

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: From age 14 in 1985, to age 31 in 2002, Applicant was convicted of two driving while intoxicated and two battery offenses. During this period of time, he also committed numerous traffic violations and assaults. He was also held in contempt of court and failed to pay fines, make court appearances, and comply with the terms of his probation. In 2002, Applicant deliberately failed to disclose most of this information in his SF 86. The record is not sufficient to overcome the criminal conduct and personal conduct security concerns raised by his actions. Clearance is denied.

CASE NO: 03-07098. h1

DATE: 04/25/2006

DATE: April 25, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-07098

DECISION OF ADMINISTRATIVE JUDGE

JUAN J. RIVERA

APPEARANCES

FOR GOVERNMENT

Kathryn A. Trowbridge, Esq., Department Counsel

FOR APPLICANT

SYNOPSIS

From age 14 in 1985, to age 31 in 2002, Applicant was convicted of two driving while intoxicated and two battery offenses. During this period of time, he also committed numerous traffic violations and assaults. He was also held in contempt of court and failed to pay fines, make court appearances, and comply with the terms of his probation. In 2002, Applicant deliberately failed to disclose most of this information in his SF 86. The record is not sufficient to overcome the criminal conduct and personal conduct security concerns raised by his actions. Clearance is denied.

STATEMENT OF THE CASE

On September 30, 2004, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). The SOR informed Applicant that, based on information available to the government, DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to grant him access to classified information.⁽¹⁾ On December 12, 2004, Applicant answered the SOR (Answer) and requested a clearance decision based on the written record without a hearing.

Department Counsel prepared a File of Relevant Material (FORM) on August 2, 2005. The FORM was mailed to Applicant on August 10, 2005. He acknowledged receipt of the FORM on August 22, 2005, and did not object to anything contained in the FORM or submit additional information for consideration within the 30-day time period provided to him. The case was assigned to me on October 11, 2005.

FINDINGS OF FACT

Applicant admitted the SOR allegations in subparagraphs 1.a - 1.f, 1.h, 1.j, and 1.k. He denied subparagraphs 1.g, and 1.i. Although in his answer to the SOR he admitted the allegations in subparagraphs 2.a through 2.c, I considered those allegations denied, because Applicant attached a statement to his SOR answer claiming he never intended to falsify his security clearance application (SF 86).⁽²⁾ His admissions are incorporated herein as findings of fact. After a thorough

review of the pleadings and exhibits, I make the following additional findings of fact:

Applicant is 34 years old, married, and apparently has two children. He attended a vocational school in 1998, but it is not clear whether he graduated. (3) Applicant started working in 1996 as a cleaning room custodian. From 1999 to 2002, he worked as the manager of a company. In 2002, he has hired as a "contracts manager" for another company doing business with the Department of Defense. He requires access to classified information at the secret level to retain his current job.

The security concerns in Applicant's case stemmed from his long history of criminal behavior, between 1985 at age 14 and August 2002 at age 32. Applicant's earliest incidents of misconduct are alcohol related. In 1985, he was found guilty of being a minor in possession of alcohol and sentenced to six weeks of supervised probation. In June 1990, he was convicted of driving while intoxicated (DWI), driving on expired tags, and not having insurance. Two weeks after his first DWI, Applicant was arrested again for DWI, and driving with a revoked license and without insurance. He was convicted of both offenses, received a fine, and was ordered to attend a DWI First Offenders Program. (4) Noteworthy is the fact that he failed to complete the DWI First Offender's Program until sometime in 1994 despite being arrested in October 1990, February 1991, and June 1991 for failing to pay court imposed fines and comply with the terms of his probation. In his January 2003 statement, Applicant explained he failed to comply with the court orders because either his license was suspended or he was working night shifts. He had no explanation as to why he failed to disclose his second DWI on his SF 86. (5) In October 1990, he was arrested for driving on a revoked license. In July 1993, Applicant was also convicted of driving without insurance, failing to wear a seatbelt, and contempt of court.

In October 1992, Applicant was arrested and later convicted of battery, and sentenced to pay a fine. Although he admitted the SOR allegation, in his answer to the SOR he categorically denied assaulting the woman. Contrary to Applicant's denial, witnesses' statements in the police report convinced me that he, in fact, committed the offense. (6) The police report also shows that at the time of his arrest, he had a pending warrant for his arrest resulting from his failure to appear in court to answer citations for failure to wear seatbelts and driving without insurance.

In June 1993, Applicant was arrested and charged with battery on his then girlfriend (now his wife). At the time of this incident, she was pregnant with their first child. He was also arrested and charged in June 1993 with failure to participate in the court ordered DWI First Offenders' Program. Applicant denied assaulting his girlfriend. He explained he "probably pushed her against the wall in self defense." (7) The charges were latter dismissed. (8)

In March 1994, Applicant was convicted of unlawful use of a license. During the court proceedings he was charged with contempt of court for his failure to attend the court ordered DWI First Offenders' Program. He subsequently failed to attend the program and in August 1994, the court issued a bench warrant which was executed in September 1994. He was required to pay a fine.

In October 1994, Applicant was arrested for assaulting his girlfriend. At the time, he was pending an arrest warrant for his failure to pay a traffic ticket. He denied assaulting his girlfriend and claimed his arrest was solely the result of a pending warrant. In May 1995, he was arrested and charged with battery on his girlfriend. He denied assaulting her and explained the red marks on her chest were caused by his preventing her from exiting the car. This charge was later dismissed after his girlfriend recanted her statement.⁽⁹⁾

In September 1999, Applicant was arrested and charged with battery on his girlfriend. In his answer, Applicant denied the allegation. In November 1999, he was arrested under a bench warrant for contempt of court.⁽¹⁰⁾ In December 2000, Applicant called the police station to report a lost phone. Police officers responding to his call discovered Applicant was pending a bench warrant for his failure to appear in court concerning the September 1999 battery charge.⁽¹¹⁾ In January 2001, he was found guilty of battery and contempt of court. The battery charge was later dismissed after Applicant attended a court ordered Domestic Violence Program. In August 2002, he was arrested for hitting a vehicle in a parking lot.

In July 2002, Applicant submitted a SF 86 in which he deliberately provided false answers to questions 24, 26, and 40. He answered "YES" to question 24, which asked whether he had ever been charged with or convicted of any offenses related to alcohol or drugs, and disclosed his June 1990 DWI. Applicant failed to disclose, however, that in 1985 he was convicted for possessing alcohol while a minor, and that in July 1990, he was charged with DWI and later convicted of the charge.

Applicant answered "Yes" to question 26, which asked whether in the last seven years he had been arrested for, charged with, or convicted of any offenses not listed elsewhere in the SF 86. He disclosed that in December 1999, he had been found guilty of failure to appear in court. He failed to disclose, however, that he was arrested and charged with battery in September 1999 and that he was convicted in 2001 for a September 1999 battery charge. He also failed to disclose he was arrested numerous times for contempt of court, and for failing to comply with the terms of his probation, to show up for court appearances, and to pay fines.

In his answer to the SOR, Applicant admitted he failed to disclose the underlying facts of each of the falsification allegations. He claimed, however, his omissions were not deliberate and that he did not intend to deceive with his answers. Applicant explained he had no experience filling out the SF 86, and that as a result of his ignorance, it was his belief that if he disclosed only one of his arrests, charges or convictions, the government would find out about the rest.

He also answered "No" to question 40, which asked whether in the last seven years he had been a party to any public record civil court action. He failed to disclose that in December 2000, he was listed as the defendant in a debt collection action against him. He claimed he did not understand the term "public record civil court action" and believed it only applied to lawsuits among friends or family members, but not to business lawsuits. He also explained he disclosed his debt to the plaintiff in the lawsuit in his response to question 38, which asked whether he had ever been 180 days delinquent on any debts.

Concerning his use of alcohol, Applicant explained he presently ⁽¹²⁾ drinks once a week or once every other week. If he has company, he will drink a six pack in one evening. Once a year he will "tie one on", drinking 10 beers and a couple of shots of hard liquor. The last time he remembered drinking that much was December 2002, when his wife had to pick him up and he passed out at home.

Applicant stated he will drive after having a couple of beers, but that he will not drive after consuming more than two beers. He does not believe he has a problem with alcohol, but his wife complains about him drinking every weekend. In his statement, Applicant was unable to explain why he failed to disclose his numerous arrests, but asserts he was not trying to hide anything.

In his answer to the SOR, Applicant recognized he has a troubling criminal record and realizes he has made many bad choices such as driving under the influence of alcohol and not paying his fines. Applicant argued he was young and foolish when he was involved in most of his criminal behavior, and that his behavior is not recent. Concerning his relationship with his wife, Applicant explained they have been together since 1992. During the first years together they argued constantly and were involved in physical altercations. He claimed he has never punched or been violent toward his wife. He alleged his wife is the one that assaulted him, and in response he has been forced to hold her back, down, or to push her away in self defense. Applicant submitted he has changed his lifestyle. He averred he is now a mature, responsible person as demonstrated by his favorable job progression. He and his wife still have arguments, but they are not violent. The last time they were involved in a physical altercation was in 1999.

POLICIES

The Directive sets forth adjudicative guidelines which must be considered in evaluating an Applicant's eligibility for access to classified information. The administrative judge must take into account both disqualifying and mitigating conditions under each adjudicative guideline applicable to the facts and circumstances of the case. The guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the granting or denial of access to classified information. However, the guidelines are not viewed as inflexible ironclad rules of law. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive, ⁽¹³⁾ and the whole person concept. ⁽¹⁴⁾ Having considered the record evidence as a whole, I conclude Guideline J (Criminal Conduct) and Guideline E (Personal Conduct), are the applicable relevant adjudicative guidelines.

BURDEN OF PROOF

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information. ⁽¹⁵⁾ 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 to ensure each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own.

The government has the initial burden of proving controverted facts alleged in the SOR. To meet its burden, the government must establish by substantial evidence⁽¹⁶⁾ a prima facie case that it is not clearly consistent with the national interest for the applicant to have access to classified information. The responsibility 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 carries a heavy burden of persuasion.⁽¹⁷⁾ The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of protecting national security.⁽¹⁸⁾

CONCLUSIONS

Under Guideline J (Criminal Conduct), a history or pattern of criminal conduct is a security concern because it may indicate an unwillingness to abide by rules and regulations and may show the applicant to be lacking in judgment, reliability and trustworthiness.⁽¹⁹⁾ The government established its case under Guideline J by showing that from age 14 in 1985, to age 31 in 2002, Applicant was convicted of three alcohol related incidents, two of them of a serious nature. During this period of time, he was arrested five times for battery. Two of the arrests resulted in convictions. He also was arrested numerous times for his failure to obey court orders, the terms of his probation, and his failure to pay fines. I also find, as discussed below under Guideline E, that Applicant deliberately falsified his security clearance application. I conclude Guideline J Disqualifying Condition (DC) 1: *Allegations or admission of criminal conduct*,⁽²⁰⁾ and DC 2: *A single serious crime or multiple lesser offenses*,⁽²¹⁾ apply.

After considering all of the Guideline J Mitigating Conditions (MC), I find that only MC 1: *The criminal behavior is not recent*,⁽²²⁾ applies. There is no evidence he has been involved in any further misconduct since 2002. As such, his actions are not recent.

Nevertheless, under the totality of the circumstances, I find Applicant's criminal behavior is not isolated, and that he has not demonstrated clear evidence of successful rehabilitation. Applicant engaged in criminal misconduct over a period of 17 years, from the time he was 14 until he was 31. As such, his behavior can not be attributed to youthful exuberance or stupidity. The available evidence indicates he has not been involved in criminal misconduct since 2002. However, considering his 17 year history of criminal behavior, the nature and seriousness of his misconduct, and his prolonged, recalcitrant disrespect and disregard for court orders, I find his favorable information is not sufficient to mitigate the Guideline J security concerns. His behavior raises questions about his ability and willingness to follow the law, and ultimately, to protect classified information.

Applicant's falsification of his SF 86 brings to the forefront the security concerns raised by his criminal behavior. Even though not alleged under Guideline J in the SOR, under whole person concept⁽²³⁾ I must consider his falsification of the SF 86 a violation of 18 U.S.C. 1001.⁽²⁴⁾ As such, his falsification weighs against the presence of rehabilitation and positive behavioral changes. Further, the fact that he continues to drink and drive, even if only after consuming two beers, raises concerns about his judgment, especially in light of his two prior DWI convictions. Guideline J is decided against the Applicant.

Under Guideline E (Personal Conduct), personal conduct is always a security concern because it asks the ultimate question - whether a person's past conduct instills confidence the person can be trusted to properly safeguard classified information. An applicant's conduct is a security concern if it involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Such behavior could indicate that the person may not properly safeguard classified information.⁽²⁵⁾

The government established its case under Guideline E by showing that Applicant deliberately provided false answers when he submitted his SF 86. Applicant chose not to disclose his past criminal behavior, seemingly, because of his concern for the adverse impact this information would have had on his qualifications to obtain a security clearance. Applicant's explanations for his failure to disclose the information - i.e., if he disclosed one incident, arrest, charge or conviction, the government would discover the rest -- rang hollow in light of the totality of the facts and circumstances, including his age at the time he submitted the SF 86, his past disregard for the law and court orders, his statement, and his answer to the SOR. I find Applicant's omissions were knowing and deliberate, and committed with the intent to mislead the government. Guideline E Disqualifying Conditions (DC) 2: *The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire ...*,⁽²⁶⁾ and DC 4: *Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress ...*,⁽²⁷⁾ apply.

Applicant was 31 years old at the time he submitted the SF 86. In light of his past behavior and his other run-ins with the law, his falsifications cannot be attributed to youthful exuberance or stupidity. He deserves credit for changing his lifestyle, for his efforts to be a family man, and for his favorable job progression. Notwithstanding, his current behavior is not sufficient to mitigate the security concerns raised by his falsifications. I have considered all the Personal Conduct⁽²⁸⁾ Mitigating Conditions, and find that none apply. In light of all the facts and circumstances, I conclude Applicant's falsifications are relatively recent and that the motive that led him to falsify the SF 86 - i.e., his desire to cover up his criminal behavior - remains a viable factor that could influence Applicant's future behavior. As such, he is likely susceptible to influence, pressure, or coercion in order to cover up his past criminal behavior from prospective employers and others in his community. Guideline E is decided against the Applicant.

A single criminal incident calls into question a person's judgment. Repeated misconduct after several convictions demonstrates an absolute lack of judgment and complete disregard for the law, rules and regulations. Under the totality of the circumstances of this case, the passage of time alone is not sufficient to demonstrate Applicant possesses the

requisite judgment, reliability, and trustworthiness of one who will protect the national interest as his own.

I have carefully weighed all of the evidence, and I have applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guidelines. Considering all relevant and material facts and circumstances present in this case, including Applicant's statement, his misconduct, the whole person concept, and the adjudicative factors listed in the Directive, I find Applicant has not mitigated the security concerns.

FORMAL FINDINGS

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1, Criminal Conduct (Guideline J) AGAINST APPLICANT

Subparagraph 1.a - 1.k Against Applicant

Paragraph 2, Personal Conduct (Guideline E) AGAINST APPLICANT

Subparagraph 2.a - 2.c Against 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. Clearance is denied.

Juan J. Rivera

Administrative Judge

1. Required by Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992) (Directive), as amended.
2. Office of Personnel Management Security Clearance Application, Standard Form 86.
3. Applicant's sketchy personal information was obtained from his security clearance application, FORM, Item 4; his answer to the SOR, Item 2; and his January 2003 statement, Item 6.
4. FORM, Items 7 and 11.
5. FORM, Item 6.
6. FORM, Item 8.
7. FORM, Item 6.
8. FORM, Item 10.
9. FORM, Item 13.
10. FORM, Items 14 and 16.
11. In his 2003 statement, Applicant blamed his wife for not giving him the court appearance notices.
12. Applicant's statement is dated January 2003.
13. Directive, Section 6.3. 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: the nature and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the age of the applicant; the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation; and the probability that the circumstances or conduct will continue or recur in the future.
14. Directive, E2.2.1. ". . . The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. . . ."
15. *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
16. ISCR Case No. 98-0761 (December 27, 1999) at p. 2 (Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.); ISCR Case No. 02-12199 (April 3, 2006) p. 3 (Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.); Directive, ¶ E3.1.32.1.
17. *Id.* at 528, 531.

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

19. Directive, E2.A10.1.1.

20. Directive, E2.A10.1.2.1.

21. Directive, E2.A10.1.2.2.

22. Directive, E2.A10.1.3.1.

23. Directive, Para. 6.3, E2.2.1.

24. It is a criminal offense to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation, or knowingly make or use a false writing in any matter within the jurisdiction of the executive branch of the Government of the United States. Security clearances are within the jurisdiction of the executive branch of the Government of the United States. (*Egan*, 484 U.S. at 527).

25. Directive, E2.A5.1.1.

26. Directive, E2.A5.1.2.2.

27. Directive, E2.A5.1.2.4.

28. Directive, E2.A5.1.3.