

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant is a senior computer systems engineer for a defense contractor who held a security clearance while serving on active military duty. He had three minor alcohol-related arrests before entering active military duty. While on active military duty, he was convicted of domestic violence and alcohol-related offenses stemming from domestic problems, and he completed anger and alcohol awareness programs. He is now divorced from his wife. He was arrested for possession of an illegal substance but the charge was dismissed. He failed to list the arrest on his security clearance application because he did not know the employer requesting the information. He voluntarily told the security agents of the arrest before being confronted with the arrest. Applicant has mitigated security concerns related to criminal and personal conduct. Clearance is granted.

CASENO: 04-01389.h1

DATE: 03/31/2005

DATE: March 31, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-01389

**DECISION OF ADMINISTRATIVE JUDGE**

**THOMAS M. CREAN**

**APPEARANCES**

## **FOR GOVERNMENT**

Marc E. Curry, Esq., Department Counsel

## **FOR APPLICANT**

*Pro Se*

## **SYNOPSIS**

Applicant is a senior computer systems engineer for a defense contractor who held a security clearance while serving on active military duty. He had three minor alcohol-related arrests before entering active military duty. While on active military duty, he was convicted of domestic violence and alcohol-related offenses stemming from domestic problems, and he completed anger and alcohol awareness programs. He is now divorced from his wife. He was arrested for possession of an illegal substance but the charge was dismissed. He failed to list the arrest on his security clearance application because he did not know the employer requesting the information. He voluntarily told the security agents of the arrest before being confronted with the arrest. Applicant has mitigated security concerns related to criminal and personal conduct. Clearance is granted.

## **STATEMENT OF THE CASE**

On June 4, 2004, the Defense Office of Hearing and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to not grant a security clearance to Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive). Applicant acknowledged receipt of the SOR on June 8, 2004. The SOR alleges security concerns under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of the Directive.

Applicant answered the SOR in writing on July 21, 2004. He admitted all of the allegations under Guidelines J and E but offered detail explanations for his answers. He requested a hearing before an administrative judge. The request for a hearing was received by DOHA on July 26, 2004. Department Counsel was prepared to proceed with the case on February 9, 2005, and the case was assigned to me on February 16, 2005. A notice of hearing was issued on February 16, 2005, and the hearing was held on March 8, 2005. Three government exhibits, eleven Applicant exhibits, and the testimony of the Applicant were received during the hearing. The transcript was received on March 16, 2005.

## FINDINGS OF FACT

Applicant is a 31-year-old man employed for over two years as a senior computer systems engineer by a defense contractor. He served over seven years on active military duty. He is unsure if he had a security clearance while on active duty. (1) Applicant received letters of commendation and a military award for achievement and was meritoriously promoted while on active duty. (2)

Before joining the military and while not old enough to drink or possess alcohol, Applicant was charged with three separate alcohol-related offenses in 18 months. He was found guilty of having an open container of alcohol and paid a fine, found guilty of illegal possession of alcohol and fined, and found guilty of urinating in public and fined. (3)

While Applicant was serving on active duty, he experienced marital problems. After an unaccompanied overseas tour, Applicant and his wife had more domestic problems and Applicant started drinking alcohol to excess. Applicant was convicted of assault and battery on a family member and received a suspended jail sentence and paid a fine. His wife was granted a protection order from Applicant. He attended, on his own, and completed a changing-anger-pattern support course. (4) As a result of continued domestic problems, Applicant was arrested six months later for driving while intoxicated and received a suspended jail sentence and paid a fine. He attended and completed an Alcohol Safety Action Program. (5) Applicant and his wife decided to live separately but still continued to socialize together. Applicant arrived at his wife's house in the middle of the night to find another man with her. There was an altercation and Applicant was charged with assault. His wife was charged with turning in a false alarm. The charges for both were dismissed. (6) Applicant and his wife are now divorced. There were two children from the marriage that he is supporting. (7)

Shortly after leaving active duty, Applicant attended a party. The police raided the party and Applicant was charged with possession of a controlled substance and associating with others maintaining a common nuisance. The charges were dismissed, but Applicant admitted he used a controlled substance at the party. He experimented with the controlled substance because he could not use drugs while on active duty. (8)

After leaving active duty, Applicant sought employment in the private sector with defense contractors. He was called by a potential employer he did not know and asked if he was interested in working for the employer on defense related work. The employer requested Applicant complete a security clearance application. Applicant listed his alcohol-related offenses, but not the possession of controlled substance charge in response to questions 24 asking if he had ever been charged with or convicted of any offense related to alcohol or drugs. He also did not list the use of the controlled substance in response to question 27 asking if he had ever used any controlled substance. Applicant did not know the prospective employer at the time and did not want to include the information on his security clearance application. He talked to the prospective employer and told him about the charge and use of marijuana. However, the employer had already forwarded the Applicant's security clearance application to the Defense Security Service (DSS). When Applicant was interviewed by a special agent from DSS, he voluntarily, without being requested, disclosed the drug use information to the agent. Applicant did not work for the first employer, but did accept a position with his present defense contractor employer. (9)

## 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."<sup>(10)</sup> Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.<sup>(11)</sup>

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions and mitigating conditions for each guideline. Each clearance decision must be fair, impartial, and a commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶ 6.3.1 through ¶ 6.3.6.

"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." An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person.<sup>(12)</sup> An administrative judge should consider: (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 applicant'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 of recurrence.<sup>(13)</sup>

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 necessarily a determination as to the loyalty of the applicant.<sup>(14)</sup> 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.

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.<sup>(15)</sup> Thereafter, Applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate facts.<sup>(16)</sup> An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."<sup>(17)</sup> "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability."<sup>(18)</sup> "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security."<sup>(19)</sup>

Based upon a consideration of the evidence, I find the following adjudicative guidelines most pertinent to the evaluation of the facts in this case:

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

Guideline E - Personal Conduct: A security concern exists for conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Any of these characteristics in a person could indicate that the person may not properly safeguard classified information.

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

## CONCLUSIONS

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

The government has established its case under Guideline J. Applicant's arrests and convictions for alcohol-related criminal activity and assault and battery, and his arrest for possession of illegal drugs and a related offense brings the matter under Criminal Conduct Disqualifying Conditions Directive ¶ E2.A10.1.2.1 (*allegations or admission of criminal conduct, regardless whether the person was formally charged*); and Directive ¶ E2.A10.1.2.2 (*a single serious crime or multiple lesser offenses*). Applicant admitted he was arrested and convicted of three alcohol related criminal offenses before he was 21 years old. He admitted he was charged with and convicted of domestic violence offenses. He admitted he was charged with illegal drug related offenses. I conclude the aforementioned Criminal Conduct Disqualifying Conditions have been established.

The Criminal Conduct Mitigating Conditions that are applicable to this case are Directive ¶ E2.A10.1.3.3 (*the criminal behavior was not recent*); and Directive ¶ E2.A10.1.3.6 (*there is clear evidence of successful rehabilitation*). Three of the alcohol-related offense happened when Applicant was young and are over 10 years old. The only other alcohol-related incident happened as a result of a domestic problem. Between the first three incidents and the later incident, Applicant had served successfully on active military duty and matured. The first three offenses are not recent and have

not lead to current similar criminal conduct. There are clear indications of successful rehabilitation by Applicant from the conditions that caused the domestic violence problems. Applicant successfully completed a domestic violence prevention and rehabilitation program. He is divorced from his wife removing him from the situation that caused the domestic violence offenses. After his driving while intoxicated offense, Applicant successfully completed a driving and alcohol-related course. There have been no further incidents of either domestic violence or alcohol abuse. While the drug related charges were dismissed, there is evidence Applicant was engaged in the underlying activity leading to the charges. However, Applicant admitted his involvement and that it was a one-time experiment. There is no evidence of repeated misconduct or drug use. I conclude Applicant has successfully mitigated the security concerns under Guideline J.

Applicant's failure to list his one time use of a controlled substance in response to questions 24 and 27 of the security clearance application brings the matter under Personal Conduct Disqualifying Condition ¶ 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*). Question 24 asks whether the applicant has ever been charged with or convicted of an offense relating to alcohol or drugs. Question 27 asks since the age of 16 or in the last 7 years whichever is shorter has the applicant used any illegal drugs. Applicant listed only his alcohol-related offenses in response to question 24 and answered "NO" to the use of illegal drugs. By his own admission, Applicant used an illegal drug once in 2001. A finding of falsification requires evidence that the Applicant acted with an intent to mislead or deceive the government. The record evidence as a whole must be considered to determine whether there is direct or circumstantial evidence concerning Applicant's intent or state of mind at the time the statement was made. Applicant stated he did not provide the correct information. He explained that he did not want to list the offense since he did not know the employer requesting him to complete the form. Applicant had a duty to answer questions 24 and 27 truthfully, even though he did not know the prospective employer asking him to complete the security clearance application. I conclude the aforementioned Personal Conduct Disqualifying Condition has been established.

The Personal Conduct Mitigating Condition that applies to this case is Directive ¶ E2.A5.1.3.3 (*the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*). Even though he did not answer the questions truthfully, the un-rebutted testimony is Applicant told the employer and DSS agent as soon as he could about the erroneous answers and his reasons for providing erroneous answers before being confronted with the untruthful answers. I conclude Applicant has mitigated security concerns under Guideline E.

I carefully considered all of the circumstances in light of the "whole person" concept for a fair, impartial, and commonsense decision. I conclude Applicant is eligible for access to classified information.

### **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:

Paragraph 1, Guideline J: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: For Applicant

Subparagraph 1.g.: For Applicant

Paragraph 2, Guideline E: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

### **DECISION**

In light of all of the circumstances presented in the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Thomas M. Crean  
Administrative Judge

1. Applicant exhibit A (DD Form 214, dated Oct. 26, 2001); Tr. 56-58.
2. Applicant exhibit B (Meritorious promotion, dated Dec. 2, 1995); Applicant exhibit C (Award of Achievement Medal, dated Sep. 27, 1996); Applicant Exhibit D (Commendation, dated April 27, 2001); Tr. 14-19.
3. Tr. 34.
4. Tr. 21; Applicant Exhibit F (Certificate of Completion, dated Sep. 23, 1999).
5. Tr. 23-28.
6. Applicant Exhibit G and H (Case information sheets, dated Jul. 24, 2000 and May 2, 2001); Tr. 27-29.
7. Tr. 20.
8. Tr. 33-34; Government exhibit 2 (Applicant's statement, dated Jun. 18, 2003) at 3.
9. Tr. 35-36.
10. *Department of the Navy v. Egan*, 484 U.S. 518 (1988).
11. Directive ¶ E2.2.1.
12. *Id.*
13. Directive ¶¶ E2.2.1.1 through E2.2.1.9.
14. *See* Exec. Or. 10865 § 7.
15. Directive ¶ E3.1.14.
16. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15.
17. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).
18. ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993))
19. *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.