

KEYWORD: Criminal Conduct; Alcohol; Personal Conduct

DIGEST: Applicant had five alcohol-related arrests/incidents spanning a 12-year period. In addition to these alcohol-related arrests/or incidents, he consumed alcohol to excess over at least four years. Lastly, he failed to disclose his most recent arrest for Driving While Under the Influence and failed to provide a truthful account regarding the extent of his alcohol consumption to the Defense Security Service. Collectively, these facts raise criminal conduct, alcohol consumption, and personal conduct concerns. Applicant has not presented sufficient evidence to mitigate any of these concerns. Clearance is denied.

CASE NO: 03-12202.h1

DATE: 04/28/2006

DATE: April 28, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-12202

DECISION OF ADMINISTRATIVE JUDGE

ROBERT J. TUIDER

APPEARANCES

FOR GOVERNMENT

Kathryn A. Trowbridge, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant had five alcohol-related arrests/incidents spanning a 12-year period. In addition to these alcohol-related arrests/or incidents, he consumed alcohol to excess over at least four years. Lastly, he failed to disclose his most recent arrest for Driving While Under the Influence and failed to provide a truthful account regarding the extent of his alcohol consumption to the Defense Security Service. Collectively, these facts raise criminal conduct, alcohol consumption, and personal conduct concerns. Applicant has not presented sufficient evidence to mitigate any of these concerns. Clearance is denied.

STATEMENT OF THE CASE

On July 29, 2004, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant.

The SOR detailed reasons under Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct) why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to conduct proceedings and determine whether a clearance should be granted, continued, denied, or revoked. In a signed and sworn statement, dated August 20, 2004, Applicant responded to the SOR allegations and requested his case be decided on the written record in lieu of a hearing.

On April 14, 2005, Department Counsel submitted the government's case through a file of relevant material (FORM), [\(U\)](#) a copy of which was provided to the Applicant. Department Counsel moved to amend ¶ 3.a. to read "You failed to disclose your Driving Under the Influence arrest as stated in 1.a. (above) during your interview with a Defense Security Service Agent on April 25, 2002." This in essence merges ¶¶ 3.a. and 3.b., which appear to have been inadvertently divided in the SOR, and Applicant noted this mistake in his Response to SOR. He was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not submit any information within the 30 day time period after receipt of copy of the FORM. After the file was complete and ready for consideration, it was assigned to me on September 12, 2005. Department Counsel's motion to amend the SOR is granted, and SOR ¶ 3.b. is withdrawn.

FINDINGS OF FACT

Applicant admitted SOR allegations ¶¶ 1.a. through 1.d., and 1.e. except for the words "[Location A]," and substituting "[Location B]." He denied ¶¶ 1.f., 2.a., and admitted ¶ 2.b. except as previously noted in ¶ 1.e. He admitted ¶ 3.a. with an explanation, he correctly noted there is no ¶ 3.b., he denied ¶ 3.c., he admitted ¶ 3.d. except as previously noted in ¶¶ 1.e., and 1.f. Those admissions are incorporated herein as findings of fact.

Applicant is a 56-year-old divorced man, who was married from October 1967 to August 2002. It is unclear from the FORM how many children he has. Since January 1988, he has been employed as an electronics technician for a defense contractor. His security clearance application (SF-86) submitted in June 2000 indicated he held a secret security clearance, which was granted in December 1989. Applicant served in the Marine Corps from June 1967 to November 1987, and retired as a First Sergeant, pay grade E-8.

Applicant had five alcohol-related arrests or incidents spanning a 12-year period from June 1988 to November 2000. Those arrests/incidents are summarized as follows:

1. June 1988 - Arrested and charged with Driving Under the Influence (DUI). Sentenced to one day confinement and fined \$413.00;
2. July 1992 - Arrested and charged with DUI, 2nd Offense in five years. Driving privileges were suspended and fined;
3. October 1997 - Arrested and charged with DUI. Ordered to attend Victim Impact Seminar, attend alcohol screening/counseling, commitment to one day of confinement, and to pay fines and surcharges totaling \$500.00;

4. October 1998 - Cited for DUI and Speeding. Signed plea agreement to plead guilty to Speeding and the DUI was dismissed. Ordered to pay fines and surcharges totaling \$500.00; and

5. November 2000 - Arrested and charged with Aggravated DUI. Sentenced to three years supervised probation, 250 hours community service, ten days confinement, and ordered to pay fines and surcharges totaling \$1,770.00.

SOR ¶ 1.f. states Applicant is scheduled to be on probation until May 30, 2007. Applicant submitted a source document from the cognizant court titled Order Of Discharge From Probation reflecting his probation was discharged absolutely, effective March 30, 2004. This is consistent with his denial to SOR ¶ 1.f.

SOR ¶ 2.a. alleges Applicant consumed alcohol at times in excess and to the point of intoxication from about 1988 until at least December 2002. Applicant denied this allegation as it was written and indicated instead he "consumed alcohol from before 1988 until Feb.14, 2001 which is when I started attending AA." In April 2002, Applicant was interviewed by a Special Agent of the Defense Security Service (DSS). In that statement, he said, "I have not consumed any alcohol whatsoever since April 2001, but know that my sobriety can only be one day at a time." Later in that statement, he said "For nearly twenty years prior to April 2001, I drank excessively."

Applicant also admitted in that same April 2002 statement to DSS, referring to his November 2000 DUI arrest, which is alleged under ¶ 1.a. and admitted to by Applicant, that he failed to disclose this arrest to the DSS Special Agent, "I did not disclose my DUI arrest in 2000 to Special Agent [name deleted] because I find it embarrassing but I never tried to hide the extent of my drinking from family members."

In April 2003, he was interviewed again by the same DSS Special Agent and referring to his April 2002 statement said, "In that initial statement, I claimed I had maintained sobriety and not consumed any alcohol whatsoever since April 2001. The truth is, I may have consumed alcohol between April 2001 and April 25th, 2002 when I signed the statement. I simply cannot remember drinking alcohol during that period of time, but I certainly will not deny the allegations. When I was initially interviewed, I was still in denial of my alcoholism." He also stated, "Since signing my initial statement on April 25th 2002, I have regressed from my abstinence on three occasions. Every time I drank, I drank to intoxication. The most recent regression was the last week of December, 2002." Applicant's five alcohol-related arrests/incidents over a 12-year period cited above are not in dispute.

Regarding Applicant's alcohol recovery, he stated in his Response to SOR, "In my own defense I am continuing in recovery and over the last 3 ½ years I have made progress. However it is one day at a time." In Applicant's April 2002 statement to DSS, he stated he was attending Alcohol Anonymous (AA) meetings and working the 12 step program. However, in his April 2003 statement to DSS, he stated since his April 2002 statement to DSS, he regressed from alcohol abstinence on three occasions as recently as December 2002, but was continuing to attend AA meetings.

Lastly, Applicant in a Response to Interrogatories submitted to DOHA in June 2004, stated he was "alcohol free" and was attending AA meetings. Applicant did not submit any documentation regarding his sobriety or progress as a recovering alcoholic. Nor did he submit any evidence regarding

his character or work performance.

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead they are to be applied by administrative judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, administrative judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive. The government has the burden of proving any controverted fact(s) alleged in the SOR, and the facts must have a nexus to an Applicant's lack of security worthiness.

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. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

BURDEN OF PROOF

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." 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." Executive Order 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.

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. All that is required is proof of facts and circumstances which 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.

Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, then the applicant has the ultimate burden of establishing his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

Security clearances are granted only when "it is clearly consistent with the national interest to do so." See Executive Orders 10865 § 2 and 12968 § 3.1(b). "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 "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." See *Egan*, 484 U.S. at 531. Doubts are to be resolved against the applicant.

CONCLUSIONS

Guideline J - Criminal Conduct

In the SOR, DOHA alleged Applicant had five alcohol-related arrests/incidents spanning a 12-year period, and was scheduled to be on probation until May 2004. (¶¶ 1.a. through 1.f.). *The Concern*: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. Directive ¶ E2.A10.1.1.

The Government established its case under Guideline J by Applicant's admissions and evidence submitted with the exception of ¶ 1.f. The facts give rise to Criminal Conduct Disqualifying Conditions (CC) E2.A10.1.2.1. (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged*); and CC DC E2.A10.1.2.2. (*A single serious crime or multiple lesser offenses*).

In light of Applicant's five alcohol-related convictions spanning a 12-year period, the most recent having occurred in November 2000, I am unable to apply any Criminal Conduct Mitigating Conditions listed under E2.A.10.1.3. The repetitive nature of Applicant's alcohol-related convictions gives rise for concern that he is unable to conform his behavior with the norms expected of him. Furthermore, there is little basis in the record to believe there is clear evidence of his successful rehabilitation. However, Applicant did offer competent evidence establishing that his probation ended in March 2004 versus December 2002, as alleged in SOR ¶ 1.f. With the exception of SOR ¶ 1.f., I find against Applicant on this concern.

Guideline G-Alcohol Consumption

In the SOR, DOHA alleged Applicant's five alcohol-related arrests/incidents previously stated under Criminal Conduct above under this concern and further alleged he consumed alcohol at times to excess and to the point of intoxication

from about 1988 until at least December 2002.(¶¶ 2.a. and 2.b.). *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. Directive ¶ E2.A7.1.1.

The Government established its case under Guideline G by Applicant's admissions and evidence submitted. Applicant after being interviewed a second time by DSS admitted that he consumed alcohol until at least April 25, 2002 when he signed his statement to DSS. Although Applicant denies ¶ 2.a. as written, he does admit that he consumed alcohol "from before 1988 until Feb. 14, 2001" Applicant hedged somewhat on the end date of his alcohol consumption when he stated he "may have consumed alcohol between April 2001 and April 25th 2002." He admitted in his April 2003 statement that he had three regressions since he submitted his statement to DSS in April 2002 and added that his "most recent regression was the last week of December, 2002."

These facts give rise to Alcohol Consumption Disqualifying Conditions (AC DC) 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*); and AC DC E.2.A7.1.2.5. (*Habitual or binge consumption of alcohol to the point of impaired judgment*).

Applicant asserts that he is in recovery, attending AA meetings, and taking one day at a time. Unfortunately, he has not submitted any evidence to verify or substantiate his progress. Given the varying versions of the facts he has given and the limited record available in this FORM, I am unable to give him the benefit of the doubt in this regard. The dearth of favorable evidence supporting Applicant's sustained sobriety does not weigh in his favor. Accordingly, I am unable to apply any of the Alcohol Consumption Mitigating Conditions. I find against Applicant on this concern.

Guideline E - Personal Conduct

In the SOR, DOHA alleged Applicant had provided false information during his April 2002 interview with a DSS Special Agent when he failed to disclose his November 2000 DUI arrest and when he claimed he had not consumed any alcohol since April 2002 as alleged in ¶¶ 3.a. and 3.b. *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. Directive ¶ E2.A5.1.1.

The government established its case under Guideline E by Applicant's admissions and evidence submitted. The facts give rise to Personal Conduct Disqualifying Condition (PC DC) E.2.A5.1.2.3. (*Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination*).

Applicant's choice to provide incomplete or deceptive answers to the DSS Special Agent undermined the investigative process and creates doubts about his trustworthiness and candor. Applicant did have previous experience with security clearances, at a minimum, when he retired from the Marine Corps and was granted a clearance in December 1989. Unfortunately, his alcohol consumption has adversely impacted him on many levels. Again, given the limited evidence available to me in this FORM, Applicant's various accounts of the truth, and the inability to go beyond the record, I am unable to apply any of the Personal Conduct Mitigating Conditions. I find against Applicant on this concern.

The awarding of a security clearance is not a once in a life time occurrence, but is based on applying the factors, both disqualifying and mitigating, as set forth in the Directive, to the evidence presented. Additionally, this determination does not question the Applicant's patriotism and should not be seen as such.

In closing, Applicant would have been better served had he taken the time to be more thorough in his responses, especially after he became aware of the deficiencies in his Response to SOR noted in Department Counsel's FORM. I cannot invent facts and am required to base my decision on the facts presented, as required by the Directive.

FORMAL FINDINGS

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

Paragraph 1.: Guideline J: 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.: For Applicant

Paragraph 2.: Guideline G: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Paragraph 3: Guideline E AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

Subparagraph 3.b.: Withdrawn

Subparagraph 3.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.

Robert J. Tuider

Administrative Judge

1. The government submitted seven items or exhibits in support of its contention.