

KEYWORD: Criminal Conduct

DIGEST: Applicant has a history of criminal conduct extending from 1986 to 1999. This includes two felony convictions for physical altercations with police officers and several incidents of assault and battery. He also has two convictions for driving under the influence of alcohol. Applicant failed to mitigate the security concerns arising from his criminal conduct. Clearance is denied.

CASENO: 03-12237.h1

DATE: 02/23/2006

DATE: February 23, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-12237

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL J. BRESLIN

APPEARANCES

FOR GOVERNMENT

Sabrina Redd, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has a history of criminal conduct extending from 1986 to 1999. This includes two felony convictions for physical altercations with police officers and several incidents of assault and battery. He also has two convictions for driving under the influence of alcohol. Applicant failed to mitigate the security concerns arising from his criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

On June 13, 2002, Applicant submitted a security clearance application. The Defense Office of Hearings and Appeals (DOHA) declined to grant a security clearance for Applicant under 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), as amended (the "Directive"). On April 5, 2004, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. The SOR alleges security concerns raised under the Directive, specifically Guideline J, Criminal Conduct.

Applicant answered the SOR in writing on May 5, 2004. He elected to have a hearing before an administrative judge.

I received the case on October 12, 2005. With the concurrence of Applicant and Department Counsel, I convened the hearing on November 17, 2005. The government introduced Exhibits 1 through 12. Applicant testified on his own behalf. At the beginning of the hearing, Department Counsel moved to amend the SOR by deleting ¶ 1.i in accordance with the amendment to 10 U.S. C. § 986. There being no objection, I granted the motion. DOHA received the transcript of the hearing (Tr.) on December 1, 2005.

FINDINGS OF FACT

Applicant admitted the factual allegations in ¶¶ 1.a through 1.h of the SOR, with explanations. (Applicant's Answer to SOR, dated May 5, 2005.) Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, I make the following additional findings of fact.

Applicant was born in January 1960. (Ex. 1 at 1.) When he was 17 years old, he left high school and enlisted in the U.S. Marine Corps, where he served from August 1977 to July 1979. (*Id.* at 3; Tr. at 34-35.) Applicant held a security clearance while in the Marine Corps. (Tr. at 35.)

Applicant began working for his current employer, a defense contractor, in May 1980. (Ex. 1 at 1.) In June 1981, Applicant was married. (*Id.* at 2.) Two children were born of the marriage. (*Id.* at 3.)

In October 1986, while driving home after drinking alcohol during an evening in a club, Applicant allowed the vehicle he was driving to cross the center line and side-swipe another car. (Tr. at 15; Ex. 12.) The police responded and Applicant was arrested and charged with Driving Under the Influence of Alcohol (DUI) and Driving on the Wrong Side of the Road. (Answer to SOR, *supra*, at 2.)

Applicant and his wife had a troubled marriage. (Tr. at 13.) They argued often and at times their disputes became violent. In May 1989, Applicant's wife filed a complaint with authorities, who arrested Applicant for Simple Battery and Contempt of Court. (Tr. at 20.) The charge was later dismissed. (Ex. 12 at 2.)

Similar problems with his wife led to an arrest for Disorderly Conduct in November 1989. (Ex. 12 at 2.) Applicant was found guilty and required to pay a \$55.00 fine. (Answer to SOR, *supra* at 2.)

Later that same month, Applicant was again involved in an argument with his wife at their home, and she called the police. (Ex. 5 at 3-4.) A witness reported that shots were fired, although Applicant denies this. The police officers told Applicant to step into the yard, but he refused to leave his home. (*Id.*) As the police approached Applicant, he grabbed one of the officers, dragged him into the house, and scuffled with him. A second officer entered the home to assist. Applicant struck and hit the police officers before he was physically subdued and placed under arrest. Authorities charged Applicant with two counts of Aggravated Assault on a Police Officer, Aggravated Assault on his wife, and two counts of Obstruction of a Police Officer. (Tr. at 22; Ex. 5 at 3.) In April 1990, pursuant to a plea agreement, Applicant pled guilty to two counts of Obstruction of a Police Officer. The court sentenced him to five years confinement to be served on probation, a \$1,000.00 fine, and 250 hours of community service. (Ex. 5 at 1.)

He was arrested again in December 1989 for Simple Battery and Contempt of Court. (Answer to SOR, *supra* at 2.) The court later dismissed the charges. (Ex.12 at 2.)

In August 1996, Applicant and his wife got into an argument. His wife smashed the car windshield. He asserted she got their pistol, but he took it from her. (Ex. 7 at 1.) Applicant took the pistol and a half-pint bottle of whiskey and went out to his car. When the police arrived, they attempted to restrain Applicant, but he resisted, leading to a scuffle.(Ex. 7 at 2.) Applicant broke free of the police and ran into his house. (*Id.*) They later apprehended and handcuffed Applicant; he threatened to harm the arresting officers. Authorities charged Applicant with two counts of Obstruction of Police Officers, making Terroristic Threats, Interference with Government Property, Possession of a Firearm by a convicted felon, Escape, Simple Battery, and creating a Public Disturbance. (Ex. 6 at 1.) Applicant negotiated a plea agreement to Obstruction of Police Officers and Possession of a Firearm by a Felon; the remaining charges were not prosecuted. The court sentenced Applicant to five years confinement to be served on probation, a \$1,500.00 fine, and payment of court fees. The court also required Applicant to submit to an alcohol/drug assessment. (Ex. 6 at 1.)

Applicant enrolled in counseling to help with his marital problems, focusing on depression and anger management. (Tr. at 33.) He continued the counseling for about one year.

On January 24, 1999, Applicant consumed several drinks of whiskey while watching a football game, and then drove to visit a friend. (Tr. at 15-16.) He saw a female acquaintance and stopped to pick her up. (Tr. at 15.) A police officer in a nearby patrol car pulled Applicant over for stopping his vehicle suddenly. (Tr. at 16.) The patrolman administered a field sobriety test, then took Applicant to the police station for a Breathalyzer test. (Tr. at 16.) Applicant coughed into the machine; the officers concluded he refused to take the test. Authorities charged applicant with DUI.

In April 1999, Applicant pled guilty to the DUI charge. (Tr. at 16.) The court sentenced him to pay a \$645.00 fine or serve six months in jail, and to perform community service. He was also required to attend Alcoholics Anonymous meetings for six months. (Ex. 7 at 4; Tr. at 18.) Applicant indicated he didn't learn anything from the program. (Tr. at 19.)

Applicant's last arrest for DUI occurred while he was still on probation for the incident in August 1996. (Tr. at 20.) As a result, on February 1, 1999, authorities revoked Applicant's probation. He was required to spend ten days in confinement. (Tr. at 20; Ex. 6 at 9.)

Applicant divorced his wife in September 1998. (Ex.1 at 2.) He was awarded custody of their children. (Tr. at 27.)

Applicant still works for the defense contractor. He began as a drill press operator in the fabrication shop. (Tr. at 36.) He then worked as a composite fabricator, and later as a mechanic on experimental aircraft. (*Id.*) In about April 1996, Applicant received a Secret clearance. (Ex. 1 at 6.) Subsequently, he was considered for a Special Access Program to work on a classified project; the military service involved denied his access. (Tr. at 38; Ex. 9.) Applicant also worked as a material review board investigator in the Quality Control area. (Tr. at 37.) In August 1999 he received a commendation for outstanding job performance. (Ex. 8.) At the time of the hearing, Applicant had successfully held a security clearance for about nine years. (Tr. at 14.)

Presently, Applicant stills consumes alcoholic beverages regularly. Tr. at 17.) He drinks whiskey on the average of three or four days each week. (Tr. at 18.) He estimates his consumption at about one-half to one pint of whiskey each week. (Tr. at 17-18.) He denies drinking to the point of intoxication. (Tr. at 18.)

POLICIES

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." (*Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988)). In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch.

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. The adjudicative guideline at issue in this case is:

Guideline J, Criminal Conduct: A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. (Directive, ¶ E2.A10.1.1.)

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to this adjudicative guideline, are set forth and discussed in the conclusions below.

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." (Directive, ¶ E2.2.1.) An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. *Id.* An administrative judge should consider the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (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. (*Id.*)

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. (Directive, ¶ E3.1.14.) Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. (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)). "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.)

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. (Exec. Ord. 10865, § 7.) It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

CONCLUSIONS

I considered carefully all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

Paragraph E2.A10.1.2.1 of the Directive provides that "allegations or admission of criminal conduct" may be disqualifying. Similarly, under ¶ E2.A10.1.2.2 of the Directive, it may be disqualifying where an applicant committed "a single serious crime or multiple lesser offenses." Applicant's record includes two felony convictions and several misdemeanor offenses. I find both these potentially disqualifying conditions are raised in this case.

Under the Directive, the security concerns arising from a history of criminal conduct may be mitigated in certain circumstances. Under ¶ E2.A10.1.3.1 of the Directive, it may be mitigating when "the criminal behavior was not recent." The Directive does not define the term "recent"; the recency of an incident is determined by considering all the circumstances, including the applicant's age, his pattern of behavior over a period of time, and the number of years since the last incident relative to the entire course of conduct. Applicant has a history of criminal charges for offenses related

to alcohol abuse and violent conduct extending from 1986 through 1999, a period of about 13 years. However, he has had no criminal incidents for about seven years. Considering all the circumstances, I conclude Applicant's criminal conduct is not recent, and this potentially mitigating condition applies.

The Directive, ¶ E2.A10.1.3.2, also provides that it may be mitigating where "the crime was an isolated incident." As noted above, Applicant has a long history of crimes related to alcohol abuse and violence. His crimes are not isolated incidents; therefore, this potentially mitigating condition does not apply.

Paragraph E2.A10.1.3.4 of the Directive states it may be mitigating where "the factors leading to the violation are not likely to recur." Similarly, under ¶ E2.A10.1.3.6 of the Directive, it may be mitigating where "there is clear evidence of successful rehabilitation." Applicant's repeated arguments with his wife gave rise to the offenses that resulted in violence or public disturbance. He divorced her in 1998 and has little regular contact. I find the factors leading to Applicant's violent offenses are not likely to recur. Several of applicant's offenses related to excessive alcohol consumption. Applicant attended alcohol abuse counseling, but derived little benefit from it. He continues to drink alcohol, although he asserts he no longer drives after drinking. Applicant has not met his burden of demonstrating clear evidence of successful rehabilitation. I conclude these potentially mitigating conditions do not apply.

I carefully considered the disqualifying and mitigating conditions in this case, in light of the "whole person" concept. I conclude Applicant has not mitigated the security concerns arising from his history of criminal conduct.

FORMAL FINDINGS

My conclusions as to each allegation in the SOR are:

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: Against Applicant

Subparagraph 1.g: Against Applicant

Subparagraph 1.h: 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.

Michael J. Breslin

Administrative Judge