

DATE: October 26, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-04516

ECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Jr., Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 43-year-old electronics technician employed by a defense contractor. Applicant has three driving while intoxicated arrests and dispositions over 18 years, a diagnosis of substance dependence, used marijuana for 20 years until 1998, including while holding a security clearance and after testifying before an administrative judge that he stopped using marijuana in 1984, tested positive for marijuana in 1998, and deliberately falsified answers to his most recent security clearance application. Applicant did not mitigate the alcohol consumption, drug involvement, personal conduct, and criminal conduct security concerns. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On December 15, 2003, DOHA issued a Statement of Reasons⁽¹⁾ (SOR) detailing the basis for its decision-security concerns raised under Guideline G (Alcohol Consumption), Guideline H (Drug Involvement), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on January 19, 2004 and elected to have a hearing before an administrative judge. The case was assigned to me on March 22, 2004. A Notice of Hearing was issued on March 24, 2004, setting the hearing for April 20, 2004. On April 20, 2004, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government and the Applicant submitted exhibits which were admitted into evidence. DOHA received the hearing transcript (Tr.) on May 6, 2004.

PROCEDURAL ISSUES

Applicant raised the issue and questioned at the hearing why the same allegations used in the 1986 hearing on his security clearance were again part of this proceeding. I ordered the 1986 file to be produced, and it was by Department Counsel. That file is marked as Exhibit 8.

A comparison of the two SORs showed that several allegations are the same between the two cases. DOHA Administrative Judge Paul J. Mason decided the 1986 case for Applicant on those allegations. The same allegations made in 1986 are found in the current SOR at subparagraphs 1.b., 2.a., 2.b. 2.d., 2.e., 4.c (numbered in the SOR erroneously as 4.b., there appearing to be two subparagraphs 4.b., that fact then causing following subparagraphs to be misnumbered), and 4.d. I made my own findings of fact and conclusions based upon the evidence introduced into this 2004 hearing.

FINDINGS OF FACT

Applicant admitted all allegations in the SOR except subparagraphs 1.g., 1.h., 1.i., and all of Paragraphs 3 and 4, which allegations he denied. Applicant's admissions to the SOR allegations are incorporated here as findings of fact. After a complete and thorough review of the evidence in the record, and full consideration of that evidence, I make the following additional findings of fact:

Applicant is 43 years old, married to his second wife, and has one step-daughter. Applicant's wife testified Applicant has a positive influence on her daughter and they have a good relationship. At his previous hearing in 1986 Applicant's girlfriend, later his first wife, testified Applicant had a positive influence on her three sons. They were divorced in 1991. Applicant remarried in 2002. Applicant works for a defense contractor as an electronics technician, and has worked at that job since 1985. (Tr. 34 to 39, 47, 105, 133; Exhibit 1; Exhibit 10 (1986 transcript) at 38 to 54)

Applicant was arrested three times in three states over 18 years for driving while under the influence of alcohol (DUI) or a related offense. The first arrest was in 1980. Applicant pled guilty to reckless driving in December 1980 and the DUI charge was dismissed. Applicant was sentenced to two years unsupervised probation and 50 hours of community service, but Applicant paid \$260.50 in lieu of community service. In January 1989, Applicant was arrested in another state for DUI, fined \$500 and had his driving privileges suspended in that state for six months. That state reported Applicant's conviction to his home state, which revoked his driving privileges for a minimum of one year. Applicant obtained reinstatement of his home state driving privileges in 1993. In 1998 Applicant was arrested in his home town for DUI, possession of drug equipment, improper lane usage, other moving violations, and fleeing and eluding a police officer. Applicant drove his Corvette to a local restaurant to get food for himself and his girlfriend (now his wife) about midnight, after they had been drinking beer at his house. His mode of driving upon his return trip to his house alerted the police and they followed and arrested him. Applicant was convicted of DUI and improper lane usage, and the remaining charges were dismissed or not prosecuted. Applicant was fined \$1300, given 18 months supervision, ordered to complete 25 hours of community service, and ordered to attend a Level III DUI treatment program. (Tr. 43 to 54, 85, 86, 122; Exhibits 2 to 9)

Applicant attended a DUI remedial education program in 1989 after his 1989 DUI conviction. Applicant completed that program in March 1989. Applicant was classified as a Level I-Non-Problematic User of alcohol. In July 1991, as part of a follow-up session, Applicant was again classified as a Level I-Non-Problematic User. After Applicant's 1998 arrest and DUI conviction, he was again evaluated by the same alcohol program pursuant to court order, and determined to exhibit "symptoms of substance dependence". From July 28, 1998, to September 17, 1998, Applicant attended an alcohol and drug dependency treatment program, and was diagnosed as dependent and as a problem drinker with a Mortimer-Filkins score of 54. After the 75 hours of treatment, Applicant was still determined to be dependent, and aftercare of a continuing care group and biweekly meetings of Alcoholics Anonymous (AA) was prescribed??. Applicant participated in the aftercare program for a while, but does not attend AA now. Applicant reduced his alcohol consumption from the 1998 level, but continues to consume it. (Tr. 99, 100, 117 to 126; Exhibits 2, 4, 5 and 6)

Applicant used marijuana from his high school days in January 1978 until at least April 1998. In March 1998 Applicant tested positive for marijuana in a urinalysis test as part of the court-ordered alcohol and drug evaluation. Applicant purchased marijuana numerous times before April 1998 spending \$40 to \$50 each time. Applicant used marijuana while holding a security clearance in the Marines during the early 1980s, and later between 1986 and 1998 while holding a Secret security clearance and working for his present employer. That security clearance was granted Applicant after he testified at the November 1986 hearing that he last used marijuana on September 9, 1984. Applicant also tested positive for marijuana in 1982 while serving in the Marines. At that time Applicant was fined \$100, reduced in rank, and ordered to participate in a six-week drug rehabilitation program. On September 7, 1984, Applicant was arrested and charged

with the possession of cocaine. He admits he used it that night with some friends, but that was the last time he used it. Applicant was found guilty and sentenced to two years probation and fined \$575. (Tr. 73 to 75, 96 to 98, 102; Exhibit 10 (1986 transcript) at 63 to 66; Exhibits 2, 4 to 6)

Applicant did not disclose on his security clearance application (SCA), signed May 14, 2001, in response to Question 27, that he used marijuana during the past seven years, from 1994 to the date of his signing the SCA. Applicant also did not answer Question 28 truthfully because he stated he had not used any illegal drugs while possessing a security clearance. Applicant used marijuana, an illegal drug, at least until April 1998 and while holding a security clearance. Applicant did not disclose his 1980 DUI arrest in response to Question 24 of the SCA, which should have been disclosed because the question asks if Applicant had ever been charged with any offense related to alcohol, and Applicant had been, regardless of the later disposition of the charge. Applicant did not disclose his 1980 alcohol driving arrest nor his 1982 kidnaping arrest on his 1985 SCA because he did not think he was convicted or charged in those cases, and he thought that they did not have to be disclosed. Those offenses should have been disclosed. (Tr. 73 to 75, 96 to 98, 102; Exhibit 10 (1986 transcript) at 67 to 76; Exhibits 1, 2, 4 to 8, 11)

Applicant was arrested in May 1982 as a suspect on charges of robbery, kidnaping, and assault with a deadly weapon. Applicant drove some friends to a house, where they engaged in certain actions that attracted police attention. However, Applicant was asleep in the car. The charges were later dismissed. Applicant failed to appear for a warrant on a failing to stop at a red light charge. (Tr. 89 to 92; Exhibits 9, 10 at 71 to 75)

The Government presented no evidence to support SOR allegation 4.b. as originally numbered. (Tr. 83, 84)

Applicant submitted copies of his work evaluations, showing his good work performance. Applicant's wife testified what a good husband and provider he is to her. (Tr. 137 to 147; Exhibits A to E)

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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." Exec. Or. 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.

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. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline that must be carefully considered in making the overall common sense determination required.

In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶6.3 of the Directive. Those assessments include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (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 (See Directive, Section E2.2.1. of Enclosure 2). Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996). All that is required is proof of facts and circumstances that 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. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance. ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "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. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Exec. Or. 12968 § 3.1(b).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

Guideline G - Alcohol Consumption

The Concern: 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. E2.A7.1.1.

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

- (1) Alcohol-related incidents away from work, such as driving while under the influence. E2.A7.1.2.1.
- (4) Evaluation of alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program. E2.A7.1.2.4.

Conditions that could mitigate security concerns include:

- (2) The problem occurred a number of years ago and there is no indication of a recent problem. E2.A7.1.3.2.
- (3) Positive changes in behavior supportive of sobriety. E2.A7.1.3.3.

Guideline H - Drug Involvement

The Concern: Improper or illegal involvement with drugs, raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information. E2.A8.1.1.1

Drugs are defined as mood and behavior-altering substances and include: E2.A8.1.1.2.

- (1) Drugs, materials and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens); E2.A8.1.1.2.1, and

(2) Inhalants and other similar substances. E2.A8.1.1.2.2.

Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction. E2.A8.1.1.3.

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

(1) Any drug abuse (see above definition). E2.A8.1.2.1

(4) Evaluation of drug abuse or drug dependence by a licensed clinical social worker who is a staff member of a recognized drug treatment program. E2.A8.1.2.4

Conditions that could mitigate security concerns include:

(1) The drug involvement is not recent. E2.A8.1.3.1

Guideline E - Personal Conduct:

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. The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

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

(2) The deliberate omission, concealment, falsification or misrepresentation 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; E2.A5.1.2.2.

(4) Personal conduct or concealment of information that increases an individual's

vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail; E2.A5.1.2.4.

(5) A pattern of dishonesty or rule violations. E2.A5.1.2.5

Conditions that could mitigate security concerns include:

None

Guideline J - Criminal Conduct

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. E2.A10.1.1.

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

(1) Allegations or admissions of criminal conduct, regardless of whether the person was formally charged. E2.A10.1.2.1.

(2) A single serious crime or multiple lesser offenses. E2.A10.1.2.2.

Conditions that could mitigate security concerns include: E2.A10.1.3.

(1) The criminal behavior was not recent. E2.A10.1.3.1.

(2) The crime was an isolated incident. E2.A10.1.3.2.

(3) The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life. E2.A10.1.3.3.

(4) The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur. E2.A10.1.3.4.

CONCLUSIONS

Regarding the allegations concerning Applicant's alcohol usage under Guideline G, the Government proved its case. Applicant has three arrests for DUI, and two convictions, even though supervision was granted by the two state courts. Applicant lost his driving privileges for nearly four years after the second incident in 1989, yet he again drove while under the influence of alcohol in 1998. Applicant was evaluated twice as part of the sentences for these last two DUI offenses. He was found in the second evaluation to have substance abuse problems, tested positive for marijuana, and was classified as a problem drinker, yet he continued to drink alcohol. Disqualifying Conditions (DC) 1 and 4 apply.

While Applicant's last DUI arrest was six years ago, there is a pattern to them, and Applicant submitted no evidence at the hearing other than his mere assertion that he has no current alcohol problem to support the application of any Mitigating Condition (MC). Applicant continues to drink alcohol and Applicant did not present any evidence of any positive changes in his daily behavior to support applying MC 3. After evaluating the totality of the evidence, I conclude no MC apply and conclude this guideline against Applicant.

Considering the allegations of drug usage under Guideline H, Applicant's 20 year history of marijuana use, and his 1984 cocaine use, show me the Government proved its case. Particularly troubling to me is Applicant's use of marijuana while holding security clearances. That situation is aggravated by Applicant's telling Judge Mason in 1986 that he last used marijuana in 1984, when in fact he continued to use it until at least 1998. After considering all of the evidence, including his mendacity in 1986 on this issue, Applicant failed to convince me that he no longer uses drugs. MC 1, 2, and 4 apply.

No MC apply here. Therefore, I conclude this guideline against Applicant.

Regarding Guideline E, the Government proved its case. Applicant tries to persuade me he hastily completed the SCA causing the negative and untruthful answers to Questions 27 and 28, yet the Department Counsel aptly questioned Applicant on the detail of his answers to other questions in the SCA. Applicant also failed to answer truthfully two questions on his 1985 SCA concerning his arrests for alcohol and kidnaping. Applicant's prior experience in completing an SCA and the 1986 hearing, involving the same type of issues, put him on notice he must make full disclosure. Again, he failed to make the required disclosure. He has engaged in a pattern of dishonesty. DC 2, 4, and 5 apply.

No MC apply to Applicant's pattern of deception on two SCAs. Therefore, I conclude Guideline E against Applicant.

Regarding Guideline J, the Government proved its case here also. Applicant has a history of criminal allegations, and several serious crimes were involved. He was lucky not to have been sentenced to any jail time for some or all of the offenses, but they are serious none the less. DC 1 and 2 apply to subparagraphs 4.a. 4.c., and 4.d..

Several of the allegations under this SOR Paragraph 4 were not proven by the evidence submitted. Subparagraph 4.b. had no evidence introduced. Subparagraph 4.c. (the former second subparagraph 4.b.) resulted in no charges against Applicant in 1982 because he seemed to be an innocent party to crimes, so MC 1, 2, 3, and 4 are applicable to this allegation. Therefore, I conclude for Applicant on these allegations, but against him on Guideline J.

At the 1986 hearing and again at the 2004 hearing Applicant testified he has changed and is more mature. Judge Mason had reason to believe those statements in 1986. Applicant's record since then shows he has not changed and has not matured, for the reasons stated in this decision. I do not find Applicant credible or persuasive in his assertions. The similarities between the two cases and his testimony at both hearings is uncanny and shows the deceptive patterns of Applicant's life. For all these reasons, I conclude Applicant should not have another security clearance absent proof of

alcohol and drug rehabilitation and a proper diagnosis from a licensed professional, and Applicant making full disclosure on any future SCA. He should have a heavy burden of persuasion based on his record to date before he is granted another security clearance.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline G: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: Against Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: Against Applicant

Subparagraph 1.h.: Against Applicant

Subparagraph 1.i.: Against Applicant

Subparagraph 1.j.: Against Applicant

Paragraph 2. Guideline H: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: Against Applicant

Subparagraph 2.e.: Against Applicant

Subparagraph 2.f.: Against Applicant

Paragraph 3. Guideline E: AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

Subparagraph 3.b.: Against Applicant

Paragraph 4. Guideline J: AGAINST APPLICANT

Subparagraph 4.a.: Against Applicant

Subparagraph 4.b.: For Applicant

Subparagraph 4.c.: For Applicant

Subparagraph 4.d.: Against Applicant

Subparagraph 4.e.: Against Applicant

DECISION

In light of all of 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.

Philip S. Howe

Administrative Judge

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).