

KEYWORD: Alcohol; Personal Conduct

DIGEST: Applicant was convicted of driving under the influence of alcohol in 1987 and 2001. He deliberately failed to report these convictions in his security clearance application. Applicant failed to mitigate the security concerns raised by his alcohol consumption and personal conduct. Clearance is denied.

CASENO: 03-11548.h1

DATE: 08/10/2004

DATE: August 10, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-11548

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

SYNOPSIS

Applicant was convicted of driving under the influence of alcohol in 1987 and 2001. He deliberately failed to report these convictions in his security clearance application. Applicant failed to mitigate the security concerns raised by his alcohol consumption and personal conduct. 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 5 December 2003, DOHA issued a Statement of Reasons⁽¹⁾ (SOR) detailing the basis for its decision—security concerns raised under Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on 16 January 2004 and elected to have the case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's written case on 30 April 2004. A complete copy of the file of relevant material (FORM) was provided to Applicant, and he was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant received the FORM on 7 May 2004, but failed to respond within the required 30-day period. Directive ¶ E3.1.7. The case was assigned to me on 6 July 2004.

RULINGS ON PROCEDURE

The case was forwarded to DOHA on 22 June 2004. By letter dated 21 June 2004, Applicant submitted a response to the FORM through Department Counsel. It was received by Department Counsel on 25 June 2004. The Department Counsel indicated he did not object to the administrative judge considering the information. It appears, from the absence of any evidence to the contrary in the case file, Applicant did not request an extension of time to file the response and no extension was granted. Consideration of an applicant's response would be inappropriate if he filed it late without being granted an extension for good cause shown. *See* Directive ¶ E3.1.7; ISCR Case No. 02-24965 at 3 (App. Bd. Aug. 19, 2003). Before forwarding Applicant's matters without objection, Department Counsel should have indicated whether Applicant requested an extension and whether he granted the request. I could order Applicant and Department Counsel

to file affidavits so I could determine whether Applicant was granted an extension of time to file his response. Nevertheless, as Department Counsel did not object, as a matter of judicial economy, I will consider it.

Department Counsel moved to amend the allegation in SOR ¶ 2.f by replacing the words "subparagraphs 1.b., through 1.f., above" with "subparagraph 1.e. above." FORM at 5. There is no ¶ 1.f. As Applicant did not object and the motion conforms the allegation to the evidence, the motion is granted.

FINDINGS OF FACT

Applicant is a 42-year-old senior engineer/supervisor for a defense contractor. He has been married since 1988 and has three sons, ages 16, 14, and 12 years. He was granted a secret clearance in July 1985.

When he was 18 or 19 years old, Applicant was taken to the police station because he had been drinking underage at a dance. Applicant was held until his parents picked him up. Apparently no charges were filed. Ex. 8 at 2.

In May 1987, Applicant consumed several drinks at a dance and was pulled over by police as he was driving home. He failed a sobriety test and was charged with driving while under the influence (DUI) of alcohol. Applicant was placed on probation for three years, had to pay a fine, and was required to attend alcohol education classes and perform community service. Answer; Ex. 8 at 2. In July 1988, Applicant's probation was revoked and a bench warrant for his arrest was issued for failing to pay his fine. The warrant was recalled in March 1989 after Applicant paid the fine in full. Ex. 9 at 1.

In January 2001, Applicant consumed five drinks in five hours while at a friend's house. After getting into an altercation with another visitor, Applicant drove home. He was pulled over by police. He failed a sobriety test, was taken to the police station, and was charged with DUI and driving with a blood-alcohol level in excess of .20%, when the state limit was .08%. *Id.* at 1-2; Ex. 10 at 1. Applicant pled no contest to DUI and the court dismissed the other charge. The court sentenced Applicant to serve 10 days in jail, suspended, to attend a drunk driving course and a Mothers Against Drunk Driving course, to pay a fine, and to have his license restricted. Ex. 10 at 3.

Applicant completed a security clearance application (SCA) on 12 May 2000. Another SCA was filed on 14 June 2000. Question 40 on both SCAs asked if Applicant had ever been charged with or convicted of an alcohol-related offense. Applicant answered "no" on both forms. Ex. 6 at 5; Ex. 7 at 6-7. Applicant admits falsifying his 14 June 2000 SCA by

deliberately failing to report a 1986 alcohol-related conviction. Ex. 8 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, 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. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

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 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

Guideline G-Alcohol Consumption

In the SOR, DOHA alleged Applicant consumed alcohol to the point of intoxication from 1983 until the present (¶1.a) and was arrested for DUI in 1987 (¶ 1.e), 1997 (¶ 1.d), 2001 (¶ 1.c), and 2002 (¶ 1.b). 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 the allegations in SOR ¶¶ 1.a, 1.c, and 1.e. Applicant has had alcohol-related incidents away from work-his DUIs in 1987 and 2001. DC E2.A7.1.2.1. He also consumed alcohol to the point of intoxication on at least two occasions after he was granted a security clearance in 1985. The two alcohol-related incidents in the past 17 years does not indicate a pattern. MC E2.A.7.1.3.1. Applicant has not supplied sufficient information from which I can conclude any of the other listed mitigating conditions apply. Applicant "does not consider himself an alcoholic,"and contends he only has one or two drinks with friends. But he was convicted twice of DUI and has not submitted any evidence from which I can reasonably conclude he has taken steps to preclude it from happening again. I find against Applicant on ¶¶ 1.a, 1.c, and 1.e. Department Counsel concedes the allegations in ¶¶ 1.b and 1.d are the result of a misreading of the record evidence.

Guideline E-Personal Conduct

In the SOR, DOHA alleged Applicant failed to appear in court for sentencing in November 1997 (¶ 2.a), failed to appear in court for sentencing in December 1997 (¶ 2.b), failed to pay a fine in July 1988 (¶ 2.c), admitted deliberately failing to list his alcohol-related arrest in 1986 on his SCA (¶ 2.d), and falsified his 14 July 2000 SCA by deliberately asserting in response to question 30 that, in the previous seven years, his use of alcohol had not resulted in alcohol-related treatment (¶ 2.e), and question 24 that he was charged or convicted on an alcohol-related offense in 1987 (¶ 2.f). 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. Directive ¶ E2.A5.1.1.

Applicant denied the allegations contained on ¶¶ 2.a and 2.b. Department Counsel agrees there is no evidence to support those allegations. FORM at 4. I find for Applicant on ¶¶ 2.a and 2.b.

The government established by substantial evidence that Applicant failed to pay the fine for his 1987 conviction causing a bench warrant to issue. ¶ 2.c. His failure to timely pay the fine amounts to reliable unfavorable information. DC E2.A5.1.2.1. Applicant admits this allegation, but claims it was all a mistake and he was not aware that a warrant had been issued-he was in another state working on a project for his employer, his wife was supposed to pay the bill, and she unintentionally forgot to pay it. I find Applicant's explanation for the delay in payment credible. But he has not convinced me that he did not know a bench warrant was issued and was subsequently recalled when he paid the debt in

full. See Ex. 9 at 1. I find against Applicant on ¶ 2.c.

In ¶ 2.d, the Government alleged Applicant admitted not listing his 1986 alcohol-related arrest on his July 2000 SCA. The arrest was actually in 1987. Exs. 9, A. This allegation is in large measure the same allegation in ¶ 2.e. Therefore, I find for Applicant on ¶ 2.d.

In ¶ 2.e, the Government alleged Applicant falsified his answer to question 30 on the SCA by deliberately failing to disclose he had, in the previous seven years, received alcohol-related treatment of counseling. Although Applicant admitted the allegation was true, in fact it is not. As Department Counsel noted in the FORM, Applicant's alcohol-related treatment and counseling was ordered, and occurred, after he completed his SCA. I find for Applicant.

In ¶ 2.f, the Government alleged Applicant falsified his SCA by failing to admit his conviction for DUI in 1987 in answer to question 24. Applicant admits deliberately falsifying the SCA in this manner. Answer; Ex. A. Deliberately providing false information on an SCA may disqualify an applicant from obtaining a security clearance. DC E2.A5.1.2.2. None of the mitigating conditions listed under Guideline E apply. 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: For Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: For Applicant

Subparagraph 1.e: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: Against Applicant

Subparagraph 2.d: For Applicant

Subparagraph 2.e: Against Applicant

Subparagraph 2.f: 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. 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.