

KEYWORD: Personal Conduct

DIGEST: Applicant has a long history of providing false information to employers and government agencies in order to conceal his three convictions for driving under the influence of alcohol and his poor employment record. Applicant failed to mitigate the security concerns arising from his personal conduct. Clearance is denied.

CASENO: 03-16819.h1

DATE: 01/24/2005

DATE: January 24, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-16819

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL J. BRESLIN

APPEARANCES

FOR GOVERNMENT

Sabrina R. Redd, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has a long history of providing false information to employers and government agencies in order to conceal his three convictions for driving under the influence of alcohol and his poor employment record. Applicant failed to mitigate the security concerns arising from his personal conduct. Clearance is denied.

STATEMENT OF THE CASE

On October 4, 2001, Applicant submitted an application for a security clearance. The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant under Executive Order 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 (the "Directive"). On October 27, 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 E, Personal Conduct.

Applicant answered the SOR in writing on December 6, 2004. He elected to have a hearing before an administrative judge.

The case was assigned to me on August 1, 2005. With the concurrence of Applicant and Department Counsel, I convened the hearing on November 1, 2005. The government introduced Exhibits 1 through 20. Applicant offered Exhibits A through F, and testified on his own behalf. DOHA received the final transcript of the hearing (Tr.) on November 16, 2005.

FINDINGS OF FACT

Applicant admitted the factual allegations in ¶¶ 1.a, 1.a.1, 1.a.2, 1.a.3, 1.c, 1.d, and 1.e of the SOR. Applicant's Answer to SOR, dated December 8, 2004. Those admissions are incorporated herein as findings of fact. He denied the factual allegations in ¶ 1.b of the SOR. *Id.* After a complete and thorough review of the evidence in the record, I make the following additional findings of fact.

Applicant is 54 years old. (Ex. 1 at 1.) He is a fire and security alarm system mechanic working for a defense contractor. (*Id.*)

In January 1988, state police officers arrested Applicant for driving under the influence of alcohol. (Ex. 4 at 4; Ex. 5.) At trial, Applicant pled guilty to the charge and was sentenced to a \$300.00 fine. (Ex. 4 at 4.)

In September 1996, state police officers stopped Applicant for a burnt-out headlight while he was driving home from work at a bar he owned. (Ex. 4 at 3; Ex. 6 at 1.) The officers noted an odor of alcohol, Applicant's unsteadiness, four empty beer bottles in the passenger compartment, and a cold bottle of beer, three-quarters full, on the console of the vehicle. (Ex. 6 at 2, 3.) A breath test revealed a blood/alcohol concentration of .187%. (Ex. 4 at 3.) Authorities charged Applicant with driving under the influence of alcohol, driving with an open container of alcoholic beverages in the vehicle, and defective equipment. (Ex. 6.) Applicant was found guilty of the charges in October 1996. (Ex. 4 at 3.) For the drunk driving offense, he was sentenced to a fine of \$1,000.00 (\$500.00 suspended), 10 days in jail (suspended), 40 hours of community service, and 12 months probation. (Ex. 4 at 3; Ex. 6.)

In May 1997, state police officers stopped Applicant for weaving while driving. (Ex. 7 at 3.) Applicant did not have his driver's license. (*Id.* at 1.) They noticed Applicant's blood-shot eyes, his unsteadiness, and a strong odor of alcohol. (*Id.* at 2.) Applicant refused to submit to a breath test. (*Id.*) He was confined until released on bond. (Ex. 4 at 3.) In July 1997, a court found Applicant guilty of driving under the influence of alcohol, and sentenced him to a fine of \$800.00, 10 days confinement (with credit for time served), 80 hours of community service, and 12 months probation. (Ex. 3 at 3; Ex. 7 at 2.) Applicant denied serving confinement. (Tr. at 48.) He successfully completed the requirements of the sentence.

In February 2000, Applicant began working for a company that provided services and equipment for theatrical productions. (Ex. 4 at 2.) Applicant's duties included servicing and repairing company equipment, including the fog machine. In May 2000, his employers told Applicant several times not to test the fog machine in the service area to avoid generating fog that would contaminate the area. (Ex. 20 at 2.) In June 2000, while working on a fog machine, Applicant accidentally caused it to generate fog in the service area. (*Id.*) He was terminated for failing to follow direct instructions. (*Id.*)

In January 2001, Applicant applied for work with a company that provided fire and security alarm systems. (Ex. 2; Ex. 4 at 1.) In order to work in the security alarm business, Applicant had to register with the state. In January 2001, Applicant completed the required "Registered Employee Information" form. (Ex. 3.) Question 8 on the form asked, among other things, whether Applicant had ever been convicted of any crime involving the illegal use of alcoholic beverages. (*Id.*) Applicant answered, "No." He did not report his DUI convictions in January 1988, September 1996, or May 1997.

The fire and security alarm company also asked Applicant to obtain and submit a state report showing his criminal history. Applicant contacted the local police department, requested a criminal history report, and paid the required fee. (Tr. at 39, 60.) He arranged to have the report mailed to his home, rather than directly to his employer. (Tr. at 60-61.) Applicant received the report (Ex. 8), opened it, and later provided it to his employer. (Tr. at 39, 61.) The report listed only one entry for a suspended license and a red light offense in June 1988. (Ex. 8 at 2.) The report did not list any of Applicant's three DUI convictions. Later, Applicant's former employer requested another report. (Ex. 17 at 2.) The police department provided a second report, dated May 15, 2001, and labeled, "Revised corrected copy," that reflected Applicant's DUI offense in January 1988. (Ex. 9.)

The fire and security alarm company terminated Applicant in April 2001. On the day he was terminated, his lead technician and supervisor informed him his dismissal was due to poor performance (Ex. 4 at 2), specifically, being unproductive. (Tr. at 42, 52-53, 67.) Applicant recognized that being fired for poor performance could hurt his efforts to get another job, and asked the supervisor how he could characterize his termination. (Tr. at 69.) They agreed for future job applications Applicant could describe it as "lack of work" although Applicant knew it was not the real reason. (Tr. at 43, 69.)

Applicant then applied for state unemployment compensation benefits. (Ex. 10.) He signed a state information form, under oath, indicating he was separated because of "lack of work." (*Id.*) Applicant was awarded unemployment compensation benefits, and his former employer was charged with payment of a portion of the amount. (Ex. 13.)

The former employer appealed, arguing Applicant was not eligible for unemployment compensation benefits because he was only a temporary worker, and because he had been fired for poor performance and failure to follow rules. (Exs. 12, 14, 15.) The former employer also alleged Applicant falsified his employment application by denying alcohol-related convictions, and also falsified his police background report. (Ex. 16.)

The state administrative hearing officer determined Applicant failed in his duty to provide a complete criminal history report to the employer. (Ex. 17 at 2.) The hearing officer determined Applicant was disqualified from further unemployment compensation benefits. (*Id.* at 3.) The former employer was reimbursed for its contributions. Applicant appealed the decision (Ex. 18), but the state board of review denied the appeal. (Ex. 19.)

In May 2001, Applicant completed an employment application for his current employer, a defense contractor.

(Applicant's Answer to SOR, *supra*.) The application inquired "Have you ever pled guilty or no contest to or ever been convicted of a crime?" Applicant answered, "No."

On October 1, 2001, he completed an SF 86, Security Clearance Application, in order to obtain the security clearance necessary for access to government work sites. (Ex. 1.) The application included Question 20:

Has any of the following happened to you in the past 7 years?

- Fired from a job
- Quit after being told you'd be fired
- Left by mutual agreement following allegations of misconduct
- Left a job by mutual agreement following allegations of unsatisfactory performance
- Left a job for other reason under unfavorable circumstances

In response, Applicant indicated he had been fired from the theatrical production company, and stated, "It is my belief that my discharge was due to cutbacks in Service Department expenses." (Ex. 1 at 6.) He also indicated he was fired from the fire and security alarm company for "failure to complete some required paperwork necessary for full-time employment status." (*Id.* at 5.)

The SF 86, Security Clearance Application, included Question 24, which asked:

Have you ever been charged with or convicted of any offense related to alcohol or drugs? For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances 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 "Yes," and reported his conviction for DUI in May 1997 and September 1996. (Ex. 1 at 7.) He did not report his conviction for DUI in 1988.

As noted above, DOHA initiated this action on October 27, 2004. At the hearing on November 1, 2005, Applicant indicated he denied being convicted of a crime because he believed a conviction for DUI was a traffic offense, not a crime. (Tr. at 37, 45.)

He swore he did not alter the police background report; rather, he provided his employer the document the police gave to him. (Tr. at 39.) He averred his employer was already aware of his history of traffic offenses. (Tr. at 60-61.) Applicant claimed that when he received the report (Ex. 8) in the mail he opened the letter but did not unfold it, therefore he was not aware it was inaccurate. (Tr. at 62.)

Applicant indicated the he cited "lack of work" as the justification for his unemployment compensation claim because his employer had agreed he could report it that way. (Tr. at 42, 67-69.) He admitted, however, that he knew the real reason was that he was regarded as unproductive. (Tr. at 53.)

With regard to the reasons for termination set forth on his SF 86, Applicant indicated he "carefully" chose the phrases "in my opinion" and "I believe" and they "were not meant to be factual reasons." (Tr. at 41.) He admitted he was fired from the theatrical production company for failure to follow explicit instructions. (Tr. at 58.)

Applicant submitted several letters from his managers and co-workers attesting to his professional skill, honesty, trustworthiness, and superior duty performance. (Exs. A, B, C, D, E, and F.) He has been promoted twice, and recognized for his outstanding contributions to the program.

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 potentially disqualifying and mitigating conditions under each guideline. The adjudicative guideline at issue in this case is:

Guideline E, Personal Conduct. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the applicant may not properly safeguard classified information. Directive, ¶ E2.A5.1.1.

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.

The Directive sets out various factors relevant to an applicant's personal conduct that may be potentially disqualifying. Paragraph E2.A5.1.2.1 indicates that "[r]eliable, unfavorable information provided by associates, employers, coworkers, neighbors or other associates" that shows "questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations" may raise security concerns. I find Applicant provided deliberately false and misleading information on a state Registered Employee Information Questionnaire in January 2001, when he denied any prior conviction for a crime involving the illegal use of alcoholic beverages (SOR ¶ 1.a). Applicant maintained that he did not believe his three DUI convictions met the definition of "crimes." I find this contention unpersuasive, given the seriousness of the offenses; the circumstances of Applicant's arrests and (temporary) confinement; the seriousness of his sentences he received, including probation; his age and experience; and the fact that he listed two of three of his DUIs as offenses on his SF 86 in October 2001.

Paragraph 1.b of the SOR alleged Applicant falsified information he gave to his employer by altering a criminal history report to delete a reference to a previous DUI conviction. The available evidence shows the first document Applicant submitted (Ex. 8) did not include any of his DUI convictions, and it does not match the later report (Ex.9). However, the evidence does not persuade me that Applicant altered Ex. 8-there are no signs of obvious alteration; Ex. 9 is clearly a new report, rather than a file copy of the first report, and both reports are inaccurate because they omit two other DUI convictions. For these reasons, I find for Applicant on this allegation. However, I also conclude Applicant submitted Ex. 8 knowing it was incomplete, with the intent to mislead his employer. I reject Applicant's contention that he arranged to have the document delivered to his house rather than sent to his employer, he opened the letter knowing that the information contained therein could cost him his job, but that he turned in Ex. 8 without looking at it. I will consider this information as part of the "whole person"concept.

This potential disqualifying condition also applies to the allegations in ¶¶ 1.c and 1.d of the SOR. When Applicant applied for unemployment compensation benefits and indicated the reason for his prior termination was "lack of work," he knew it was not true. Similarly, Applicant provided false information on an employment application when he denied ever having been convicted of a crime.

Under ¶ E2.A5.1.2.2 of the Directive, "[t]he deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire" may be disqualifying. Applicant provided false and misleading information in response to Question 20 of the SF 86, when he related he reasons for being terminated from three prior jobs. Prefacing his remarks with the words, "I believe" or words to that effect, does not alter that fact that the reasons he listed were not accurate. Applicant has a lengthy record of being fired from jobs under adverse circumstances, a record he would have known to be a liability in obtaining employment or a clearance. Applicant would have been very aware of Question 20. He admitted choosing his words carefully, showing his intent to deceive. I find Applicant deliberately falsified his answer to question 20 of the security clearance application by misrepresenting the true basis for his termination from three prior jobs. I conclude this potentially disqualifying condition applies.

Under the Directive, an applicant may mitigate the security concerns arising from questionable personal conduct under certain circumstances. Directive, ¶ E2.A5.1.3. I considered carefully all the potentially mitigating conditions, and conclude none apply.

I considered carefully all the facts and circumstances in this case in light of the "whole person" concept. Applicant intentionally falsified numerous document to minimize the extent of his criminal background and his poor employment record. Considering all the evidence, I conclude Applicant has not mitigated the security concerns arising from his personal conduct.

FORMAL FINDINGS

My conclusions as to each allegation in the SOR are:

Paragraph 1, Guideline E: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.a(1): Against Applicant

Subparagraph 1.a(2): Against Applicant

Subparagraph 1.a(3): Against Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: 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