

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant is 26 years old and seeks a security clearance in order to work for a federal contractor. In 1997, 1998, and 2002, he was arrested and convicted of charges involving theft and alcohol. On two separate security clearance applications, he failed to disclose criminal charges from 1997 and 1998, but did disclose a 2002 conviction for driving while impaired by alcohol. He denied any intention to falsify information to the government. Application did not mitigate the security concerns related to his criminal history or personal conduct. Clearance is denied.

CASENO: 03-15805.h1

DATE: 11/25/2005

DATE: November 25, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-15805

DECISION OF ADMINISTRATIVE JUDGE

SHARI DAM

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 26 years old and seeks a security clearance in order to work for a federal contractor. In 1997, 1998, and 2002, he was arrested and convicted of charges involving theft and alcohol. On two separate security clearance applications, he failed to disclose criminal charges from 1997 and 1998, but did disclose a 2002 conviction for driving while impaired by alcohol. He denied any intention to falsify information to the government. Application did not mitigate the security concerns related to his criminal history or personal conduct. Clearance is denied.

STATEMENT OF THE CASE

On March 31, 2005, the Defense Office of Hearings and Appeals (DOHA) under Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR, which is essentially an administrative complaint, detailed reasons under Guideline J (Criminal Conduct) 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 a security clearance to Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted.

On June 1, 2005, Applicant filed his answer to the allegations contained in Paragraph 1 of the SOR. On June 7, 2005, he filed his answer to the allegations contained in Paragraph 2 of the SOR and requested a hearing. A Notice of Hearing was issued on September 22, 2005, and the hearing was held on October 20, 2005. At the hearing the Government introduced five exhibits into evidence and Applicant introduced one exhibit. Neither party presented witnesses. DOHA received the Transcript (Tr.) on November 3, 2005.

FINDINGS OF FACT

In his answers to the SOR, Applicant admitted all of the allegations contained in paragraph 1 under Guideline J and those contained in paragraph 2 under Guideline E. These admissions are incorporated into my findings of fact. After a complete review of the evidence in the record, I make the following additional findings of fact:

Applicant is 26 years old. He graduated high school in 1997 and attended one year of college. ⁽¹⁾

Since high school Applicant held various jobs with private companies. From August 1999 to August 2001, he worked for the federal government. ⁽²⁾ In October 2001, he completed his first Security Clearance Application (SCA). ⁽³⁾ In January 2002, he began working for a federal contractor and completed his second SCA in September 2002. ⁽⁴⁾

On November 4, 1997, Applicant was arrested after attempting to steal video games with his friends. He was charged with misdemeanor Theft-Less than \$300.00. He was granted Probation Before Judgment, served 18-month probationary period, and paid \$55.00 in court costs. ⁽⁵⁾ Applicant was 18 years old at the time.

In 1998, Applicant was charged with writing bad checks for an amount less than \$300.00. Applicant denied the charges claiming his checkbook had been stolen. He paid the court costs. ⁽⁶⁾ Applicant was 19 years old at the time.

In July 2002, Applicant, age 23, was arrested and charged with driving while impaired by alcohol. He was found guilty and sentenced to jail for 60 days. The sentence was suspended for five years and he was placed on probation for 12 months. He was ordered to undergo an alcohol evaluation, and his driver's license was suspended for 30 days. ⁽⁷⁾ In August 2002, a comprehensive alcohol evaluation was performed at an outpatient treatment center. After completing the evaluation, the program director found Applicant had a positive attitude and not in need of treatment. ⁽⁸⁾

Since July 2002, Applicant has not encountered any legal problems, driving offenses or other criminal actions. He successfully completed the probationary terms previously imposed on him by the courts. ⁽⁹⁾ He acknowledged his previous misconduct and immaturity at the time. ⁽¹⁰⁾

When Applicant completed his SCA on October 25, 2001, he certified his answers were "true, complete, and correct" to the best of his knowledge and belief. [\(11\)](#) In response to Question 20 (*YOUR POLICE RECORD (Do not include anything that happened before your 16th birthday.) In the last 7 years, have you been arrested for, charged with, or convicted of any offenses(s)? (Leave out traffic fines of less than \$150.00)*), Applicant answered "No." He did not list the 1997 and 1998 incidents. [\(12\)](#)

When Applicant completed the second SCA on September 19, 2002, he certified his answers were "true, complete and correct" to the best of his knowledge and belief. In response to Question 26 (*YOUR POLICE RECORD - OTHER OFFENSES: In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.) For this item, report information regardless of whether the records in you case has been "sealed" or otherwise stricken from the record. The single exception in this requirement is for certain convictions under the Federal Controlled Substance Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607.*), Applicant answered "No." He again failed to disclose the 1997 and 1998 charges. [\(13\)](#) However, he disclosed the 2002 conviction in response to the question requesting information about offenses related to alcohol. [\(14\)](#)

In March 2003, Applicant was interviewed by a government investigator about the 2002 alcohol arrest and various employment issues to which he offered extensive answers. Although the investigator apparently did not inquire about past criminal charges, Applicant did not offer any information about the 1997 and 1998 charges during that interview. [\(15\)](#)

In his answer and during the hearing, Applicant stated that he had forgotten about the charges when he filled out the SCA's in 2001 and 2002, and did not think about them during the 2003 interview. [\(16\)](#) After listening to Applicant testify, I do not find this explanation credible.

POLICIES

Enclosure 2 of the Directive sets forth adjudication guidelines which must be considered in the evaluation of security suitability. An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the adjudicative process provision in Paragraph E2.2., Enclosure 2 of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. In addition, each security clearance decision must be based on the relevant and material facts and

circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically, these are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 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. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽¹⁷⁾ The government has the burden of proving controverted facts.⁽¹⁸⁾ The burden of proof is something less than a preponderance of the evidence.⁽¹⁹⁾ Once the government has met its burden, the burden shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against her.⁽²⁰⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽²¹⁾

As noted by the Court in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), "it should be obvious that no one has a right to a security clearance"⁽²²⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽²³⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽²⁴⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽²⁵⁾ 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.

In all adjudications, the protection of our national security is the paramount concern. The objective of the security clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration relevant circumstances, and applying sound judgment, mature thinking and careful analysis.

Based upon the allegations contained in the SOR and a consideration of the evidence as a whole, the following adjudicative guidelines are pertinent to an evaluation of the facts of this case:

Guideline J - Criminal Conduct: A security concern arises when a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Guideline E - Personal Conduct: A security concern arises when an individual's conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with the rules and regulations could indicate that the person may not properly safeguard classified information.

CONCLUSIONS

Upon consideration of all the facts in evidence and application of the appropriate adjudicative factors, I conclude the following with respect to the allegations set forth in the SOR:

Guideline J: Criminal Conduct

The government established its case under Guideline J. Based on the evidence in this case Criminal Conduct Disqualifying Condition (CC DC) 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*), apply to the allegations contained in Paragraph 1 of the SOR. Applicant admitted he was arrested and charged with separate crimes in 1997, 1998 and 2002. In addition, Applicant falsified his security clearance applications in violation of federal law, 18 U.S.C. § 1001.

I considered all the mitigating conditions under Guideline J, in particular Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1. (*The criminal behavior was not recent*), and CC MC E2.A10.1.3.4. (*There is clear evidence of successful rehabilitation*), and conclude they apply to subparagraphs 1.a., 1.b., and 1.c. In addition to expressing remorse over the incidents that occurred more than three years ago, Applicant offered evidence that he successfully completed two probationary terms, was found not to be in need of alcohol treatment, and has remained out of trouble since 2002.

However, none of the mitigating conditions apply to the falsification of his two security clearance applications as alleged in subparagraph 1.d.

Guideline E: Personal Conduct

The government also established a case under Guideline E. Based on the evidence, Personal Conduct Disqualifying

Condition (PC DC) E2.A5.1.2.2. (*The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities*), applies to this case. Applicant falsely answered a question on his October 2001 SCA and on the September 2002 SCA by failing to disclose his past criminal history. I find Applicant was not credible when he claimed the reason he omitted the charge was because he had forgotten. Forgetting about one's criminal history may be excusable during the completion of the first SCA, but it is not an excuse when it occurs during the completion of a second application and a subsequent interview regarding past criminal conduct. I find Applicant's omissions were intentional.

I reviewed all the mitigating conditions in this case, especially, Personal Conduct Mitigating Condition (PC MC) E2.A5.1.3.2. (*The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*), and PC MC E2.A.5.1.3.3. (*The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*), and conclude none apply. Applicant had three opportunities over a period of two years to provide accurate and truthful information prior to the initiation of the hearing, but did not do so. Thus, Applicant has failed to mitigate the personal conduct concerns in subparagraph 2.a. and 2.b. by failing to disclose requested information.

I considered Applicant's credibility, appearance and demeanor while testifying. I considered all the evidence provided, including, Applicant's present age, history of interactions with the law, rehabilitation, his remorse about his previous conduct and willingness to accept the consequences of his conduct. I have also taken into account the "whole person" concept in evaluating his risk and vulnerability in protecting our national interest. After doing so, I find Applicant has not sufficiently mitigated the security concerns caused by his history of criminal conduct or personal conduct. Therefore, I am persuaded by the totality of the evidence in this case that it is clearly not consistent with the national interest to grant Applicant a security clearance at this time. Accordingly, Guideline J and Guideline E are decided against the Applicant.

FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph one: Guideline J (Criminal Conduct) AGAINST THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: Against the Applicant

Paragraph 2: Guideline E (Personal Conduct) AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

Subparagraph 2.b.: Against the Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly not consistent with the national interest to grant a security clearance to Applicant. Clearance is denied.

Shari Dam

Administrative Judge

1. Item 1 (Security Clearance Application, dated September 19, 2002) at 1.
2. *Id.* at 2.
3. Item 2 (Security Clearance Application, dated October 25, 2001).
4. Item 1, *supra* note 1, at 1.
5. Answer, dated June 1, 2005.

6. *Id.*; Tr. 23.
7. Item 4 (State Records relating to the July 6, 2002 DUI case).
8. Item 5 (Letter of Comprehensive Alcohol/Drug Counseling Services, Inc.)
9. Tr. 25-26.
10. Tr. 36.
11. Item 2, *supra* note 3, at 7.
12. *Id.*
13. Item 1, *supra* note 1, at 7.
14. *Id.* at 6.
15. Tr. 22.
16. Answer, dated June 7, 2005; Tr. 34.
17. ISCR Case No. 96-0277 at 2 (App. Bd., Jul. 11, 1997).
18. ISCR Case No. 97-0016 at 3 (App. Bd., Dec. 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.
19. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).
20. ISCR Case No. 94-1075 at 3-4 (App. Bd., Aug. 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.
21. ISCR Case No. 93-1390 at 7-8 (App. Bd., Jan. 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.
22. *Egan*, 484 U.S. at 528.
23. *Id.*
24. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
25. Executive Order No. 10865 § 7.