

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant is a 47-year-old engineering technician who has worked for a federal contractor since 2002. Applicant had seven arrests from March 1987 to May 2003. Three of the arrests were for Driving Under the Influence of Alcohol. Applicant failed to list all his criminal conduct on his security clearance application, as required. Applicant failed to mitigate the security concerns under Guideline J, criminal conduct, and Guideline E, personal conduct. Clearance is denied.

CASENO: 04-04077.h1

DATE: 11/22/2005

DATE: November 22, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-04077

DECISION OF ADMINISTRATIVE JUDGE

CAROL G. RICCIARDELLO

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esq., Department Counsel

FOR APPLICANT

SYNOPSIS

Applicant is a 47-year-old engineering technician who has worked for a federal contractor since 2002. Applicant had seven arrests from March 1987 to May 2003. Three of the arrests were for Driving Under the Influence of Alcohol. Applicant failed to list all his criminal conduct on his security clearance application, as required. Applicant failed to mitigate the security concerns under Guideline J, criminal conduct, and Guideline E, personal conduct. Clearance is denied.

STATEMENT OF CASE

On April 15, 2005, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline J, criminal conduct, and Guideline E, personal conduct. In an undated sworn statement, Applicant admitted all the allegations in the SOR allegations, and requested a hearing.

The case was assigned to me on September 22, 2005. A notice of hearing was issued on September 28, 2005, scheduling the hearing for October 19, 2005. The hearing was conducted as scheduled. The government submitted seven exhibits that were marked as Government Exhibits (GE) 1-7. The exhibits were admitted into the record without objection. Applicant testified and submitted eight exhibits that were marked as Applicant's Exhibits (AE) A through H. The exhibits were admitted into the record without objection. The transcript was received on October 31, 2005.

FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR, are incorporated herein. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is a 47-year-old engineering technician, who has worked for a federal contractor since 2002. Applicant was twice divorced and has no children.

Applicant was arrested on March 8, 1987, and charged with (1) Driving Under the Influence (DUI), (2) Failure to Yield Right of Way, and (3) Driving with an Expired Licence. He was found guilty of the DUI, and was sentenced to 30 days in jail with 30 days suspended, awarded one year probation and fined \$300.00, plus court costs. Count (2) and count (3) were Nolle Prossed.

Applicant was arrested on September 23, 1988, and charged with larceny of government property. Applicant was working at a liquor store on a military base. He placed items outside of the store in an inconspicuous place so that when he finished work he would take them without paying for them. Applicant was caught before he had the opportunity to actually take them away. Applicant pleaded guilty and was awarded one year of probation and ordered to pay \$25.00 to the Victim's Restitution Fund.

Applicant was arrested on March 20, 1993, and charged with DUI. Applicant was fined and put on probation.

On October 10, 1999, Applicant and his girlfriend were arguing. He became angry and later went to her house and poured bleached on her clothes. Applicant was arrested and charged with (1) Simple Assault Domestic Violence, and (2) Criminal Mischief. Count (1) was Nolle Prossed and count (2) was dropped. Applicant replaced the clothes. Applicant was 41-years-old at the time of the incident.

On April 21, 2000, Applicant believed his girlfriend had his television set. Applicant went to what he believed was her new apartment. Applicant went into the apartment to take the television set. While he was doing this, another person came into the apartment. Applicant was standing in the apartment with the television set. At that point, Applicant realized he was in the wrong apartment and this was not his television set. Applicant left the apartment and was arrested on his way out. Applicant was charged with Burglary No Forced Entry Residence 3rd Degree. He was found guilty and received a one year suspended sentence for two years, and was fined \$500.00.

Applicant was arrested on July 4, 2000, and charged with DUI. His blood alcohol was .20%. He was found guilty and sentenced to one year in jail with eight months suspended, awarded 24 months of probation, fined \$2,500.00, plus court costs and ordered to pay \$50.00 to the Victims Compensation Assessment.

On May 3, 2003, Applicant while driving, tossed a cigarette out the window and it flew back into the car. The lit cigarette landed on Applicant and he abruptly stopped his vehicle. The police stopped Applicant due to the erratic stop of the vehicle. He was arrested, and charged with (1) Giving False Name to Law Enforcement, and (2) Reckless Driving. He was found guilty on count (2) and was fined \$300.00. Count (1) was Nolle Prossed. Applicant denies he gave a false name, but admits that the home address on his driver's license differed from his current home address because he had recently moved.

Applicant signed a security clearance application (SCA) on August 28, 2003, and submitted it on September 18, 2003. Applicant answered "Yes" to Question 24 (*Your police record-Alcohol/Drug Offenses, For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the court 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 19 U.S.C. 3607. Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?*) Applicant listed the September 2000 DUI arrest, however he failed to list the other alcohol related offenses of March 8, 1987, and arch 20, 1993.

With regards to Question 26 (*Your Police Record-Other Offenses, For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the court 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 19 U.S.C. 3607. In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25 (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.)*), Applicant answered "No" which was a false statement, because he had been arrested on October 10, 1999, and April 21, 2000.

Applicant's only explanation for why he failed to list these offenses, was because he just overlooked them.

While filling out the SCA, Applicant asked the Human Resource specialist at his company questions about how to fill out certain questions. He was told to go back only seven years in providing information. Applicant has no explanation as to why he did not at least include those arrests that were within a seven year window. Applicant claims he misread the questions and did not understand some of them.

Applicant signed a SCA on April 1, 1987, while employed for a different company. On that questionnaire, with regard to Applicant's prior arrests, Applicant failed to list his most recent arrest of March 8, 1987. This arrest occurred less than one month before he filled out the SCA.

Applicant claims many of his troubles are attributed to his abuse of alcohol. Applicant claims, as of June 2005, he no longer drinks any alcohol because it was causing so much trouble in his life. He claims he stopped drinking due to some medical problems. Applicant now attends church regularly and has "found the Lord." Applicant's fellow church-goers are aware of his problems, as is his family. No one at work is aware of Applicant's past criminal offenses.

Applicant is viewed by his fellow workers as a team player, who is a professional. His attendance is excellent, he follows policy and procedures, has a positive attitude and shows respect for his fellow workers. Applicant is seen as having a high energy level and receives good performance appraisals. Applicant received letters of appreciation and certificates of completions for training.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Considering the evidence as a whole, Guideline J, criminal conduct, and Guideline E, personal conduct considerations, with their respective DC and MC, apply in this case. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽²⁾ The government has the burden of proving controverted facts.⁽³⁾ The burden of proof is something less than a preponderance of evidence.⁽⁴⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against

him.⁽⁵⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁶⁾

No one has a right to a security clearance⁽⁷⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽⁸⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽⁹⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽¹⁰⁾ 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.

Based upon 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 is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

Guideline E-Personal Conduct is a security concern when an individual's conduct involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that 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 guideline are set forth and discussed in the conclusions below.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a *prima facie* case for disqualification under Guideline J and Guideline E.

Based on all the evidence Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*Allegations or admissions of criminal conduct, regardless of whether the person was formally charged*), and CC DC E2.A10.1.2.2 (*A single serious crime or multiple lesser charges*) apply. Applicant was arrested seven times from March 8, 1987 through May 3, 2003. Three of the arrests were for DUI. Applicant was convicted of all three DUI arrests, and was convicted of various other offenses stemming from the other arrests.

I have considered all the mitigating conditions and especially considered Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.2.1 (*The conduct was not recent*), CC MC E2.A10.1.2.2 (*The crime was an isolated incident*), CC MC E2.A10.1.2.4 (*The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*), and CC MC E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*). Applicant's most recent offense occurred in May of 2003, a period of approximately two and a half years ago. I find this period of time is too short to

consider the offense as not to be recent. Applicant has seven arrest spanning over 16 years, so the criminal conduct is not isolated. There was no evidence that Applicant's acts were not voluntary. The questions remains whether the acts are likely to recur and whether there is clear evidence Applicant is successfully rehabilitated. Applicant claimed that the source of his problems was his abuse of alcohol. Applicant testified that he no longer drinks alcohol and has "found the Lord." Applicant's life-changing commitment and revelation are commendable, but it is too early to conclude that his commitment to remain alcohol-free and thereby stay out of trouble is sustainable. Applicant had only come to this conclusion a mere four months before his hearing. More time is needed to ensure Applicant is successfully rehabilitated with regards to criminal conduct.

Based on all the evidence, Personal Conduct Disqualifying Condition (PC 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*), and PC DC E2.A5.1.2.5 (*A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency*) apply in this case. Applicant failed to list all of his criminal conduct in response to questions on his 2003 SCA. Applicant also failed to list criminal conduct in response to questions on his 1987 SCA. These deliberate omissions establish a pattern of dishonesty.

I have considered all the mitigating conditions and especially considered Personal Conduct Mitigating Condition (PC MC) E2.A5.1.3.2 (*The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*), PC MC E2.A5.1.3.3 (*The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*), PC MC E2.A5.1.3.4 (*Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided*); and PC MC E2.A5.1.3.5 (*The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*). I conclude none of the mitigating conditions apply. Applicant deliberately failed to provide a list of his criminal conduct as required on his SCA. I have specifically considered that Applicant may have received incorrect advice about how far back he should go in providing information. Even taking the evidence in the light most favorable to the Applicant, that the Human Resource specialist told him to go back only seven years, Applicant failed to provide all the information about his arrests during that seven year period. Applicant did not subsequently voluntarily provide the correct information, nor did he make a good-faith effort to correct it before being confronted. I have considered the evidence presented that Applicant also failed to provide accurate information regarding his criminal conduct on a 1987 SCA. I conclude his falsifications were not isolated and Applicant has a history of providing false answers. Applicant has failed to mitigate the security concerns regarding his personal conduct.

In all adjudications, the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I have considered all the evidence in the record and considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. I have considered Applicant's criminal history, SCA application answers, and his recent efforts to put his life on the right track by refraining from alcohol, staying out of trouble and attending church. I am persuaded by the totality of the evidence in this case, that it is not clearly consistent with the national interest to grant Applicant a security clearance. Accordingly, Guideline J and Guideline E are decided against Applicant.

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: Criminal Conduct (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

Paragraph 2: Personal Conduct (Guideline E) AGAINST THE APPLICANT

Subparagraph 2.a. Against the Applicant

Subparagraph 2.b. 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.

Carol G. Ricciardello

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, ¶ E3.1.14.
4. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
5. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, ¶ E3.1.15.
6. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, ¶ E3.1.15.
7. *Egan*, 484 U.S. at 531.
8. *Id.*
9. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
10. Executive Order 10865 § 7.