

DATE: October 6, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-06738

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL J. BRESLIN

APPEARANCES

FOR GOVERNMENT

Sabrina R. Redd, Esq., Department Counsel

FOR APPLICANT

Douglas G. Andrews, Esq.

SYNOPSIS

Applicant has a long history of alcohol-related offenses away from work, including arrests and convictions for driving under the influence of alcohol in November 1984, driving while intoxicated in October 1989, driving under the influence of alcohol (reckless driving) in November 1998, and driving under the influence of alcohol in November 2001. He wrongfully failed to report the first three alcohol-related incidents and a felony charge for cocaine possession on his security clearance application in 2003. Applicant failed to mitigate the security concerns arising from his alcohol consumption and his personal conduct. Clearance is denied.

STATEMENT OF THE CASE

On August 7, 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 August 18, 2004, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. The SOR alleges security concerns raised under the Directive, specifically Guideline G, Alcohol Consumption, and Guideline E, Personal Conduct.

Applicant answered the SOR in writing on September 9, 2004. He elected to have a hearing before an administrative judge.

The case was originally assigned to another administrative judge and was re-assigned to me on August 1, 2005. With the concurrence of Applicant and Department Counsel, I convened the hearing on September 12, 2005. The government introduced Exhibits 1 through 3. Applicant's counsel offered Exhibits A through F, and called three witness. Applicant testified on his own behalf. After the presentation of evidence, department counsel moved to amend ¶ 1.c of the SOR by striking the words "Operating a Motor Vehicle with a blood alcohol content greater than .10" and substituting the words, "violation of probation." Applicant's counsel did not object and I granted the motion. DOHA received the final transcript

of the hearing (Tr.) on September 27, 2005.

FINDINGS OF FACT

Applicant denied the factual allegations in ¶¶ 1.b and 2.a of the SOR. Applicant's Answer to SOR, dated September 9, 2004. He admitted the factual allegations in paragraphs 1.a, 1.c, 1.d, and 1.e. *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 53 years old. Ex. 1 at 1; Tr. at 55. He seeks a security clearance to work for a defense contractor remodeling consulate buildings overseas. Tr. at 56, 83-84.

Applicant was born in March 1952. Ex. 1 at 1. He was graduated from high school in 1970 and began working in diverse facets of the construction business. Tr. at 55-56; Ex. E at 1. He has special skills in carpentry and interior work. Tr. at 56.

In August 1984, when he was 32 years old, Applicant was arrested and charged with Driving Under the Influence of Alcohol. Applicant admitted the arrest but denied the charge. He had been racing and was later stopped and questioned by the police. Ex. 2 at 3. Applicant had just left a nightclub, but asserted he had not had anything to drink. Tr. at 59. According to Applicant, he refused to give the police the name of the other racer so the officer cited him for Driving Under the Influence. Applicant appeared for the hearing. Tr. at 74. He claims the officer did not appear, so the presiding official asked Applicant to "go ahead and plead guilty because . . . they really had no proof." Tr. at 74. Applicant pled guilty to the charge and was sentenced to a \$100.00 fine and one day's confinement. Ex. 3 at 2. He asserts he did not spend any time in confinement. Tr. at 90.

In April 1989, when he was 37 years old, Applicant knowingly picked up about one or two grams of cocaine and put it in his boot to deliver it to a friend, but was caught in a police road block. Tr. at 60, 77. Applicant was charged with Criminal Possession of Cocaine, a felony, but pled guilty to a reduced charge of simple possession of cocaine. Tr. at 60. The court sentenced him to two years probation and a fine of about \$800.00. Ex. 2 at 4. As part of the terms of probation, Applicant attended substance abuse counseling for about 18 months. Tr. at 61, 76. He submitted to random drug tests during that period. Tr. at 76.

In October of that same year, Authorities arrested Applicant for driving while intoxicated (DWI). Tr. at 61. Applicant was at a bar playing pool with some friends and had several drinks, then attempted to drive home. *Id.* He submitted to a breath test which indicated a .10 % blood-alcohol concentration. Tr. at 61. He pled guilty and was sentenced to a \$350.00 fine and suspension of his driving privileges for 45 days. Tr. at 62; Ex. 3 at 3. At a later time, Applicant paid his attorneys to have the record of his conviction expunged. Tr. at 62. He assumed it was done, although he never received any notice of that fact. Tr. at 81.

Applicant's drunk driving offense in October 1989 violated the terms of his probation imposed after his earlier conviction for cocaine possession. Tr. at 62-63. In July 1990, the court sentenced Applicant to 45 days confinement. Tr. at 63.

In December 1998, a police officer pulled Applicant over for making an illegal left turn, then asked him to perform a sobriety case. Tr. at 64. Applicant refused because his back was injured. A blood test revealed Applicant's blood-alcohol content was over the legal limit. Tr. at 64. State authorities arrested Applicant, then 46 years old, and charged him with driving under the influence of alcohol. Applicant pled *nolo contendere* to a reduced charge of reckless driving. Tr. at 65. The court sentenced him to a fine, probation for 12 months, and community service. Ex. 3 at 3.

In November 2001, at the age of 49, Applicant was arrested for the fourth time for an alcohol-related driving offense. Applicant was driving home after drinking alcohol and playing pool. The local police pulled him over for speeding and requested a sobriety check. The breath test revealed a blood-alcohol concentration of .15%. Ex. 2 at 3. Applicant pled guilty to driving under the influence of alcohol. *Id.* The court sentenced him to one year probation, a fine of about \$600.00, and mandatory attendance at a ten-week alcohol and drug awareness course. *Id.*; Ex. D. Applicant completed the requirements of the sentence in August 2002. Tr. at 67; Ex. D at 2.

In August 2003, Applicant began working for a federal contractor remodeling a U.S. consulate overseas. Ex. 1 at 1. On August 6, 2003, he completed an SF 86, Security Clearance Application, in order to obtain the security clearance necessary for access to the site. Tr. at 57-58. The application included question 24:

Have you ever been charged with or convicted of any offense related to alcohol or drugs? For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the 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 18 U.S.C. 3607.

Applicant answered "Yes," and reported his conviction for DUI in November 2001. Ex. 1 at 5. He did not report his three other arrests and convictions for alcohol-related offenses, nor did he report his arrest for drug possession.

Question 21 on the SF 86 asked whether Applicant had ever been charged with a felony offense. Ex. 1 at 5. Applicant answered "No." He did not report the original felony charge of criminal possession of cocaine in April 1989.

Question 26 on the SF 86 asked whether, within the preceding seven years, Applicant had been arrested for, charged with, or convicted of any other offense not listed in questions 21, 22, 23, 24 or 25. Ex. 1 at 6. Applicant answered this question "No." He did not report his arrest for DUI or his conviction for reckless driving in December 1998 or his arrest and conviction for cocaine possession in April 1989.

Question 30 on the SF 86 inquired whether Applicant's use of alcohol resulted in any alcohol-related treatment or counseling within the previous seven years. Applicant answered "No." He did not report the ten-week alcohol counseling program required following his last conviction, that he completed one year before. Tr. at 96.

The DOHA initiated this action in August 2004. In March 2005, Applicant obtained a chemical dependency evaluation. Ex. E at 1. The evaluation consisted of psychological testing and a session with a counselor lasting about one and one-half hours. *Id.* Applicant did not report his conviction for cocaine possession and he wrongfully denied some minor drug use early in his life. The evaluator concluded Applicant did not meet the criteria under the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV), for alcohol or drug abuse or dependence. The evaluator opined that Applicant's "past DUI history appears to have been a matter of poor judgment as opposed to an on-going alcohol problem." Ex. E at 3.

At the hearing in this matter, Applicant testified about the drug and alcohol-related offenses that formed the basis for this action. Tr. at 59-66. He claimed he was not driving under the influence of alcohol in August 1984 or December 1998, notwithstanding the convictions. Tr. at 70.

With regard to the omissions and incorrect answers on the security clearance application, Applicant testified that he did not believe he was required to report the omitted information. Specifically he felt he did not have to report the October 1989 offense because he thought it was expunged and he thought he only had to go back seven years. Tr. at 71. He later testified that he went through the form quickly and may have missed some questions. Tr. at 91, 93.

Applicant testified about his current alcohol consumption. Tr. at 73. He indicated he will have a couple of beers on Friday nights with his wife and friends. *Id.* He indicated that his alcohol-related offenses occurred when he was younger and "happy-go-lucky," but that he is different now. Tr. at 85-86. Applicant believes "anyone can get a DUI if you drink two or three beers and get in your car and drive home." Tr. at 86.

Two of Applicant's friends and his wife testified on his behalf. They praised his character and testified that they have never observed Applicant become intoxicated. Applicant also submitted documents complimenting his duty performance. Ex. F.

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." *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch.

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 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.

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

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.

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.

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 G, Alcohol Consumption

Paragraph E2.A7.1.2.1 of the Directive provides that it may be a disqualifying condition if the evidence reveals "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." The evidence of the convictions establishes four instances where Applicant committed an alcohol-related driving offense away from work: August 1984, October 1989, December 1998, and November 2001. I conclude this potentially disqualifying condition applies.

The security concerns arising from Applicant's alcohol consumption can be mitigated under certain circumstances. Under the Directive, ¶ E2.A7.1.3.1, it may be mitigating where "[t]he alcohol-related incidents do not indicate a pattern." The alcohol-related incidents in this case were separated by many years; however the history indicates a pattern of poor judgment or a lack of amenability to correction over the long term. Applicant's evidence does not persuade me that this potentially mitigating condition applies.

Under ¶ E2.A7.1.3.2 of the Directive, it may be mitigating where "[t]he problem occurred a number of years ago and there is no indication of a recent problem." Applicant's first alcohol-related incident occurred in 1984, which was a number of years ago. However, Applicant's latest alcohol-related incident occurred in 2001 and is recent. The available evidence indicates Applicant does not have a medical problem, such as Alcohol Abuse or Alcohol Dependence. Ex. E at 3. Instead, Applicant's problem with alcohol stems from a lack of judgment relating to his use or abuse of alcohol. This mitigating condition does not apply.

Paragraph E2.A7.1.3.3 provides that "[p]ositive changes in behavior supportive of sobriety" may also be a mitigating factor. Following his alcohol-related incident in 2001, Applicant attended court-ordered evaluation and completed an alcohol rehabilitation course. He gained increased awareness of the dangers of drinking and driving, and has reduced his alcohol consumption. Nonetheless, Applicant still drinks alcohol regularly, although not to excess. I find this potentially mitigating condition applies.

I considered the potentially disqualifying and mitigating factors, as well as the "whole person" concept. I conclude Applicant has not mitigated the security concerns arising from his lengthy history of problems arising from his alcohol consumption.

Guideline E, Personal Conduct

The Directive sets out various factors relevant to an applicant's personal conduct that may be potentially disqualifying. Under ¶ E2.A5.1.2.2 of the Directive, "[t]he deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire" may be disqualifying. Paragraph 2.a of the SOR alleges Applicant deliberately failed to report on his SF 86 his alcohol-related offenses in August 1984, October 1989, and December 1998, and the fact that he was charged with felony drug possession in April 1989. Applicant admitted his answers on the SF 86 were incorrect, but denied that he intended to deceive the government. He asserted he misunderstood the questions, or missed them as he hurried to complete the form. Applicant's assertions are unpersuasive. Applicant has a lengthy record of criminal convictions—a record he would have known to be a liability in obtaining a clearance. Applicant would have been very aware of question 24, especially when he had to stop to provide information about his latest conviction. The language of the question is clear and straightforward, and does not limit the reportable time period. The question also makes it clear that Applicant was required to report information even if it had been "sealed" or stricken (with one exception Applicant admits was not applicable). I find Applicant deliberately falsified his answer to question 24 of the security clearance application by failing to report convictions for three alcohol-related offenses and the drug offense. I conclude this potentially disqualifying condition applies.

Under the Directive, an applicant may mitigate the security concerns arising from questionable personal conduct under certain circumstances. Directive, ¶ E2.A5.1.3. Under ¶ E2.A5.1.3.1, it may be mitigating where "[t]he information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability." Applicant's criminal offenses for alcohol-related crimes and drug abuse were substantiated by the record of convictions and Applicant's admissions. His history of alcohol-related crimes and a drug offense is pertinent to a determination of his judgment, trustworthiness, and reliability. Applicant's falsification of this information raises a security concern. I find this mitigating factor does not apply.

Paragraph E2.A5.1.3.2 of the Directive arises where "the falsification was an isolated incident, was not recent, and the individual subsequently provided correct information voluntarily." The security clearance application in issue was executed in August 2003, therefore it was recent. Applicant provided false information in response to other questions on the form, and in responses to the counselor who performed his most recent alcohol abuse evaluation. Tr. at 95-96, 98-99. Applicant has not met his burden of demonstrating that this falsification was an isolated incident or that he subsequently provided correct information voluntarily. I conclude this potentially mitigating condition does not apply.

Under ¶ E2.A5.1.3.3 of the Directive, it may be mitigating where, "[t]he individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts." Applicant has not met his burden of proving that he made good-faith efforts to correct the omissions in his security clearance application, or that his efforts were prompt. I find this potentially mitigating condition does not apply. I also considered carefully the other potentially mitigating conditions and conclude they do not apply.

I considered carefully all the facts and circumstances in this case in light of the "whole person" concept. Applicant intentionally falsified his security clearance application to minimize the extent of his criminal history. Considering all the evidence, I am not persuaded Applicant has significantly altered his pattern of behavior so that there is little likelihood of recurrence. I conclude Applicant has not mitigated the security concerns arising from his falsification of his security clearance application.

FORMAL FINDINGS

My conclusions as to each allegation in the SOR are:

Paragraph 1, Guideline G: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: Against Applicant

Paragraph 2, Guideline E: 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