

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: In the early to mid 1980's, the Applicant was convicted three times for driving while intoxicated. He was sentenced to one to three years in the state prison for a November 1984 DWI. Although his alcohol related arrests are remote in time and would otherwise be mitigated under the Criminal Conduct guideline, he is statutorily disqualified from having a clearance granted or renewed under 10 U.S.C. § 986. In August 2002, the Applicant completed an SF 86 and lied about his alcohol arrests. He has failed to mitigate the Personal Conduct concerns. Clearance is denied.

CASENO: 03-02777.h1

DATE: 08/05/2004

DATE: August 5, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-02777

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Nichole L. Noel, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In the early to mid 1980's, the Applicant was convicted three times for driving while intoxicated. He was sentenced to one to three years in the state prison for a November 1984 DWI. Although his alcohol related arrests are remote in time and would otherwise be mitigated under the Criminal Conduct guideline, he is statutorily disqualified from having a clearance granted or renewed under 10 U.S.C. § 986. In August 2002, the Applicant completed an SF 86 and lied about his alcohol arrests. He has failed to mitigate the Personal Conduct concerns. Clearance is denied.

STATEMENT OF THE CASE

On September 29, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding⁽¹⁾ it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. In an undated response the Applicant answered the SOR and elected to have his case decided on the written record in lieu of a hearing.

On April 13, 2004, the Applicant received a complete copy of the file of relevant material (FORM) dated April 5, 2004, and was given the opportunity to file objections and submit material in extenuation, mitigation, or refutation. The Applicant's response to the FORM was due on May 13, 2004. No response has been received. In the FORM, Department Counsel submitted 9 exhibits (Items). I was assigned the case on May 20, 2004.

FINDINGS OF FACT

The SOR alleges Criminal Conduct (Guideline J), and Personal Conduct (Guideline E). The Applicant admits he was arrested, charged, and pleaded guilty to driving a motor vehicle while intoxicated (DWI) in January 1981. That admission is incorporated herein as a finding of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact.

The Applicant is 62-years-old, has worked as an engineering technician for a defense contractor since June 2002, and is seeking to obtain a security clearance.

In January 1981, he was arrested and charged with DWI. After pleading guilty, he paid a \$100.00 fine. The FBI report (Item 8) lists entries for October 1983 and March 1984, both for DWI. Both these incidents were reported by the same agency and have the same case number. It is uncertain if this represents one or two arrests. In November 1984, he was again charged with DWI. He was sentenced to one to three years in the state prison for the offense and was incarcerated one year. The remainder of his sentence was served through work release and parol. While in prison, he received alcohol counseling and outpatient treatment.

The Applicant's drinking was contributed to by his pending divorce and the failure of his business. He used alcohol as a way of escaping his hard times. (Item 7) He last consumed alcohol prior to his incarceration. He has no intention of ever using alcohol again.

In August 2002, the Applicant completed a Security Clearance Application, SF 86. Question 24a. (Item 6) asked him if he had ever been charged with or convicted of any offenses related to alcohol or drugs? He answered "No" to the question because he believed his current employer would never have given him an interview or hired him, if they knew of his arrests. (Item 7) He feels awful about this.

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive. The government has the burden of proving any controverted fact(s) alleged in the SOR, and the facts must have a nexus to an Applicant's lack of security worthiness.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

Criminal Conduct (Guideline J) The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Conditions that could raise a security concern and may be disqualifying include:

b. A single serious crime or multiple lesser offenses;

c. Conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year; ⁽²⁾

Conditions that could mitigate security concerns include:

a. The criminal behavior was not recent;

d. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur;

g. Potentially disqualifying conditions c. and d., above, may not be mitigated unless, where meritorious circumstances exist, the Secretary of Defense or the Secretary of the Military Department concerned has granted a waiver.

Personal Conduct (Guideline E) The Concern: 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.

Conditions that could raise a security concern and may be disqualifying also include:

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 qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Conditions that could mitigate security concerns include:

None apply.

BURDEN OF PROOF

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." 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." Executive Order 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.

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. All that is required is proof of facts and circumstances which indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, then the applicant has the

ultimate burden of establishing his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

Security clearances are granted only when "it is clearly consistent with the national interest to do so." *See* Executive Orders 10865 § 2 and 12968 § 3.1(b). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2 "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." *See Egan*, 484 U.S. at 531. Doubts are to be resolved against the applicant.

CONCLUSIONS

The Government has satisfied its initial burden of proof under Guideline J, Criminal Conduct. Under Guideline J, the security eligibility of an applicant is placed into question when an applicant is shown to have a history or pattern of criminal activity which creates doubt about his judgment, reliability, and trustworthiness. Between May 1981 and November 1984, the Applicant was arrested three⁽³⁾ times for drunk driving. Disqualifying Condition (DC) b.⁽⁴⁾ applies.

The Applicant's most recent arrest occurred almost 20 years ago. Mitigating Condition (MC) a.⁽⁵⁾ applies to mitigate the Applicant's now dated criminal conduct because the conduct is not recent. His divorce and failed marriage contributed to his drinking. These factors are unlikely to recur. MC d.⁽⁶⁾ applies. The standard required in MC f. is "clear evidence" of rehabilitation. Here the record only shows "some evidence" of rehabilitation, i.e., 19 plus years of sobriety and his unsupported statement that he has been a model citizen. Therefore, MC f.⁽⁷⁾ does not apply. However, applying MC a. and d. are sufficient to find for the Applicant as to his alcohol related arrests. I find for him as to SOR subparagraphs 1.a., 1.b., 1.c., and 1.d. as the alcohol-related criminal conduct is not likely to recur.

The Applicant was sentenced to one to three years confinement. DC c.⁽⁸⁾ applies. Unless the Applicant is able to obtain a waiver from the Secretary of Defense, 10 U.S.C. § 986 prohibits the Department of Defense from granting the Applicant a clearance. I find against the Applicant as to subparagraph 1.e. of the SOR. Furthermore, I am not making a recommendation concerning a waiver of Title 10 U.S.C. 986 because the decision denying or revoking a clearance is not being made solely as a result of 10 U.S.C. 986.

Under Personal Conduct, the security eligibility of an applicant is placed into question when that applicant is shown to have been involved in personal conduct which creates doubt about the person's judgment, reliability, and

trustworthiness. In August 2002, the Applicant completed an SF 86 and lied when he answered the question concerning his alcohol related arrests. He did so because he did not think his present employer would have interviewed him or hired him had his alcohol related arrests been known. DC 2-⁽⁹⁾ applies.

The falsification was deliberate and none of the mitigating conditions apply. MC 2-⁽¹⁰⁾ does not apply because, even though the falsification was on a single form, the falsification occurred in August 2002 so it is recent. MC 3 does not apply because there is no evidence the Applicant made a prompt, good -faith effort to correct the falsification before being confronted with the facts. MC 4. does not apply because there has been no showing of improper or inadequate advice. I find against the Applicant as to Personal Conduct, SOR subparagraph 2.a.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

FORMAL FINDINGS

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

Paragraph 1 Criminal Conduct (Guideline J): AGAINST THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: For the Applicant

Subparagraph 1.e.: Against the Applicant

Paragraph 2 Personal Conduct (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 the Applicant. Clearance is denied.

Claude R. Heiny

Administrative Judge

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.
2. Under the provisions of 10 U.S.C. 986 (P.L. 106-398) a person who has been convicted in a Federal or State court, including courts martial, and sentenced to imprisonment for a term exceeding one year, may not be granted or have renewed access to classified information. In a meritorious case, the Secretary of Defense or the Secretary of the Military Department concerned, may authorize a waiver of this prohibition.
3. The government has not established there were four arrests. The FBI record shows the October 1983 and March 1984 incidents as having the same case number and same agency. The record is sufficiently ambiguous as to be unable to determine if there were two arrests or one. The Applicant states he was only arrested three times.
4. DC b. A single serious crime or multiple lesser offenses.
5. MC a. The criminal behavior was not recent.
6. MC d. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur.
7. MC f. There is clear evidence of successful rehabilitation;
8. DC c. Conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year.
9. 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 qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.
10. MC 2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided

correct information voluntarily.