

KEYWORD: Alcohol; Drugs; Personal Conduct; Criminal Conduct

DIGEST: Applicant has a history of criminal conduct, drug involvement, and excessive consumption of alcohol that he failed to mitigate. Clearance is denied.

CASENO: 03-09915.h1

DATE: 08/18/2004

DATE: August 18, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-09915

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Esq., Department Counsel

FOR APPLICANT

SYNOPSIS

Applicant has a history of criminal conduct, drug involvement, and excessive consumption of alcohol that he failed to mitigate. 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 20 February 2004, 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 17 March 2004 and elected to have a hearing before an administrative judge. The case was assigned to me on 20 May 2004. On 21 June 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. DOHA received the hearing transcript (Tr.) on 1 July 2004. I left the record open for Applicant to submit additional character statements. Without objection, I admitted both documents he submitted—Exhibits E (Statement of manager) and F (Statement of friend).

FINDINGS OF FACT

Applicant consumed alcohol to the point of intoxication from 1997 to at least January 2003. Answer at 1. In 1997, during his freshman year in college, police stopped Applicant and his friends as they walked home from a fraternity party with cups of beer in their hands. Applicant was cited for underage drinking. He pled guilty to the charge, was fined, and ordered to attend first level alcohol awareness classes. Applicant successfully completed the classes. Tr. 15.

In February 1998, university police arrested Applicant for disorderly conduct. Ex. 4; Answer.

In April 2001, Applicant was driving a friend home. She became ill. He stopped the vehicle in the right-turn lane near a

street corner. His passenger leaned out the window and vomited. A police officer stopped to investigate. He smelled alcohol on applicant's breath and saw that his eyes were bloodshot and watery and his speech was impaired. Applicant failed a roadside sobriety test and was administered a breath test. The results showed .163 grams of alcohol per 210 liters of breath. The police officer arrested Applicant and charged him with driving while under the influence of alcohol (DUI) and driving a vehicle with excess alcohol on his breath. Another test was performed at the county jail. The result was .127. Applicant pled guilty to a lesser charge of driving with his ability impaired (DWAI). The court sentenced him on 24 July 2001 to a term of probation from 3-18 months, community service, a fine, and the second level alcohol education program. Ex. 3; Answer; Tr. 18.

Applicant used illegal drugs of abuse from January 1997 to January 2002. He first used marijuana in high school and then on occasion in college. He stopped using marijuana in January 2002 because he came to realize it could jeopardize the future his college degree made possible. Applicant used ecstasy twice and psilocybin (hallucinogenic mushrooms) three to four times between 2000 and 2001. He stopped using ecstasy because he did not enjoy it.

Applicant completed his security clearance application (SCA) on 24 June 2002, certifying that it was "true, complete, and correct" to the best of his knowledge and belief, and acknowledging that "a knowing and willful false statement" could be punished by fine and imprisonment under the provisions of 18 U.S.C. § 1001. Ex. 1. Question 24 asked if Applicant had ever been charged with or convicted of any offense related to alcohol or drugs. Applicant answered "yes" and listed his 2001 DWAI conviction, but did not mention being charged with underage drinking in 1997. Question 26 asked if, in the previous seven years, Applicant had been arrested for, charged with, or convicted of any other offenses not listed elsewhere on the SCA. Applicant answered "no" and failed to list his 1998 arrest for disorderly conduct. Question 27 asked if, in the previous seven years, Applicant had illegally used any controlled substances. Applicant answered "yes," and listed his marijuana use, but deliberately failed to mention his use of ecstasy and psilocybin because he was concerned that to do so could affect his ability to get a security clearance. Ex. 3 at 2.

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.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. 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. 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).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

CONCLUSIONS

Guideline G--Alcohol Consumption

In the SOR, DOHA alleged Applicant consumed alcohol to excess from 1997 to at least 24 January 2003 (¶ 1.a), was charged with underage drinking in November 1997 (¶ 1.b), and was arrested in April 2001 and subsequently convicted of DWAI (¶ 1.c). 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. Directive ¶ E2.A7.1.1.

The Government established by substantial evidence each of the allegations in the SOR. Applicant had alcohol-related incidents away from work-his DWAI and citation for underage drinking. DC E2.A7.1.2.1. And he admits to a history of drinking to the point of intoxication; this could lead to the exercise of questionable judgment and increases the risk of unauthorized disclosure of classified information. Applicant contends he has limited his drinking to "only consuming a couple of drinks only on the weekend or so. If I want to enjoy a drink I'll have one." An applicant may mitigate excessive alcohol consumption by establishing that he has made positive changes in behavior supportive of sobriety. MC E2.A7.1.3.3. Applicant failed to convince me he has made such changes in his behavior. None of the mitigating conditions apply. I find against Applicant.

Guideline H--Drug Involvement

In the SOR, DOHA alleged Applicant used marijuana from 1997 to January 2002 (§ 2.b), used ecstasy in 2000 and 2001 (§ 2.b), and used psilocybin (mushrooms) in about 2000 and 2001 (§ 2.c). The improper or illegal involvement with drugs raises questions regarding an applicant'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. Directive ¶ E2.A8.1.1.

The Government established by substantial evidence and Applicant's admissions each of the allegations in the SOR. Applicant has a history of abusing drugs listed in the Controlled Substances Act of 1970. DC E2.A8.1.2.1. It is not clear when, if at all, Applicant stopped using illegal drugs. At one point he claimed he stopped using drugs before his DWAI, but then admitted to sporadically using drugs after the DWAI. *See* Tr. 16, 19, 26-28. Under the circumstances, I am unable to conclude Applicant has "[a] demonstrated intent not to abuse any drugs in the future." *See* MC E2.A8.1.3.3. As Applicant has not established any of the mitigating conditions, I find against him.

Guideline E--Personal Conduct

In the SOR, DOHA alleged Applicant falsified material facts on his SCA by deliberately failing to disclose he had been charged with underage drinking in 1997 (§ 3.a), arrested for disorderly conduct in 1998 (§ 3.b), and used ecstasy and psilocybin in 2000 and 2001 (§ 3.c). Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate the applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

The Government established by substantial evidence that Applicant failed to disclose in his SCA that he had been charged with underage drinking in 1997, had been arrested for disorderly conduct in 1998, or had used ecstasy and psilocybin in 2000 and 2001. The deliberate omission of relevant and material facts from an SCA may disqualify an applicant from a security clearance. DC E2.A5.1.2.2. The failure to disclose the alleged information in his SCA shifted the burden to Applicant to explain the omissions sufficiently to negate a finding of knowing and deliberate falsification. *See* ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004).

Applicant admitted he deliberately provided false information about his drug use because it might affect his ability to get a clearance. Ex. 3 at 2. Applicant failed to credibly explain his omissions sufficiently to negate adverse findings.

Guideline J--Criminal Conduct

In the SOR, DOHA alleged Applicant was arrested and charged with disorderly conduct in 1998 (¶ 4.a), cited for underage drinking in 1997, and convicted of DWAI in 2001 (¶ 4.b), and violated 19 U.S.C. § 1001 by deliberately omitting material facts (as alleged in ¶ 3) from his SCA. A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1.

It is a criminal offense to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the executive branch of the Government of the United States. 18 U.S.C. § 1001. Security clearances are within the jurisdiction of the executive branch of the Government of the United States. *See Egan*, 484 U.S. at 527.

The Government established each of the allegations by substantial evidence. Applicant was arrested in 1998 and charged with disorderly conduct, was charged with underage drinking in 1997, and convicted of DWAI in 2001. Based on Applicant's admissions, I conclude he knowingly and willfully made materially false representations on his SCA in violation of 18 U.S.C. 1001. Applicant has a history of committing criminal offenses. DC E2.A10.1.2.2. Applicant failed to establish clear evidence of successful rehabilitation (MC E2.A10.1.3.6) or any other mitigating condition. I find against Applicant.

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

Paragraph 1. Guideline H: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: Against Applicant

Paragraph 1. Guideline E: AGAINST APPLICANT

Subparagraph 3.a: Against Applicant

Subparagraph 3.b: Against Applicant

Subparagraph 3.c: Against Applicant

Paragraph 4. Guideline J: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: 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.

James A. Young

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).