

KEYWORD: Criminal Conduct; Alcohol

DIGEST: Applicant is a 31-year-old employee of a defense contractor. Applicant has a history of criminal conduct, including three convictions for traffic-related offenses in 1991, 1994, and 1996, a conviction for wrongful possession of a firearm in 1997, and two convictions for alcohol-related driving offenses in 1998 and 2000. Applicant has not mitigated the security concerns arising from his three most recent criminal convictions or his alcohol consumption. Clearance is denied.

CASENO: 03-17878.h1

DATE: 01/25/2005

DATE: January 25, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-17878

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL J. BRESLIN

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 31-year-old employee of a defense contractor. Applicant has a history of criminal conduct, including three convictions for traffic-related offenses in 1991, 1994, and 1996, a conviction for wrongful possession of a firearm in 1997, and two convictions for alcohol-related driving offenses in 1998 and 2000. Applicant has not mitigated the security concerns arising from his three most recent criminal convictions or his alcohol consumption. Clearance is denied.

STATEMENT OF THE CASE

On January 27, 2003, 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 May 24, 2004, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. The SOR alleges security concerns raised under the Directive in Guideline J, Criminal Conduct, and Guideline G, Alcohol Consumption.

Applicant answered the SOR in writing on June 13, 2004. Item 3, Answer to SOR, dated June 13, 2004. He originally requested a hearing, but later elected to have the matter decided on the written record in lieu of a hearing. Item 4, Supplemental Answer to SOR, dated August 24, 2004.

Department Counsel submitted the Government's written case on October 26, 2004. Department Counsel provided a complete copy of the file of relevant material (FORM) to Applicant, along with notice of his opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant received the FORM on November 17, 2004, but did not provide matters in response. The case was originally assigned to another administrative judge, but was reassigned to me on December 29, 2004.

PROCEDURAL ISSUES

The government moved to amend ¶ 1.b of the SOR to modify the formal charges arising from Applicant's arrest on July 7, 2000, and the disposition of the charges. FORM, dated October 26, 2004, at 3. The proposed amendment comports with the available information in the file and Applicant raised no objection, therefore the motion to amend is granted. The government also conceded that the allegations in ¶¶ 1.a, 1.b, and 1.c relate to a single arrest on July 7, 2000, and the allegations in ¶¶ 1.d and 1.e relate to a single arrest on July 11, 1998. *Id.* at 4.

FINDINGS OF FACT

Applicant denied the allegations in ¶ 1.c of the SOR. Item 3, *supra*, at 1. He admitted all the remaining factual allegations in the SOR, with explanations. *Id.* 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 is 31 years old. Item 6, Security Clearance Application, dated January 27, 2003, at 1. He is employed by a defense contractor as a warehouse specialist. *Id.* He seeks a security clearance.

Applicant was a member of a gang while he was in high school. Item 8, Applicant's Statement, dated January 20, 1999, at 1. He asserts he joined because of peer pressure. *Id.* He denies ever being arrested for being a gang member or having problems with law enforcement during that time. *Id.* Applicant's younger brother was killed in gang violence. *Id.* Applicant maintains he was no longer a gang member by the time of his first arrest. *Id.*

Applicant has a history of criminal offenses. In March 1991, when Applicant was about 17 years old, he was arrested for improperly riding his bicycle on a public roadway, operating a bicycle with improper equipment, and failure to appear. Item 16, County Sheriff's Booking Record, dated March 3, 1991, at 1. Applicant pled guilty to all counts and was sentenced to two days confinement. *Id.* at 3.

In September 1994, when Applicant was about 21 years old, he failed to obey a pedestrian signal and was cited for the offense. Item 15, Court Minute Order, dated March 14, 2003, at 1. In March 2003, Applicant pled nolo contendere and the court found him guilty of the offense. *Id.* The court sentenced Applicant to a fine. *Id.*

In July 1996, Applicant failed to obey the order of a school crossing guard and was charged with a violation of the vehicle code. Item 14, Court Minute Order, dated March 14, 2003. The case was removed from the court calendar for a period of time. *Id.* In March 2003, Applicant pled nolo contendere. The court found him guilty of the offense and imposed a fine. *Id.*

In September 1997, Applicant discharged his handgun to ward off a group of individuals who had threatened him and his brother and had thrown a brick into his automobile's windshield. Item 7, Applicant's Statement, dated December 1, 1998, at 1; Item 8, Applicant's Statement, dated January 20, 1999, at 2; Item 9, Applicant's Statement, dated June 12, 2003, at 1. The police arrested Applicant and charged him with negligent discharge of a firearm, a felony. Item 13, Superior Court Records, dated September 16, 1997, at 8. Subsequently, the prosecutors dropped that charge and substituted the misdemeanor charges of carrying a loaded firearm in a vehicle in a city and having a concealed firearm in a vehicle. *Id.* at 17-18. In October 1997, Applicant pled guilty to having a concealed firearm in a vehicle. *Id.* at 1. The court sentenced him to 32 days confinement (time served), and ordered his weapon destroyed. *Id.* at 2-3; Item 7, *supra*, at 1.

In 1998, Applicant began working as a receiving clerk for a federal contractor. Item 6, *supra*, at 2. He applied for a security clearance on March 8, 1998. Item 5, SF 86, Questionnaire for National Security Positions, dated March 8, 1998. In response to question 23a, Applicant denied ever being charged with a felony offense. Item 5, *supra*, at 7. In response to question 23f, he denied having been arrested or convicted of any offenses within the previous seven years other than the wrongful discharge of a firearm. *Id.* A security investigator interviewed Applicant in December, 1998. Item 7, *supra*, at 2. Applicant indicated he did not list the felony charge because it had been dismissed in court. *Id.* He indicated he forgot about the conviction for failure to appear and riding a bicycle improperly. *Id.* Applicant left the job in September 1999 without receiving a security clearance. Item 6, *supra*, at 2, 7.

In July 1998, Applicant went out with friends to a sports club to celebrate his birthday and had several beers. Item 9, *supra*, at 2. He then drove his vehicle while under the influence of alcohol and was arrested by the police. *Id.* The police charged Applicant with driving without a license, driving under the influence of alcohol, and driving with a blood-alcohol content greater than .08%. Item 12, Court Records, dated August 6, 1998, at 1. In August 1998, Applicant pled guilty to driving under the influence of alcohol. *Id.* The court sentence him to confinement for 15 days and probation. *Id.* He was also required to take alcohol awareness training classes. Item 9, *supra*, at 3.

In July 2000, Applicant went out with a group to welcome home a friend who had returned from military service. Item 9, *supra*, at 2. He drank beer at a friend's house. *Id.* Later that evening, his car was vandalized and a window broken out. *Id.* Applicant decided to drive his car home, rather than leaving it outside in that neighborhood. *Id.* Patrol officers arrested him and charged him with driving while privileges were suspended, driving under the influence of alcohol, driving with a blood-alcohol content greater than .08%, and possession of an illegal firework. *Id.*; Item 11, Court

Records, dated July 11, 2000. Applicant pled guilty to driving with a blood-alcohol concentration greater than .08%, and the remaining charges were dismissed. Item 11, *supra*. The court sentenced Applicant to confinement for 45 days, a fine, 18 months of alcohol awareness training, and five years' probation. Item 9, *supra*, at 3.

In February 2002, Applicant began working for a defense contractor. Item 6, *supra*, at 2. He applied for a security clearance by submitting an SF 86, Security Clearance Application, on January 27, 2003. *Id.* at 1. In response to question 30, Applicant denied that his use of alcoholic beverages resulted in any alcohol-related treatment or counseling. *Id.* at 7. However, he reported his two convictions for driving drunk and included a reference to alcohol school as part of his punishment for the 1998 offense. *Id.* at 6, 7. In an statement to security investigators, Applicant denied having a problem with alcohol, claiming that he only drinks on special occasions. Item 9, *supra*, at 4.

POLICIES

In Executive Order 12968, *Access to Classified Information*, § 3.1(b) (August 4, 1995), the President provided that eligibility for access to classified information shall be granted only 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." 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.

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 guidelines at issue in this case are:

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.

Guideline G, Alcohol Consumption - 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.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to these adjudicative guidelines, 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.

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.

Guideline J, Criminal Conduct

Under Guideline J of the Directive, a history or pattern of criminal conduct may disqualify an applicant from holding a security clearance. Specifically, ¶ E2.A10.1.2.2 of the Directive provides that a "single serious crime or multiple lesser offenses" may be disqualifying. Similarly, an "admission of criminal conduct" may be disqualifying under ¶ E2.A10.1.2.1 of the Directive. Applicant's admissions and the substantial evidence show that he has five convictions spanning a ten-year time frame. The offenses also indicate patterns of misconduct: three of the convictions relate to failure to obey regulations related to traffic, and two involve alcohol-related driving offenses. I find Applicant has a history and a pattern of criminal conduct and has admitted to criminal conduct. I conclude these potentially disqualifying conditions apply.

Under the Directive, the security concerns arising from Applicant's criminal conduct may be mitigated under certain circumstances. Paragraph E2.A10.1.3.1 of the Directive provides that it is potentially mitigating where "[t]he criminal behavior was not recent." Three of Applicant's convictions were for relatively minor offenses in 1991, 1994, and 1996, and resulted in minimal fines. I find this behavior was not recent, therefore this mitigating condition applies to these incidents (SOR, ¶¶ 1.g, 1.h, 1.i). Applicant's unlawful possession of a firearm occurred in 1997, but the sentence included three years' probation. Applicant's drunk-driving offenses in 1998 and 2000 also included extended periods of probation. Applicant was on probation from his last offense at the time he applied for the security clearance at issue. I find Applicant's convictions in 1997, 1998, and 2000 are recent, therefore this mitigating condition does not apply to these incidents (SOR, 1.b, 1.e, and 1.f).

It may also be mitigating if the "crime was an isolated event." Directive, ¶ E2.A10.1.3.2. Applicant admitted to five criminal convictions in ten years. It is readily apparent that Applicant's criminal conduct was not an isolated event. This potentially mitigating condition does not apply.

Under the Directive, ¶ E2.A10.1.3.3, it may be mitigating where an applicant "was pressured or coerced into committing the act and those pressures are no longer present in that person's life." There is no evidence Applicant was pressured or coerced into committing any of these offenses. He denied being involved in a gang at the time of his first arrest or at any time thereafter. To the contrary, Applicant admits his friends tried to dissuade him from driving after drinking alcohol but he elected to drive anyway, resulting in the last conviction. I find this potentially mitigating condition does not apply.

Under ¶ E2.A10.1.3.3 of the Directive, it may be mitigating where "the factors leading to the violation are not likely to recur." Similarly, it may be mitigating where "[t]here is clear evidence of rehabilitation." Directive, ¶ E2.A10.1.3.3. The state courts employed a series of corrective and rehabilitative measures designed to amend Applicant's conduct. With regard to the conduct relating to traffic offenses, a substantial period of time has passed without another offense, suggesting that the corrective action was successful and that similar violations are not likely to recur. However, with regard to the alcohol-related incidents, it is not apparent that the rehabilitative efforts have been successful. Applicant completed the alcohol awareness training course after the 1998 conviction, but committed a similar crime about two years later. At the time of Applicant's response to the SOR, he had not begun the second court-ordered alcohol awareness training program. Finally, there is no evidence indicating any attempt at rehabilitation related to the handgun violation. I conclude these potentially mitigating factors apply to the traffic-related offenses, but do not apply to the remaining convictions.

I considered all the circumstances in light of the "whole person" concept. Most significantly, I considered Applicant's representation that he has matured and become more responsible. Unfortunately, considering Applicant's lack of candor in answering security clearance questionnaires in the past, I have serious reservations about his credibility. I conclude Applicant has not mitigated the security concerns arising from his criminal conduct.

Guideline G, Alcohol Consumption

Under ¶ E2.A7.1.2.1 of the Directive, "[a]lcohol-related incidents away from work, such as driving while under the influence," may be disqualifying. Applicant admitted, and the substantial evidence demonstrates, that he drove a vehicle under the influence of alcohol on two occasions, resulting in convictions and sentencing. I conclude this potentially disqualifying condition applies to the allegations in ¶¶ 1.b and 1.e in the SOR. I also find that the allegations in ¶¶ 1.a, 1.c, and 1.d were not accurate, and only repeated the instances described above.

Under the Directive, ¶ E2.A7.1.3.1, it may be mitigating where "[t]he alcohol-related incidents do not indicate a pattern." Applicant twice drove his vehicle while under the influence of alcohol; this shows a pattern of behavior. I conclude this mitigating condition does not apply.

It may be mitigating where "[t]he problem occurred a number of years ago and there is no indication of a recent problem." Directive, ¶ E2.A7.1.3.2. Applicant's drunk driving offenses occurred over four years ago. Also, there is no evidence indicating Applicant has had a problem with alcohol since that time. I conclude this potentially mitigating condition applies. However, I distinguish this mitigating condition from determinations concerning Applicant's rehabilitative potential or findings relating to the relative recency of Applicant's criminal conduct.

It may also be mitigating where the individual shows "[p]ositive changes in behavior indicative of sobriety." Directive, ¶ E2.A7.1.3.3. The available evidence shows Applicant completed the court-ordered alcohol awareness training after his first alcohol-related driving offense in 1998, and then committed a similar crime in 2000. He had not completed his second alcohol awareness training program at the time he applied for this clearance. Applicant indicated that he now only drinks on special occasions. Given his questionable record of rehabilitation, I am not persuaded that Applicant has shown positive changes in his behavior supportive of sobriety. I find this mitigating condition does not apply.

Finally, ¶ E2.A7.1.3.4 of the Directive provides it is potentially mitigating where,

[f]ollowing a diagnosis of alcohol abuse or alcohol dependence, the individual has successfully completed inpatient or outpatient rehabilitation along with aftercare requirements, participates frequently in meetings of Alcoholics Anonymous or a similar organization, has abstained from alcohol for a period of at least 12 months, and received a favorable prognosis by a credentialed medical professional or licensed social worker who is a staff member of a recognized alcohol treatment program.

In this case, there is no evidence of a diagnosis of alcohol abuse or alcohol dependence, no proof Applicant completed a rehabilitation program and its aftercare requirements, and no suggestion that Applicant participates in Alcoholics Anonymous or a similar program. Applicant admitted he still consumes alcohol on occasion. Finally, there is no evidence of a favorable prognosis. I conclude this potentially mitigating condition does not apply.

I considered all the potentially disqualifying and mitigating conditions in light of the "whole person" concept. I conclude Applicant has not mitigated the security concerns arising from his alcohol consumption as set out in ¶¶ 1.b and 1.e of the SOR.

FORMAL FINDINGS

My conclusions as to each allegation in the SOR are:

Paragraph 1, Guideline J: AGAINST APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: For Applicant

Subparagraph 1.e: Against Applicant

Subparagraph 1.f: Against Applicant

Subparagraph 1.g: For Applicant

Subparagraph 1.h: For Applicant

Subparagraph 1.i: For Applicant

Paragraph 2, Guideline G: AGAINST APPLICANT

Subparagraph 2.a: 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