KEYWORD: Personal Conduct; Alcohol

DIGEST: Applicant deliberately omitted from his security clearance application (SF-86) his 1996 arrest for driving while intoxicated (DWI) and relevant information about his debts. He drinks to the point of intoxication at least once each month and continues to drink and drive. He has failed to mitigate the resulting security concerns about his personal conduct (Guideline E) and his alcohol consumption (Guideline G). Clearance is denied.

CASENO: 03-04143.h1

DATE: 08/16/2004

DATE: August 16, 2004

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 03-04143

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Jason Perry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant deliberately omitted from his security clearance application (SF-86) his 1996 arrest for driving while intoxicated (DWI) and relevant information about his debts. He drinks to the point of intoxication at least once each month and continues to drink and drive. He has failed to mitigate the resulting security concerns about his personal conduct (Guideline E) and his alcohol consumption (Guideline G). Clearance is denied.

STATEMENT OF THE CASE

On December 8, 2003, in accordance with DoD Directive 5220.6, as amended (Directive), the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns about his personal conduct and alcohol consumption. The SOR informed him DOHA adjudicators, based on available information, could not make the preliminary affirmative finding it is clearly consistent with the national interest to grant or continue Applicant's security clearance.[(1)]

On February 17, 2004, Applicant responded to the SOR (Answer), admitting the allegations therein at subparagraphs 1.a,[(2)] 1.b, 2.b, and 2.c, and requested a determination without a hearing. On May 5, 2004, DOHA Department Counsel submitted a file of relevant materials (FORM) with five exhibits (Items 1 - 5) attached in support of the government's preliminary decision, a copy of which was sent to Applicant the next day. Applicant received the FORM on May 24, 2004 and was allowed 30 days to submit additional information in his own behalf. However, he did not respond to the FORM by the June 23, 2004 deadline, and the case was assigned to me on July 7, 2004.

FINDINGS OF FACT

Applicant's admissions are incorporated herein as facts. After a thorough review of the pleadings and exhibits, I make the following additional findings of fact:

Applicant is a 31-year-old installer employed by a defense contractor full-time since March 2002. This appears to be his first application for a security clearance.[(3)]

On March 23, 1996, Applicant was arrested and charged with DWI. The case was *nolle prosequi* two months later, but the reason why is unclear. Applicant contends the charge was dropped because Applicant's blood alcohol content (BAC) when he was arrested was below the legal limit of .10% in that jurisdiction. He also claims his attorney told him that there would be no record of his case.[(4)] However, during an interview with a Defense Security Service (DSS) agent on or about October 22, 2002, Applicant acknowledged his arrest, admitted he was legally intoxicated at the time, and did not know why the charges were dropped.[(5)]

Applicant first consumed alcohol in 1990, when he was 18 or 19 years old. Since then, he has consumed alcohol once or twice weekly, and becomes intoxicated at least once each month. He has continued to drink and drive since his 1996 arrest, and "will continue to drink and drive while legally intoxicated."[(6)]

On July 31, 2003, Applicant submitted an SF-86, from which he omitted his 1996 DWI arrest by answering "no" to question 24. This question requires disclosure of any alcohol- or drug-related arrest "regardless of whether the record in [the] case has been 'sealed' or otherwise stricken from the record."[(7)] In the aforementioned DSS interview, Applicant stated he chose not to disclose the arrest on his SF-86 because he thought the government would not find out about it.

On the same SF-86, in response to questions 38 and 39 regarding delinquent debts, Applicant disclosed only that he had been delinquent on one credit card from January 2000 until January 2001. However, the DSS credit check revealed Applicant was delinquent on at least five accounts.[(8)] Applicant deliberately omitted this information because he was afraid he would lose his (then) new job if he listed all of his debts.[(9)]

POLICIES

The Directive sets forth adjudicative guidelines[(10)] to be considered in evaluating an Applicant's suitability for access to classified information. The Administrative Judge must take into account both disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having considered the SOR allegations and having reviewed the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are those conditions listed under Guideline E (personal conduct) and Guideline G (alcohol consumption).

BURDEN OF PROOF

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest[(11)] for an Applicant to either receive or continue to have access to classified information. The government bears the initial burden of proving, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If the government meets its burden, it establishes a *prima facie* case that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden then shifts to the Applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, the Applicant bears a heavy burden of persuasion on the issue of whether, despite the government's information, it is clearly consistent with the national interest to grant or continue Applicant's access.[(12)]

A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.[(13)]

CONCLUSIONS

Excessive alcohol consumption is a security concern (Guideline G) because it 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.[(14)] The government has established, through Applicant's admissions and the exhibits included with the FORM, a *prima facie* case for disqualification under this guideline.

It is undisputed that Applicant was arrested for DWI in 1996 as alleged in SOR 1.b. Although the charges were eventually dropped, it is also clear he had been drinking before he drove. The record evidence here consists of Applicant's statement to DSS and his Answer. His Answer admits the arrest, but claims the charge was dismissed because his BAC was below the legal limit. Attached to the Answer is a statement by the prosecutor in Applicant's case, but the statement says only that the DWI charge was *nolle prosequi* and that the author was a licensed attorney at the time. On the other hand, in his statement to DSS Applicant clearly admits the arrest and that he was legally intoxicated when he was arrested. A charge may be *nolle prosequi* for any number of reasons, including that advanced by Applicant in his Answer. However, Applicant has not provided sufficient information to support his claim that he was not legally intoxicated. Despite being afforded an opportunity to submit information to rebut the FORM, he has submitted nothing further that might buttress his position. Therefore, he has failed to meet his burden of persuasion on this point.

According to his October 2002 statement to DSS, since Applicant began drinking as a teenager in the early 1990's, he has consistently consumed alcohol at least twice weekly, and he drinks to the point of intoxication at least once each month. Despite an arrest for DWI in 1996, he has driven after drinking, conduct he intends to continue in the future. (SOR 1.a) Again, in response to the government's case as set forth in the FORM, Applicant has been silent. In his Answer to the SOR, Applicant denied he drinks to intoxication each month, a controverted fact the government proved through Applicant's own statement to DSS. Yet Applicant has provided no information to overcome the government's case on this point.

The facts alleged in SOR 1.a and 1.b are fully supported in the documents included with the FORM and warrant application of Guideline G disqualifying condition (DC) 1[(15)] and DC 5.[(16)] Of the Guideline G mitigating conditions (MC), only MC 1[(17)] applies in that one DWI arrest does not constitute a pattern of alcohol-related incidents. He has been arrested only once; however, I believe MC 1 affords Applicant little benefit in light of the fact he has continued to drink and drive after his DWI. That he has not been arrested more than once or injured himself or another through his disregard of laws against driving while intoxicated is simply dumb luck. Applicant's willingness to continue to drink to excess at least 12 times a year and, possibly, drive under the influence calls into question his judgment and reliability. I view of the foregoing, and in light of questions about Applicant's truthfulness (discussed below) which weigh against the claims in his Answer, I conclude Guideline G against the Applicant. Personal conduct (Guideline E) 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.[(18)] Here, the government is concerned with Applicant's allegedly deliberate falsification of a security clearance application. In his Answer, Applicant admits he falsified his answers to his SF-86 questions 38 and 39 regarding past due debts. (SOR 2.b and 2.c) Applicant disclosed one debt greater than 180 days delinquent, but he had other delinquencies at the time that he should have listed as well. In his 2002 statement to DSS, Applicant stated he did not list his other debts because he was concerned about possible adverse effects a full disclosure of his financial problems might have on his employment status. Applicant also omitted his DWI arrest from the SF-86 by answering "no" to question 24 regarding alcohol-related offenses. By the plain language of the question, Applicant was required to provide this information even if the charges had been "sealed or otherwise stricken from the record." In his 2002 statement to DSS, Applicant acknowledged his arrest, stated he did not know why the charges were dismissed, admitted he was legally intoxicated when he was arrested, and stated he answered "no" to question 24 because he "did not want to provide the government with information the government might not be able to find."[(19)] Department Counsel has presented sufficient evidence in the FORM to establish a *prima facie* case for disqualification under this guideline and I conclude that Guideline E DC 2[(20)] applies here. Department Counsel has proven the controverted allegation in SOR 2.a based on Applicant's 2002 statement, and Applicant has admitted SOR 2.b and 2.c. By contrast, only Guideline E MC 4[(21)] is potentially

applicable here. In his Answer, Applicant asserts the affirmative defense that he relied on advice of his attorney to the effect that Applicant did not have to list the arrest because the charges were dismissed and there would be no record of it. Applicant provided the name of the attorney and suggested DOHA call him to verify his claim. However, Applicant bore the burden of presenting evidence to support his defense and it is not Department Counsel's job to conduct additional investigation to obtain information supportive of Applicant's claims. Further, Applicant's position is undermined by the fact he said nothing about acting on advice of counsel when he was interviewed in 2002; instead, he admitted he had deliberately falsified his SF-86 because he did not think the government would find out about the arrest. Finally, Applicant did not provide, in response to the government's argument and exhibits in the FORM, any additional information about his claim that he was so advised by counsel. None of the remaining mitigating conditions apply, either through lack of factual relevance or lack of support in the record. I conclude Guideline E against the Applicant. Concealment, misrepresentation, or omission of a material fact in the SF86 is an act of great security significance. In addition to its interest in a proper security clearance decision, the Department of Defense has a significant interest in ensuring that false and misleading information does not interfere with its security clearance investigations. Additionally, the Government must be able to repose a high degree of trust in those to whom it grants access to classified information. Applicant's intentional omission of relevant information from his SF-86 undermines the government's confidence he can be relied on to properly fulfill his obligation to safeguard classified information. I have carefully weighed all of the evidence, and I have applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guideline. I have also considered the whole person concept as contemplated by the Directive in Section 6.3, and as called for by a fair and commonsense assessment of the record before me as required by Directive Section E2.2.3. These facts raise reasonable doubts about Applicant's ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. Absent substantial information to resolve those doubts, which Applicant failed to provide, I conclude the record evidence weighs in favor of the government's decision to deny Applicant access to classified information. **FORMAL FINDINGS** Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are entered as follows: Paragraph 1, Alcohol Consumption (Guideline G): AGAINST THE APPLICANT Subparagraph 1.a: Against the Applicant Subparagraph 1.b: Against the Applicant Paragraph 2, Personal Conduct (Guideline E): AGAINST THE APPLICANT Subparagraph 2.a: Against the Applicant Subparagraph 2.b: Against the Applicant Subparagraph 2.c: 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. atthew E. Malone Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

2. Applicant's admission here is limited to his having consumed alcohol since 1996. He "vehemently denies" that he drinks to intoxication each month or that he will continue to drink and drive while intoxicated.

3. FORM, Item 4.

4. FORM, Item 3.

5. FORM, Item 5.

6. FORM, Item 5.

7. FORM, Item 4.

8. FORM, Item 5, Personal Financial Statement (PFS).

9. FORM, Item 5.

10. Directive, Enclosure 2.

11. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).

12. *See Egan,* 484 U.S. at 528, 531.

13. *See Egan;* Directive E2.2.2.

14. Directive, E2.A7.1.1.

15. Directive, E2.A7.1.2.1. 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;

16. Directive, E2.A7.1.2.5. Habitual or binge consumption of alcohol to the point of impaired judgment;

17. Directive, E2.A7.1.3.1. The alcohol related incidents do not indicate a pattern;

18. Directive, E2.A5.1.1.

19. FORM, Item 5.

20. Directive, E2.A5.1.2.2. 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;

21. Directive, E2.A5.1.3.4. Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and

the previously omitted information was promptly and fully provided;