the SOR raises serious question about his judgment, reliability, and trustworthiness under three separate guidelines of DoD Directive 5220.6. I find all of the allegations in the SOR to be supported by the Government's evidence. I have carefully considered all of Applicant's explanations, in the context of the overall record evidence. As discussed below, nothing in the record establishes adequate mitigation or extenuation of any of the SOR allegations.

Criminal Conduct - Applicant's long history of criminal activity began in 1981, when he was 20 years old, and continued up to the recent past. The six separate incidents in 1981, 1984, 1989, 1996, 2003, and April 2004, involved drug possession, disorderly conduct and resisting arrest, driving while intoxicated, speeding, and/or probation violation. Applicant's explanations and testimony suggest that his conduct should be viewed in the context of the difficult family problems he has faced over years and the realities of living where he does. I have spent considerable time in his area of the country and have heard testimony from dozens of men and women similarly situated.

The evidence compels the conclusion that Applicant is ultimately responsible for his own conduct and that criminal activity is a part of Applicant's character, and not an aberration in an otherwise law abiding and trustworthy individual.

I have carefully considered Applicant's work record and the letters of recommendation submitted by his colleagues and friends. The fact remains however that Applicant's criminal conduct has not diminished with the passage of time, but seems to have increased during the past few years.

Disqualifying Conditions (DC) (1) - any criminal conduct, regardless of whether the person was formally charged and (2) a single serious crime or multiple lesser offenses are established but none of the parallel Mitigating Conditions has been shown; e.g., the criminal activity is still recent (MC (1)) and is not an isolated incident (MC (2)).

Guideline G (Alcohol) - Applicant has consumed alcohol since 1979, when he was 18. He admits continuing to consume alcohol until at least December 8, 2004, only seven months before the hearing. His alcohol abuse resulted in three alcohol-related arrests and convictions, in 1996, 2003, and 2004, cited in SOR 1.d., 1.e., and 1.f. As part of these convictions, he was ordered not to drink or possess alcohol, to complete an alcohol assessment, and to be on probation until July 2005. The record, including his admissions, establishes that he continued to consume alcohol, not withstanding all of the above and, in particular, the probation requirements cited in SOR 1.e. and 1.f.

Disqualifying Conditions (DC) (1) - alcohol-related incidents away from work and (4) habitual or binge consumption to the point of impaired judgment are applicable, but none of the parallel Mitigating Conditions has been established by the record.

Personal Conduct - Applicant clearly provided an incorrect answer in his security clearance application to Question 27. After considering his explanations, the record compels the conclusion that Applicant knew and had reason to know he was answering falsely and that the false answer was a deliberate attempt to deceive DoD. The same holds true as to his failure to mention his cocaine, marijuana, and methamphetamine use as cited in SOR 3.a.910., 3.a.(2), and 3.a.(3), above, when being interviewed by a DSS agent on June 5, 2003.

Applicant's last word of explanation (AX K) is that he falsified his 2000 security clearance application, because he "thought at the time that it would do more harm than good, now I know that the truth is the best and only answer." [\(1\)](#)

Disqualifying Condition (2) is applicable - a "deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire . . .," as is DC (3) - deliberately providing false information concerning relevant and material matters to an investigator . . . in connection with a personnel security or trustworthiness determination. None of the parallel Mitigating Conditions have been shown by the record.

I have given consideration to Applicant's evidence that he has attended numerous meetings of Alcoholics Anonymous (AA), has completed alcohol education classes, has focused on raising his children. And has the incentive to avoid old habits (AX L).

It is difficult not to sympathize with Applicant's efforts to improve his life and take care of his family, but it is simply impossible to conclude from the overall record that the multiple problems causing the Government's concerns are under control and are unlikely to recur. Indeed, the evidence shows his problems have continued or recurred up to the recent past. He simply has not met the burden of demonstrating mitigation or extenuation. A year must pass after this decision

becomes final before Applicant can request reconsideration of his security clearance eligibility. Applicant will have the opportunity to follow through on his efforts and document what he has done.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Guideline J (Criminal Conduct) 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

Guideline G (Alcohol) Against the Applicant

Subparagraph 2.a. Against the Applicant

Subparagraph 2.b. Against the Applicant

Subparagraph 2.c. Against the Applicant

Guideline E (Personal Conduct) Against the Applicant

Subparagraph 3.a.(1) Against the Applicant

Subparagraph 3.a.(2) Against the Applicant

Subparagraph 3.a.(3) Against the Applicant

Subparagraph 3.b. 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.

BARRY M. SAX

ADMINISTRATIVE JUDGE

1. AX K references a "2003 Security Clearance Application" in which he says he answered "honestly and truthfully." There is no such 2003 document in the case file or referenced in it. I conclude Applicant is writing about the sworn statement he gave to DSS in December 2003, in which he did discuss his drug use. In context, however, it is more likely than not he is talking about the sworn statement, in which he was responding to questions from an agent who had the arrest and other records with him. In any case, the statement was more than two years after he had lied on his security clearance application. I find no mitigation for the falsification.