

KEYWORD: Criminal Conduct; Alcohol; Financial

DIGEST: Applicant was sentenced to 10 years imprisonment for residential burglary and unlawful restraint, and served two years and five months in prison. The provisions of 10 U.S.C. § 986 require denial of his clearance. Clearance denied.

CASENO: 03-18799.h1

DATE: 02/13/2006

DATE: February 13, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-18799

DECISION OF ADMINISTRATIVE JUDGE

JOHN GRATTAN METZ, JR

APPEARANCES

FOR GOVERNMENT

Jason Perry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was sentenced to 10 years imprisonment for residential burglary and unlawful restraint, and served two years and five months in prison. The provisions of 10 U.S.C. § 986 require denial of his clearance. Clearance denied.

STATEMENT OF THE CASE

Applicant challenges the 29 November 2004 Defense Office of Hearings and Appeals (DOHA) Statement of Reasons (SOR) recommending denial or revocation of his clearance because of criminal conduct, alcohol consumption, and financial considerations. [\(1\)](#) Applicant answered the SOR on 17 January 2005 and requested decision without hearing. He did not respond to DOHA's 12 August 2005 File of Relevant Material (FORM). The record closed 22 September 2005, when the response was due. DOHA assigned the case to me 7 November 2005.

FINDINGS OF FACT

[\(2\)](#)

Applicant admitted the allegations of paragraphs 1 and 2 of the SOR. He denied the allegations of paragraph 3. Accordingly, I incorporate these admissions as findings of fact.

Applicant--a 51-year-old field technician for a defense contractor since October 2000--seeks access to classified information. He has not previously had a clearance.

Applicant has a 20-year history of criminal conduct demonstrated by nine arrests between August 1984 and February 2004.⁽³⁾ The most security significant of these arrests was a September 1984 arrest for aggravated kidnaping, kidnaping, residential burglary, and unlawful restraint arising out of a domestic dispute between Applicant and his estranged wife. He was convicted of residential burglary and unlawful restraint and sentenced to 10 years and 3 years respectively. His successful appeal resulted in reduction of his sentence to time served: two years and five months, thus triggering the provisions of 10 U.S.C. §986.

In addition, Applicant had a February 2004 DUI charge (failure to submit)⁽⁴⁾, a July 2002 drunk in public charge (Applicant admitted having had too much to drink), a January 2001 DUI charge (.10 B.A.C.), a September 1999 resisting a peace officer charge (alcohol-related bar fight), and a January 1999 battery/criminal damage to property charge.⁽⁵⁾

In his August 2003 sworn statement and his answer to the SOR, Applicant minimized the significance of his arrests, even where the court dispositions or other documentation belie his version of events. He provided documentation of his good work performance and reputation in his current job. He asserts that he met all the conditions of his February 2004 DUI conviction, including counseling and AA participation, and claims that he has continued with AA to ensure that "the drinking incidences cease." However, he provided no corroboration of the claimed AA meetings or counseling.

POLICIES

The Directive, Enclosure 2 lists adjudicative guidelines to be considered in evaluating an Applicant's suitability for access to classified information. Administrative Judges must assess both disqualifying and mitigating conditions under each adjudicative issue fairly raised by the facts and circumstances presented. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3. of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative for or against Applicant. However, specific adjudicative guidelines should be followed whenever a case can be measured against them, as they represent policy guidance governing the grant or denial of access to classified information. Considering the SOR allegations and the evidence as a whole, the relevant, applicable, adjudicative guidelines are Guideline J (Criminal Conduct), Guideline G (Alcohol

Consumption), and Guideline F (Financial Considerations).

Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 amended Title 10 U.S. Code to add a new section, § 986 [the Smith Amendment], precluding the initial granting or renewal of a security clearance by the Department of Defense (DoD) under four specific circumstances. On 7 June 2001, the Deputy Secretary of Defense issued implementing regulations under DoD 5200.2-R; the Director, DOHA issued Operating Instruction 64 (O.I. 64) on 10 July 2001. On October 9, 2004, Section 1062 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 was approved and adopted, amending portions of §986 of Title 10, United States Code, to provided, in pertinent part, that Applicants who are both sentenced to prison for more than one year and "incarcerated as a result of that sentence for not less than one year," may not be given a clearance. The amendments further provided that waivers "may be authorized only in accordance with standards and procedures prescribed by, or under the authority of, an Executive order or other guidance issued by the President."

BURDEN OF PROOF

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an Applicant's security clearance. The government must prove, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If it does so, it establishes a *prima facie* case against access to classified information. Applicant must then refute, extenuate, or mitigate the government's case. Because no one has a right to a security clearance, the Applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability, and trustworthiness of those who must protect national interests as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.⁽⁶⁾

CONCLUSIONS

The government established a Guideline J case by demonstrating that Applicant was convicted of residential burglary and unlawful restraint, was sentenced to 10 years imprisonment, and served two years and five months.⁽⁷⁾ This criminal conduct cannot be mitigated under 10 U.S.C. § 986. The statute requires that Applicant's clearance be denied because he served a over a year.⁽⁸⁾ However, even without this requirement, I could not find Applicant's criminal conduct mitigated. Although this arrest occurred over 20 years ago, Applicant had five alcohol-related arrests between January

1999 and February 2004. None of the Guideline J mitigating factors apply. His conduct is recent, ⁽⁹⁾ not isolated, ⁽¹⁰⁾ and there is little evidence of successful rehabilitation. ⁽¹¹⁾ Accordingly, I conclude Guideline J against Applicant.

The government established a Guideline G case and Applicant did not mitigate those concerns. Applicant's five alcohol-related incidents over five years ⁽¹²⁾ raise serious security concerns whether he has a problem with alcohol. He meets none of the mitigating factors for alcohol consumption. His alcohol incidents indicate a pattern of abuse. ⁽¹³⁾ His alcohol problem is recent. ⁽¹⁴⁾ Although he claims to have made changes in his personal life and learned important lessons from his alcohol counseling, he has provided neither corroboration nor details. ⁽¹⁵⁾ Consequently, his evidence falls short of meeting his burden of demonstrating that he does not have an alcohol problem. I conclude Guideline G against Applicant.

The government did not establish a Guideline F case. Applicant's answer to the SOR established that Applicant had resolved these accounts before the SOR was issued.

FORMAL FINDINGS

Paragraph 1. Guideline J: AGAINST THE APPLICANT

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: For the Applicant

Subparagraph d: Against the Applicant

Subparagraph e: Against the Applicant

Subparagraph f: Against the Applicant

Subparagraph g: For the Applicant

Subparagraph h: Against the Applicant

Subparagraph i: For the Applicant

Subparagraph j: Against the Applicant

Paragraph 2. Guideline G: AGAINST THE APPLICANT

Subparagraph a: Against the Applicant

Paragraph 3. Guideline F: FOR THE APPLICANT

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

DECISION

In light of all 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 denied.

John G. Metz, Jr.

Administrative Judge

1. Required by Executive Order 10865, as amended and Department of Defense Directive 5220.6, as amended (Directive).
2. With his answer, Applicant submitted documentation that he had not been indebted as alleged in the SOR, having resolved those financial issues before the SOR was issued.
3. Applicant's explanations for the conduct alleged at 1.c. (domestic assault in November 2001), 1.g. (grand theft in February 1989), and 1.i. (marijuana possession) and the recorded dispositions (no action taken in the first two, charges dropped in the last) lead me to conclude that these three arrests lack security significance as criminal conduct.
4. Applicant was stopped for driving 76 m.p.h. in a 55 zone and eluding a police officer. Although he claims to have consumed only three beers during a night of karaoke and drinks, he declined the breathalyzer because of concerns that the combination of alcohol and medication he was taking would produce a false positive. The medication--a prescription anti-depressant--specifically warns patients against alcohol use while taking the drug.

5. Although not alleged under Guideline G, this arrest was also alcohol-related.
6. *See, Department of the Navy v. Egan*, 484 U.S. 518 (1988).
7. E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;
E2.A10.1.2.2. A single serious crime or multiple lesser offenses.
8. E2.A10.1.2.3. Conviction in a Federal or State court, including a court-martial, of a crime and sentenced to imprisonment for a term exceeding one year (As issued by the Deputy Secretary of Defense on 7 June 2001, amending DoD 5200.2-R.).
9. E2.A10.1.3.1. The criminal behavior was not recent.
10. E2.A10.1.3.2. The crime was an isolated incident.
11. E2.A10.1.3.6. There is clear evidence of successful rehabilitation.
12. 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; E2.A7.1.2.5. Habitual or binge consumption of alcohol to the point of impaired judgment;
13. E2.A7.1.3.1. The alcohol related incidents do not indicate a pattern;
14. E2.A7.1.3.2. The problem occurred a number of years ago and there is no indication of a recent problem;
15. E2.A7.1.3.3. Positive changes in behavior supportive of sobriety;