

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: The Applicant's last act of Criminal Conduct occurred nearly five years ago. He was found guilty of Driving Under the Influence (DUI). He no longer consumes alcohol. The Applicant's past Criminal Conduct is not recent. When the Applicant executed his Security Clearance Application (SCA) in November of 2002, he disclosed his most recent "Felony Offense," and his most recent alcohol related offense. He did not disclose any back child support payments, as he thought he was current in paying his child support. There was no wilful falsification. Mitigation is also shown as to the Applicant's past Criminal Conduct. Clearance is granted.

CASENO: 03-22242.h1

DATE: 04/29/2005

DATE: April 29, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-22242

**DECISION OF ADMINISTRATIVE JUDGE**

**RICHARD A. CEFOLA**

**APPEARANCES**

**FOR GOVERNMENT**

Melvin A. Howry, Esquire, Department Counsel

**FOR APPLICANT**

John P. Moran, Esquire, Applicant's Counsel

**SYNOPSIS**

The Applicant's last act of Criminal Conduct occurred nearly five years ago. He was found guilty of Driving Under the Influence (DUI). He no longer consumes alcohol. The Applicant's past Criminal Conduct is not recent. When the Applicant executed his Security Clearance Application (SCA) in November of 2002, he disclosed his most recent "Felony Offense," and his most recent alcohol related offense. He did not disclose any back child support payments, as he thought he was current in paying his child support. There was no wilful falsification. Mitigation is also shown as to the Applicant's past Criminal Conduct. Clearance is granted.

**STATEMENT OF THE CASE**

On or about November 2, 2004, 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, issued an undated Statement of Reasons (SOR) to the Applicant, which detailed the reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

Applicant filed an Answer to the SOR on November 22, 2004.

The case had been previously assigned to another judge, and was received by the undersigned on March 7, 2005. A notice of hearing had been previously issued on February 24, 2005, and the case was heard on March 30, 2005. The Government submitted documentary evidence. Testimony was taken from the Applicant, who called a witness to testify

on his behalf, and who also submitted documentary evidence. The transcript (TR) was received on April 11, 2005. The issues raised here are whether the Applicant's past Criminal Conduct and alleged Personal Conduct militate against the granting of a security clearance. [The Applicant admits the underlying factual basis of the Criminal Conduct, but denies the Personal Conduct. Subparagraph 2.d. has been withdrawn by the Government (TR at page 17 lines 8~13)].

## FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents and the live testimony. The Applicant is 38 years of age, and is employed by a defense contractor who seeks a security clearance on behalf of the Applicant. 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.

### Guideline J - Criminal Conduct

1.a.~1.f. In March of 1985, the Applicant was arrested for, and subsequently found guilty of, DUI (TR at page 36 lines 4~20). His drivers license was suspended and he was fined (*Id*). The following year, in May of 1986, the Applicant was arrested for, and subsequently found guilty of, Assault, a felony (TR at page 39 line 6 to page 40 line 25). This involved an unfortunate scalding incident with his two month old daughter (*Id*). The Applicant was required to spend several weekends in jail, received some counseling, and is now not permitted to carry a firearm (*Ibid*, and TR at page 32 lines 4~13). He, in fact, helped raise this child who is now an adult (TR at page 40 lines 22~25). In October of 1989, the Applicant was arrested for, and subsequently found guilty of, having an Intoxicating Liquor Prohibited in Certain Public Places (TR at page 37 line 24 to page 38 line 21). He had an open container, beer, in a public park (*Id*). He was fined (*Ibid*).

In January of 1998, the Applicant was arrested for, and subsequently found guilty of, Theft of Livestock and Possession of a Prohibited Firearm (TR at page 27 lines 1~12, at page 29 lines 8~23, at page 74 line 25 to page 75 line 8, and Government Exhibit (GX) 2). While out hunting with some friends, the Applicant shot at a cow they thought was wild (TR at page 30 line 15 to page 33 line 8, and at page 61 line 3 to page 62 line 17). The firearm was owned by Applicant's father (*Id*). As a result of this conviction, the Applicant spent 30 days in jail, had to pay restitution for the cow which another in his hunting party killed, was fined, and was placed on probation (GX 5 and Applicant's Exhibits (AppXs) B and C).

In May of 2000, The Applicant was arrested, and subsequent found guilty of Harassment of his current spouse (TR at page 36 line 21 to page 37 line 23). He was fined and ordered to perform community service (*Id*). He and his souse have since reconciled their differences (TR at page 83 lines 8~17). In July of 2000, the Applicant was arrested for, and

subsequently found guilty of, DUI (TR at page 34 line 20 to page 35 line 4, and at page 36 lines 4~20). His drivers license was suspended and the Applicant was fined (*Id*). The Applicant has not consumed alcohol since this last arrest (TR at page 44 lines 2~10, 62 line 18 to page 63 line 11, at page 75 lines 9~15, and at page 83 line 18 to page 84 line 4).

### Guideline E - Personal Conduct

2.a. In answering question 21, "Felony Offenses," on his November 2002 SCA, the Applicant disclosed his 1986 felony conviction for assault (TR at page 33 line 9 to page 34 line 19, and GX 3 at page 5). He did not disclose the incident surrounding his 1998 arrest in answer to this question, but the Applicant did disclose his felony firearms conviction in answer to the very next question on the SCA, number 22 (*Id*).

2.b. In answering question 24, "Alcohol/Drug Offenses," on his November 2002 SCA, the Applicant disclosed his 2000 DUI (TR at page 35 line 17 to page 36 line 3, and GX 3 at page 5). He failed to disclose his 1989 open container violation or his 1985 DUI (*Id*). Due to the passage of time, the Applicant testified credibly that he "totally forgot" about these 13 and 17 year old occurrences (*Ibid*). [His "reporting official," an Air Force Staff Sergeant, and a Sergeant in the Army's Military Police, both testify as to the Applicant's credibility (AppXs E and G)]. Two weeks later, the Applicant voluntarily disclosed the information regarding these old alcohol related incidents to a Defense Security Service (DSS) Agent (TR at page 75 line 20 to page 76 line 22).

2.c. In answering question 38, "Financial Delinquencies - 180 Days," on his November 2002 SCA, the Applicant failed to disclose his back child support payments, as he thought he was current in paying his child support (TR at page 44 line 11 to page 50 line 17, and AppXs I~L, *see also* TR at page 57 line 12 to page 60 line 14, and page 67 lines 18~25). The Applicant has tried on numerous occasions to pay his arrearage, but his state's bureaucracy will not permit him to do so (*Id*).

### Mitigation

The Applicant is in the Air Force Reserves, and those who supervise or work with the Applicant think most highly of him, and would recommend the Applicant for a position of trust (AppXs E~G).

## **POLICIES**

Enclosure 2 and Section E.2.2. of the 1992 Directive set forth both policy factors, and conditions that could raise or mitigate a security concern. Furthermore, as set forth in the Directive, "[each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate:

- a. Nature, extent and seriousness of the conduct and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age and maturity of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequence involved.
- e. Absence or presence of rehabilitation.
- f. Probability that circumstances or conduct will continue or recur in the future."

The Administrative Judge, however, can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature.

The Government must make out its case under Guidelines E (Personal Conduct) and J (Criminal Conduct); which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or

extenuation, which demonstrates that the past adverse conduct is unlikely to be repeated, and that the Applicant presently qualifies for a security clearance.

Personal conduct is conduct involving questionable judgement, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations. The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations at all times and in all places. If an applicant has demonstrated a lack of respect for the law, then there exists the possibility that an applicant may demonstrate the same attitude towards security rules and regulations.

## CONCLUSIONS

Considering first the Applicant's past Criminal Conduct, the Applicant has six convictions, two of which were for felonies. The second disqualifying condition is therefore clearly applicable, a "single serious crime or multiple lesser offenses." This is countered, however, by the first and sixth mitigating conditions. The Applicant's last "criminal behavior" was nearly five years ago; and as such, is "not recent." Furthermore, there "is clear evidence of successful rehabilitation." He no longer consumes alcohol, a conscious decision resulting from the July 2000 DUI. He has also reconciled with his wife, the subject of the May 2000 Protection Order Violation. Not only his wife, but those who know him in the Air Force Reserve, testify as to his rehabilitation. Mitigation is shown. Guideline J is found for the Applicant.

When the Applicant answered his November 2002 SCA, he answered the posited questions to the best of his ability. He disclosed both felony offenses, one in answer to question 21 and the other in answer to question 22. He disclosed his most recent alcohol related offense, and simply forgot those 13 and 17 years earlier. He fully disclosed their existence two weeks later to the DSS Agent. As to the back child support, he reasonably thought that he was current. This being the case, I find no "**deliberate** omission, concealment, or falsification" here, as is required by the second disqualifying condition under Personal Conduct (emphasis supplied). The Applicant testified credibly, as attested to by those who know him; and as such, there was no wilful falsification, Guideline E is found for the Applicant.

Considering all the evidence, the Applicant has rebutted the Government's case regarding his alleged Criminal Conduct and Personal Conduct. The Applicant has thus met the mitigating conditions of Guidelines E and J, and of Section E.2.2. of the Directive. Accordingly, he has met his ultimate burden of persuasion under Guidelines E and J.

## FORMAL FINDINGS

Formal Findings required by paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: FOR THE APPLICANT

- a. For the Applicant.
- b. For the Applicant.
- c. For the Applicant.
- d. For the Applicant.
- e. For the Applicant.
- f. For the Applicant.

Paragraph 2: FOR THE APPLICANT

- a. For the Applicant.
- b. For the Applicant.
- c. For the Applicant.

Factual support and reasons for the foregoing are set forth in **FINDINGS OF FACT** and **CONCLUSIONS**, supra.

**DECISION**

In light of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Richard A. Cefola  
Administrative Judge