

KEYWORD: Criminal Conduct; Personal Conduct; Alcohol; Drugs

DIGEST: Applicant has a record of 12 convictions for various criminal offenses (breach of peace, possession of marijuana, disorderly conduct, habitual offender, assault, failure to appear, operating after suspension, operating under the influence, and cultivation of marijuana) committed between April 1974 and September 2000. He also consumed a case of alcohol per day for about 25 years, and knowingly omitted his marijuana cultivation conviction from his October 2002 security clearance application. With assault charges pending against him as of September 2005, Applicant has failed to demonstrate he possesses the requisite good judgment to hold a clearance. Clearance is denied.

CASENO: 04-01442.h1

DATE: 03/31/2006

DATE: March 31, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-01442

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has a record of 12 convictions for various criminal offenses (breach of peace, possession of marijuana, disorderly conduct, habitual offender, assault, failure to appear, operating after suspension, operating under the influence, and cultivation of marijuana) committed between April 1974 and September 2000. He also consumed a case of alcohol per day for about 25 years, and knowingly omitted his marijuana cultivation conviction from his October 2002 security clearance application. With assault charges pending against him as of September 2005, Applicant has failed to demonstrate he possesses the requisite good judgment to hold a clearance. Clearance is denied.

STATEMENT OF THE CASE

On December 14, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons under Guideline J, criminal conduct, Guideline E, personal conduct, Guideline G, alcohol consumption, and Guideline H, drug involvement, why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. [\(1\)](#)

On January 18, 2005, Applicant answered the SOR. By letter dated January 26, 2005, he requested a hearing before a DOHA administrative judge. The case was assigned to me on August 1, 2005. On September 7, 2005, I scheduled a hearing for September 28, 2005. At the hearing, 11 government exhibits and one Applicant exhibit were admitted, and Applicant testified, as reflected in a transcript received on October 19, 2005.

FINDINGS OF FACT

DOHA alleged under Guidelines J and E that Applicant engaged in a pattern of criminal activity (19 arrests and several convictions, including for habitual offender in 1987, 1992, 1994, 1995, OUI in 1999 and cultivation of marijuana and criminal forfeiture -firearms-in 2000) between April 1974 and February 2001.⁽²⁾ Personal conduct concerns were also alleged related to Applicant's failure to disclose his 2001 conviction on his October 2002 security clearance application. Applicant's 1974 possession of marijuana and 2001 marijuana cultivation convictions were cross-alleged under Guideline H. Under Guideline G, DOHA alleged Applicant consumed on average 24 to 36 beers daily from 1972 to 1999, was charged with alcohol-related offenses six times from the late 1970s to early 1980s, and engaged in drunk driving on approximately six occasions from about 1984 to 2002. Applicant denied the three offenses he was alleged to have committed in 1974 (SOR ¶¶ 1.q., 1.r., 1.s.) and the conduct under Guideline E (SOR ¶¶ 2.a., 2.b., 2.c., and 2.d.). He admitted the remaining allegations in the SOR. His admissions are incorporated as findings of fact. After a thorough review and consideration of the evidence of record, I make the following additional findings:

Applicant is a 51-year-old outside machinist seeking a secret-level security clearance. From Fall 2002 to January 2005, he worked for a defense contractor (company A). On issuance of the SOR, his interim secret clearance was withdrawn, and he was laid off, apparently subject to recall. As of September 2005, he was collecting workmen's compensation benefits for an injury sustained on the job.⁽³⁾

Applicant started drinking alcohol as a young teen in the 1960s. From about 1972 to 1999, he consumed on average a case of beer daily, and an additional six-pack on occasion. He also smoked marijuana from 1973 to 1980. Applicant's drinking led to several criminal violations in two different states over the years. A detailed history of his legal infractions follows:

After graduating from a technical school as a tool and die maker in 1973, Applicant went to work for company A that November. In April 1974, he was arrested for breach of peace and possession of marijuana after the police caught him smoking the drug in an apartment. He was fined \$25 for breach of peace and sentenced to 30 days in jail (suspended) and six months probation on the marijuana charge (SOR ¶ 1.s.). Criminal record information maintained by the Federal Bureau of Investigation (Ex. 3) reflects two other arrests for larceny that year, in April and December 1974 (SOR ¶ 1.q., 1.r.), but there is no proof Applicant committed the offenses.

Following a strike at company A in 1975, Applicant started working for another defense contractor where he was granted a clearance. After paying a \$25 fine for a disorderly conduct offense in November 1976 (SOR ¶ 1.p.), Applicant broke into the dog pound to free his dog that same month. Charges of theft of dog and burglary 3rd were dismissed in late January 1977. Another count of criminal mischief 3rd was nolle prossed (SOR ¶ 1.o.). In May 1979, Applicant was found guilty and fined \$250 for a criminal assault (SOR ¶ 1.n.). In September 1979, he was fined \$25 for failure to appear 2nd (SOR ¶ 1.m.). The offense for which he failed to show in court is not of record. The FBI reports Applicant

was arrested in April 1984 (SOR ¶ 1.1.) and September 1984 (SOR ¶ 1.k.) on larceny and failure to appear charges, and in January 1989 for threatening, reckless endangerment, and disorderly conduct (SOR ¶ 1.i.) but Applicant does not recall these arrests, and there is no evidence he was convicted of these offenses.

In 1984, Applicant moved to another state on the invitation of a close friend who had relocated. Following a series of motor vehicle infractions, Applicant's operator's license was suspended for an indefinite period in late April 1986. He continued to drive his "hot rod type" pick-up truck, especially after consuming a case of beer, and it led to him being declared a habitual offender in August 1987, and sentenced to 60 days in jail and \$100 fine (SOR ¶ 1.j.). In May 1992, Applicant was indicted on a charge of habitual offender (operating after suspension). In late September 1992, he pleaded guilty and was sentenced to 48 hours in jail, and fined \$440 (SOR ¶ 1.h.).

In late February 1993, Applicant was arrested for operating a motor vehicle after license revoked, and it led to him being indicted in April 1993 for habitual offender, a class C crime. A warrant was issued for his arrest in May 1993 when he failed to appear for his arraignment. The charge was dismissed in March 1994 on acceptance of his plea to operating after suspension (SOR ¶ 1.f., ¶ 1.g.), for which he was sentenced to seven days in jail and \$510 in fines and assessments. In August 1995, a warrant of arrest was issued for his failure to pay the fine for the operating after suspension.

Less than two months after he pled guilty to operating after suspension, Applicant was caught driving on a public way in mid-May 1994. In June 1994, he was indicted for habitual offender, class C, to which he pleaded guilty that November and was sentenced to 30 days in jail, execution stayed on approval of home release monitoring, and \$575 in fines and costs. In December 1994, his license was again revoked for an indefinite period. Applicant had not paid the fine by the following November, and a warrant was issued for his arrest (SOR ¶ 1.e.).

In March 1995, Applicant was again caught operating his vehicle on a public way after he had been declared a habitual offender and his license had been revoked. He was indicted in May 1995 for habitual offender, class C crime. He failed to appear for his arraignment, and in June 1995, a warrant was issued for his arrest. In early February 1996, he pleaded guilty and was sentenced to 60 days and \$525 in fines and assessments (SOR ¶ 1.d.).

In June 1996, Applicant was ordered to appear in court to answer for his failure to pay the \$1,710 in fines for those offenses in SOR ¶¶ 1.d., 1.e., and 1.f. (operating after suspension and habitual offender). In early October 1999, a warrant was issued for the unpaid fines. Twelve days later, Applicant posted cash bail of \$1,000 to be applied to the fines (SOR ¶ 1.c.).

The same day the warrant was issued for unpaid fines, Applicant was arrested for operating under the influence (OUI) with a blood alcohol level of .15% or more. In February 2000, he was indicted on charges of OUI, a class D crime, and habitual offender, a class C crime. The habitual offender charge was dismissed on his plea of guilty to OUI. He was

sentenced in October 2000 to 364 days in jail (all but 45 suspended), \$724 fines and assessments, and one year probation with conditions, including no illegal drug or alcohol use and no operation of a motor vehicle (SOR ¶ 1.b.).

While the OUI and habitual offender charges were pending, Applicant was arrested in September 2000 for aggravated trafficking or furnishing a schedule drug, a felony, after marijuana plants were found growing on his property. He was also charged with criminal forfeiture of several firearms seized during a lawful search for marijuana (SOR ¶ 1.a.). In February 2001, he pleaded guilty to an amended charge of cultivation of marijuana, a class D offense, and to criminal forfeiture, and was sentenced to 364 days in jail, all but 45 days suspended, placed on probation for one year with random drug testing, and to pay a \$10 assessment. In March 2001, he was granted admission to the public works project. Applicant denied any use of the marijuana since 1980. He also denied originally planting them, but admitted to fertilizing them because he liked how the plants look ("And it was kind of a hobby thing, I was trying to see how big I could make them." Tr. 50).

In 2002, Applicant moved back to his present locale, and in about October 2002, he returned to work for the defense contractor that had employed him back in the early 1970s. In application for a security clearance, Applicant executed a SF 86 on October 7, 2002. Applicant responded "NO" to whether he had ever been charged with or convicted of a felony offense, and whether he had ever been charged with or convicted of a firearm offense. In response to any alcohol or drug offenses, Applicant listed only his October 1999 OUI.

On December 30, 2003, Applicant was interviewed by a special agent of the Defense Security Service about his drinking habits, his adverse involvement with law enforcement, and his failure to report his marijuana and firearms forfeiture offenses on his SF 86. Applicant indicated he had consumed about a case of beer daily, occasionally up to a six-pack more, from 1972 to about 1999. He described his consumption since 2000 as only "about two bloody mary drinks twice monthly," as he realized he had to get his life in order and his drinking habits had resulted in excessive fees and fines. He denied any involvement with illegal drugs in the past seven years, with the exception of cultivating marijuana ("The charge of cultivating [marijuana] in Sep 00 resulted from my growing mj plants. I did this for the sole purpose of being able to observe them, i.e., I grew them near an ice shack and I enjoyed the appearance of the mj leaves). Applicant denied growing the plants for the benefit of children in the area. Applicant admitted he had been convicted of "as many as 20 to 25" offenses related to operating a motor vehicle between 1984 and 2002, including up to a half dozen DUI charges. He volunteered that he "most likely" was charged with alcohol-related driving offenses a half dozen times in the late 1970s/early 1980s. Applicant denied that he falsified his SF 86, explaining he decided to list "only the last one, knowing that [his] extensive police record would be obvious in any investigation of his background." (Ex. 2)

As of September 2005, Applicant claimed he was no longer drinking alcohol because of a promise to his father before his father died in 1999. He averred his last drink was "a pink kind of wine" during a family gathering in November 2004, and the government presented no evidence to the contrary. As for his SF 86 omissions, Applicant testified he thought listing the OUI would be sufficient for his employer to call the state "and they would get the complete rundown of what went down there since 1984." (Tr. 56)

Applicant was arrested in late August or early September 2005 for third degree assault after he struck his younger brother during an argument ("Yes, we were on the kitchen floor, my mother was throwing water on us like dogs in heat. And so, all he got was a bloody nose, but he had called the State Police . . . I guess he got hit in the face, he and I was lying on the floor, we ended up on the floor." Tr. 63) Applicant anticipated he would only have to pay a \$200 fine to dispose of the charge at his court hearing scheduled for mid-October 2005.

Applicant was a productive worker for the defense contractor before his layoff in January 2005. There was no evidence presented of any difficulties on the job.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, 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." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. 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.

Concerning the evidence as a whole, the following adjudicative guidelines are most pertinent to this case:

Criminal Conduct. A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. (¶ E2.A10.1.1.)

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

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. (¶ E2.A7.1.1.)

Drug Involvement. Improper or illegal involvement with drugs raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information. (¶ E2.A8.1.1.)

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility of the Applicant, I conclude the following with respect to Guidelines J, E, G, and H:

Applicant has a record of criminal misconduct from the mid-1970s. Some offenses were minor (*e.g.* disorderly conduct, breach of peace), but he was convicted of an October 1999 drunk driving offense and a September 2000 marijuana cultivation offense. While alcohol played a part in several of his past criminal acts, there is no evidence alcohol was involved in the marijuana cultivation. Under Guideline J, disqualifying conditions (DC) ¶ E2.A10.1.2.1. *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*, and E2. A10.1.2.2. *A single serious crime or multiple lesser offenses*, clearly apply. His habitual disregard of the law, especially evident in his repeated operating after license suspension, raises serious doubts about his willingness to comply with security regulations, and falls as well under Guideline E (*see* E2.A5.1.2.5. *A pattern of dishonesty or rule violations*).

Even though Applicant has not been convicted of any criminal conduct since he was sentenced to a jail term in February 2001 for cultivation of marijuana, none of the mitigating conditions apply. An assault charge was pending against Applicant as of late September 2005, as about four weeks earlier, an argument with his brother escalated into a physical altercation ("Yes, we were on the kitchen floor, my mother was throwing water on us like dogs in heat. And so, all he got was a bloody nose, but he had called the State Police . . . I guess he got hit in the face, he and I was lying on the floor, we ended up on the floor." Tr. 63). Doubts also persist about his rehabilitation because of his failure to acknowledge the criminality of his marijuana cultivation. He denied that he planted the marijuana ("I personally didn't plant them, but I was aware they were there." Tr. 39), and asserted that he "just wanted to see how big [the plants] were going to get . . . they weren't doing any harm." (Tr. 52) His felony indictment and subsequent plea to cultivation of

marijuana confirm his criminal involvement. SOR ¶¶ 1.a., 1.b., 1.c., 1.d., 1.f., 1.g., 1.h., 1.j., 1.m., 1.n., 1.o., 1.p., 1.s., and 2.a. are resolved against him. SOR ¶¶ 1.i., 1.k., 1.l., 1.q., and 1.r. are found in his favor as the evidentiary record does not prove culpability with regard to those alleged offenses.

Security significant personal conduct concerns are raised as well by Applicant's failure to disclose his February 2001 marijuana cultivation and criminal forfeiture convictions when he completed his SF 86 in October 2002. 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. Applicant's explanations for the omissions are not credible. He told the DSS agent in December 2003 that he decided to list "only the last one," as his extensive criminal record would become obvious in any investigation. This is patently false as the more recent offenses were the drug cultivation and criminal forfeiture (unregistered firearms) which he failed to list.

Although Applicant was candid about his criminal record history when questioned by the DSS agent in December 2003, his rectification was not sufficiently prompt to apply ¶ E2.A5.1.3.3. *The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*. Applicant made no effort before his interview to inform the Department of Defense about his drug conviction, putting the burden on the government investigators to discover it. At his hearing, Applicant insisted that by listing one offense, it would be enough for his employer to obtain his record. Even if Applicant mistakenly thought it was his employer rather than the Department of Defense who conducted the investigation, it would not excuse his failure to list his marijuana offense. Whereas Applicant continues to show little appreciation for his obligation of full candor, adverse findings are warranted as to SOR ¶¶ 2.b., 2.c., and 2.d.

The government's case under Guideline G, alcohol consumption, is established by Applicant's admissions to drinking about a case of beer daily, sometimes more, from about 1972 to 1999. Applicant admitted he engaged in drunk driving on at least five other occasions between 1984 and 1999, and that he had been charged with about six alcohol-related charges during the late 1970s to early 1980s. While there is only one OUI conviction of record, ⁽⁴⁾ he often drank before driving his truck on a revoked license. DC ¶ 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*, and ¶ E2.A7.1.2.5. *Habitual or binge consumption of alcohol to the point of impaired judgment*, apply.

Applicant offers in mitigation that he stopped his excessive drinking, albeit without professional assistance. Evidence of recent drinking is limited to two Blood ary drinks twice monthly as of December 2003, and some wine at a family gathering in November 2004. While the Directive provides for mitigation where the excessive drinking occurred a number of years ago and there is no indication of a recent problem (¶ E2.A7.1.3.2.), and there are positive changes in behavior supportive of sobriety (¶ E2.A7.1.3.3.), Applicant has a particularly heavy burden of demonstrating he is not likely to abuse alcohol in the future given his 25 years of excessive drinking. A beer drinker to at least October 1999, he was drinking hard liquor on a relatively frequent basis as of December 2003. It is not clear when or what prompted the switch to hard liquor. While he now maintains he has been alcohol-free except for some wine in November 2004, little is known about his present social activities or whether he has adequate support to preclude a relapse. His evidence falls short of overcoming the Guideline G concerns presented by his history of habitual drinking to the point of impaired judgment. SOR ¶¶ 3.a., 3.b., and 3.c. are concluded against Applicant.

Applicant's cultivation of marijuana is enough to raise drug involvement concerns, even in the absence of any recent personal drug use by Applicant. Under Guideline H, DC ¶ E2.A8.1.2.2. *Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution*, must be considered in evaluating Applicant's security suitability. Applicant has yet to provide a reasonable, credible explanation for his cultivation of marijuana (about 11 plants) in September 2000 if he had no intent to use it or to sell it. It is difficult to believe that he would knowingly violate the law just because he liked the way the leaves looked ("I like how they look. They don't have any flowers on them but the leave [sic] pattern on them is different." Tr. 59). His drug involvement is no longer recent (see ¶ E2.A8.1.3.1.), but the passage of time means little in this case. Applicant submits he stopped using marijuana himself in about 1980, but this did not preclude him from growing marijuana in 2000. SOR ¶ 4.a. is resolved against him.

FORMAL FINDINGS

Formal findings as required by Section 3., Paragraph 7 of Enclosure 1 to the Directive are hereby rendered as follows:

Paragraph 1. Guideline J: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

Subparagraph 1.d.: Against the Applicant

Subparagraph 1.e.: Against the Applicant

Subparagraph 1.f.: Against the Applicant

Subparagraph 1.g.: Against the Applicant

Subparagraph 1.h.: Against the Applicant

Subparagraph 1.i.: For the Applicant

Subparagraph 1.j.: Against the Applicant

Subparagraph 1.k.: For the Applicant

Subparagraph 1.l.: For the Applicant

Subparagraph 1.m.: Against the Applicant

Subparagraph 1.n.: Against the Applicant

Subparagraph 1.o.: Against the Applicant

Subparagraph 1.p.: Against the Applicant

Subparagraph 1.q.: For the Applicant

Subparagraph 1.r.: For the Applicant

Subparagraph 1.s.: Against Applicant

Paragraph 2. Guideline E: AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

Subparagraph 2.b.: Against the Applicant

Subparagraph 2.c.: Against the Applicant

Subparagraph 2.d.: Against the Applicant

Paragraph 3. Guideline G: AGAINST THE APPLICANT

Subparagraph 3.a.: Against the Applicant

Subparagraph 3.b.: Against the Applicant

Subparagraph 3.c.: Against the Applicant

Paragraph 4. Guideline H: AGAINST THE APPLICANT

Subparagraph 4.a.: Against 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 is denied.

Elizabeth M. Matchinski

Administrative Judge

- 1.
2. Applicant's February 2001 conviction was for September 2000 cultivation of marijuana and criminal forfeiture (firearms).
3. On February 8, 2005, DISCO received notification from the defense contractor that Applicant's interim secret clearance had been withdrawn, and that Applicant was "terminated from [sic] on January 28, 2005 for lack of no clearance work in his assigned area." At his hearing, Applicant testified he was collecting workmen's compensation benefits from the defense contractor. Jurisdiction was nonetheless accepted based on a request from the defense contractor that the processing of his case continue.
4. The court record of Applicant's May 1995 indictment on a charge of habitual offender Class C states, in part: "It is further charged that the above named defendant, had within the previous five years, one or more convictions for Operating Under the Influence in violation of Section 1312-B or its predecessors, namely, conviction for operating after being declared a Habitual Offender on November 28, 1994 in [superior court] and a conviction for operating after being declared a Habitual Offender on September 28, 1992 in [superior court]." Ex. 7. Previous indictments for habitual offender, including in June 1994, reflect the convictions were for Operating after Suspension. *See* Ex. 8.