

DATE: August 28, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 04-11131

DECISION OF ADMINISTRATIVE JUDGE

MARC E. CURRY

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

J. Byron Holcomb, Esq.

SYNOPSIS

Applicant served 18 months in prison as a result of a 1998 conviction for felony hit and run, and driving under the influence of intoxicants. 10 U.S.C. § 986 disqualifies him from security clearance consideration. Also, his history of criminal conduct and substance abuse, in addition to the deliberate falsification of several questions regarding these matters on his security clearance application, generate unmitigated security concerns independent of the applicability of 10 U.S.C. § 986. Clearance is denied.

STATEMENT OF THE CASE

On November 7, 2005, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) alleging that it was not clearly consistent with the national interest to grant or continue a security clearance.⁽¹⁾ The SOR alleged security concerns under Guideline J, criminal conduct, Guideline G, alcohol consumption, Guideline H, drug involvement, and Guideline E, personal conduct. Applicant answered the SOR on December 27, 2005, and requested a hearing.

The case was assigned to me on March 20, 2006. I issued a notice of hearing on March 28, 2006, scheduling it for April 13, 2006. At the hearing, that I conducted as scheduled, the government provided 24 exhibits, and Applicant's counsel provided 17 exhibits and the testimony of three witnesses. In response to a motion from department counsel, I took administrative notice of two relevant sections of the Controlled Substances Act of 1970.⁽²⁾ DOHA received the transcript on April 21, 2006.

FINDINGS OF FACT

Applicant admitted all of the SOR allegations except those listed in Paragraph 4. These admissions are incorporated herein as findings of fact. In addition, I make the following findings of fact:

Applicant is a 40-year-old, single man with a high school education. He has been working for the past two and a half

years as a sandblaster and painter. He is highly respected on his job, and is "always willing to go the extra mile and stand up when necessary to support whatever it takes to get the job done."⁽³⁾

From age 18 to age 35, Applicant drank, on average, seven to eight alcoholic beverages per day. This alcohol abuse corresponded with an extensive history of alcohol-related criminal infractions. In 1987, he was cited and fined twice for underage possession of alcohol. In 1989, he was charged with assault and false imprisonment related to a domestic dispute.

In March 1991, he was arrested and charged with driving under the influence of alcohol (DUI).⁽⁴⁾ The court released him from custody and suspended his license pending trial. Subsequently, the court convicted and sentenced him in May 1991. The record contains no evidence of the terms of the sentence.

Six months later, in November 1991, the police again arrested Applicant and charged him with DUI. The court suspended his license pending trial. Subsequently, he was found guilty. The record does not contain evidence of the terms of the sentence.

In December 1992, Applicant was arrested and charged with DUI.⁽⁵⁾ He was found guilty in June 1995.⁽⁶⁾ The record includes no evidence that explains why the adjudication of this case was deferred for three years. Nevertheless, as a result of the conviction, the court placed him on probation, ordered him to complete intensive alcohol rehabilitation, and comply with any recommendations of the treatment professionals.

Applicant was arrested and charged with DUI on two occasions between April and June of 1993. On July 20, 1993, the court consolidated the cases, and after Applicant pled guilty, sentenced him to 90 days in jail.⁽⁷⁾ Also, the court fined him, and ordered that he attend an alcohol treatment program, in addition to a DUI victims' group meeting.⁽⁸⁾ He failed to comply with the court order, leading to a contempt conviction.⁽⁹⁾

On April 26, 1994, Applicant was arrested and charged with assault stemming from an alcohol-related, domestic violence incident. On September 20, 1994, the court convicted him, sentenced him to one day in jail, and placed him on supervised probation for one year.⁽¹⁰⁾ Applicant was again arrested after an alcohol-related, domestic violence incident on May 20, 1994. On June 28, 1994, the court convicted him, and sentenced him to one day in jail and a \$250 fine.⁽¹¹⁾

In approximately July 1995, Applicant began attending an alcohol rehabilitation program, pursuant to the June 1995 court order. He was dismissed from the program after he received another alcohol-related assault charge in May 1996. Later that month, the court convicted him of both assault and contempt for failing to comply with the court order. Also, the court sentenced him to five days in jail, and placed him on probation.⁽¹²⁾

Pursuant to the May 1996 conviction, Applicant, on June 20, 1996, enrolled in another alcohol rehabilitation program in addition to a domestic violence program. On December 10, 1996, while attending both programs, he was arrested again and charged with assault. The court deferred sentencing, opting instead to monitor his progress in the treatment and counseling programs for nine months. Subsequently, Applicant completed the alcohol treatment program on January 2, 1997,⁽¹³⁾ and the domestic violence program on September 1, 1997.⁽¹⁴⁾ The court then sentenced him to 20 days in jail on September 30, 1997.⁽¹⁵⁾

Applicant did not use alcohol while enrolled in the treatment program. Shortly after his discharge in September 1997, he relapsed, and also began experimenting with methamphetamine. By the Fall of 1998, he was abusing methamphetamine every day.⁽¹⁶⁾ On November 21, 1998, while driving his employer's company automobile under the influence of alcohol and methamphetamine, Applicant struck a pedestrian. He stopped to call a paramedic, then fled the scene of the accident. The police later apprehended him, and he was subsequently charged with felony hit and run, in addition to driving while under the influence of intoxicants.⁽¹⁷⁾ Applicant pled guilty to both charges. On May 17, 1999, the court convicted and sentenced him to 22 months incarceration.⁽¹⁸⁾

In November 2000, after serving 18 months in prison, Applicant was released. He resumed working for his employer

with whom he worked in 1998 before the conviction, but was fired about two months later. His employment termination occurred because of missed work due to his continued addiction to methamphetamine. [\(19\)](#) On April 13, 2001, he was arrested after a routine stop, and charged with violation of probation and driving with a suspended license. [\(20\)](#) Three days later, he pled not guilty, and the court set the trial for April 23, 2001. [\(21\)](#) Applicant failed to appear for the trial, and the court issued an arrest warrant. On July 9, 2001, a warrant officer arrested him, and in the ensuing search, discovered four grams of methamphetamine in his wallet. [\(22\)](#) The prosecution amended the charges against Applicant to include possession of methamphetamine. He later pled guilty to the probation violation charge, and the state declined to prosecute the methamphetamine possession charge. [\(23\)](#) He was sentenced to 15 days in jail. [\(24\)](#)

Applicant enrolled in intensive treatment for drug and alcohol abuse on October 8, 2001. He successfully completed it on November 5, 2001. [\(25\)](#) He stated to a Defense Security Services investigator during a May 2004 interview that he has not used illegal drugs or alcohol since completing this treatment program, [\(26\)](#) and reiterated this contention at the hearing. [\(27\)](#)

On November 20, 2001, the police stopped Applicant after they observed him driving the wrong way down a one-way street. After he failed to produce a valid license or valid proof of liability insurance, the police arrested and charged him with driving with a suspended license, driving with no liability insurance, and driving the wrong way down a one-way street. [\(28\)](#) A search incident to the arrest revealed an empty beer bottle and a package of syringes in the glove compartment. When asked whether he had been using any illegal drugs or alcohol, Applicant told the police that he had drunk a beer shortly before being stopped, and had used one of the syringes five days before the arrest, for drugs. [\(29\)](#) Later, Applicant was convicted and sentenced to 90 days in jail.

On September 12, 2003, Applicant completed a security clearance application (SF 86). He failed to list his 2001 employment termination in response to Question 20: *(Your Employment Record, Has any of the following happened to you in the past 7 years? - Fired from job - Quit a job after being told you'd be fired - Left a job by mutual agreement following allegations of misconduct - Left a job by mutual agreement following allegations of unsatisfactory performance - Left a job for other reason under unfavorable circumstances)*. [\(30\)](#)

Also, Applicant failed to include the two underage-alcohol possession citations, a domestic violence-related assault charge from the 1980s, three of the domestic violence-related assault charges from the mid 1990s, and the 2001 drug-related charge in response to Question 24: *(Your Police Record - Alcohol/Drug Offenses Have you ever been charged with or convicted of any offense(s) 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 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 authority of 21 U.S.C. 844 or 18 U.S.C. 3607.)*. [\(31\)](#) In response to Question 26 requiring him to list any other offenses, Applicant disclosed two charges for driving with a suspended license that he received in 2001, [\(32\)](#) but failed to disclose a 1998 contempt charge, a 1999 charge for failing to comply, and a 2001 charge for driving with a suspended license. The omissions of the charges unrelated to drugs occurred because of confusion over the dates and number of past arrests. [\(33\)](#)

Applicant also failed to disclose his recurrence of methamphetamine use after leaving prison in 2000 on the SF 86 in response to Question 27 that required him to list any illegal drug use that occurred in the past 7 years. He "did not list [his] use of drugs on [his] security form because [he] did not want [his] current employers to know about [his] past addiction." [\(34\)](#)

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an

individual's eligibility for access to classified information (Mitigating Conditions).

An administrative judge need not view the adjudicative guidelines as inflexible rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision in Section E2.2., Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept," all available reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider 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.

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

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

Alcohol Consumption - Guideline G: 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.

Drug Involvement - Guideline H: Improper or illegal involvement with drugs raises questions regarding an individual's willingness or ability to protect classified information.

Personal Conduct - Guideline E: Conduct involving questionable judgment, untrustworthiness, lack of candor, dishonesty, or unwillingness to comply with rules and regulations 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 could mitigate security concerns, pertaining to these adjudicative guidelines are set forth and discussed in the conclusions below.

Any DoD contractor who "has been convicted in any court of the United States of a crime, was sentenced to imprisonment for a term exceeding one year, and was incarcerated as a result of that sentence for not less than one year" is precluded from either being granted a security clearance or having a security clearance renewed. ⁽³⁵⁾ A waiver may be authorized under certain circumstances. ⁽³⁶⁾

Since the protection of the national security is the paramount consideration, the final decision in each case must be arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the national interest." ⁽³⁷⁾ In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

The government is responsible for presenting witnesses and other evidence to establish facts in the SOR that have been controverted. The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by the government, and has the ultimate burden of persuasion as to obtaining a favorable trustworthiness determination.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship 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. Decisions under this Directive

include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Applicant's loyalty is not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

CONCLUSIONS

Criminal Conduct

Applicant has an extensive history of criminal activity. Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*Allegations or admission 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 offenses*), apply. He has not committed a crime in nearly five years. CC MC E2.A10.1.3.1 (*The criminal behavior was not recent*), applies.

Alcohol Consumption

Applicant's years of heavy alcohol consumption and history of alcohol-related arrests raise security concerns under Alcohol Consumption Disqualifying Condition (AC DC) E2.A7.1.1 (*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 AC DC E2.A7.1.5 (*Habitual or binge consumption of alcohol to the point of impaired judgment*). Although Applicant's completion of a rehabilitation program in 2001 triggers the applicability of Alcohol Consumption Mitigating Condition (AC MC) E2.A7.1.3.3 (*Positive changes in behavior supportive of sobriety*), it has minimal probative value because he has relapsed in the past after completing alcohol rehabilitation programs.

Drug Involvement

Applicant's abuse of methamphetamine triggers the applicability of Drug Involvement Disqualifying Condition (DI DC) E2.A8.1.1 (*Any drug abuse*), and DI DC E2.A8.1.2 (*Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution*). I have considered all of the mitigating conditions and conclude none apply. Although Applicant contended that he has not used methamphetamine since 2001 and has no intention of using it in the future, his credibility was compromised by numerous falsifications on his SF 86, and inconsistent statements at the hearing.

Personal Conduct

The SF 86 omissions raise the issue of whether 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*) applies. In explaining why he answered "No" to Question 20, Applicant stated in his Answer that he voluntarily left the job in 2001 for personal reasons, and was not terminated. ⁽³⁸⁾ In his signed, sworn, statement, however, he characterized his departure from the job in 2001 as a termination. I conclude PC DC E2.A5.1.2.2 is applicable. Applicant falsified Question 26, and none of the mitigating conditions apply.

Applicant contended that he forgot some probation violation charges, and confused the dates of some of the alcohol-related charges when he completed Question 24 and Question 26 of his SF 86. Given the multitude of the charges, and the age of some of them, I conclude that his explanation was credible. He did not intend to falsify the SF 86 by failing to list all of his alcohol-related charges in response to Question 24, and all of his probation violations in response to Question 26. PC DC E2.A5.1.2.2 is not applicable to these particular omissions.

Conversely, Applicant admitted to omitting information related to his past methamphetamine addiction from Question 24 and Question 27. PC DC E2.A5.1.2.2 applies. His explanation that he omitted this information because he did not

want his employer to know about it does not mitigate the conduct. Instead, it reflects a willingness to place personal self-interest over the responsibility to be candid with the government at all times. None of the personal conduct mitigating conditions apply to his omission of the methamphetamine abuse.

Whole-Person Concept

Substance abuse and anger management problems were the cause of much of Applicant's past criminal behavior and reckless conduct. He completed a domestic violence program in 1997, in addition to a substance abuse program in 2001, and has not broken the law in nearly five years. Also, his strong performance on the job reflects favorably on his security clearance-worthiness.

These positive factors are insufficient to overcome the negative security implications generated by his history of bad conduct. Specifically, he was convicted over the years of multiple alcohol and drug-related offenses and ignored the terms of each successive sentencing order with impunity. The nature and seriousness of the conduct grew progressively worse as he grew older. Also, he displayed a lack of candor when addressing these concerns both at the hearing and throughout the investigative process. Consequently, despite the fact that he has not broken the law in nearly five years, it is too soon to ascertain whether he has rehabilitated himself. I conclude Applicant has not mitigated the security concerns raised by his criminal conduct, alcohol consumption, drug involvement, and personal conduct.

10 U.S.C. § 986

Because Applicant served more than one year in prison as a result of the 1998 conviction listed in subparagraph 1.p, 10 U.S.C. § 986 applies. Therefore, Applicant is disqualified from eligibility for a security clearance regardless of whether he mitigated the security concerns. Because the applicability of 10 U.S.C. § 986 was not the sole reason for denying Applicant's security clearance, I decline to make a recommendation concerning waiver.

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: 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

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: Against Applicant

Subparagraph 1.h.: Against Applicant

Subparagraph 1.i.: Against Applicant

Subparagraph 1.j.: Against Applicant

Subparagraph 1.k.: Against Applicant

Subparagraph 1.l.: Against Applicant

Subparagraph 1.m.: Against Applicant

Subparagraph 1.n.: Against Applicant

Subparagraph 1.o.: Against Applicant

Subparagraph 1.p.: Against Applicant

Subparagraph 1.q.: Against Applicant

Subparagraph 1.r.: Against Applicant

Subparagraph 1.s.: Against Applicant

Subparagraph 1.t.: Against Applicant

Subparagraph 1.u.: Against Applicant

Subparagraph 1.v.: Against Applicant

Subparagraph 1.w.: Against Applicant

Paragraph 2. Guideline G: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: Against Applicant

Subparagraph 2.e.: Against Applicant

Subparagraph 2.f.: Against Applicant

Subparagraph 2.g.: Against Applicant

Subparagraph 2.h.: Against Applicant

Subparagraph 2.i.: Against Applicant

Subparagraph 2.j.: Against Applicant

Subparagraph 2.k.: Against Applicant

Paragraph 3. Guideline H AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

Subparagraph 3.b.: Against Applicant

Subparagraph 3.c.: Against Applicant

Subparagraph 3.d.: Against Applicant

Subparagraph 3.e.: Against Applicant

Subparagraph 3.f.: Against Applicant

Paragraph 4. Guideline E AGAINST APPLICANT

Subparagraph 4.a.: Against Applicant

Subparagraph 4.b.: Against Applicant

Subparagraph 4.c.: Against Applicant

Subparagraph 4.d.: For Applicant

Subparagraph 4.e.: Against 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.

Marc E. Curry

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. 21 U.S.C. § 802 (1970), and 21 U.S.C. § 812 (1970).
3. Exhibit N, Supervisor's Reference Letter, dated December 13, 2005.
4. Exhibit 21, Department of Corrections Certified Copy of Applicant's Criminal Record, dated July 12, 2004, at 7.
5. Exhibit 2, Court Record Extract, dated July 2, 2003, at 2.
6. *See* note 4, *supra* at 1.
7. Exhibit 3, Docket Chronology, (date illegible), at 1.
8. *Id.* at 2.
9. Answer, dated December 27, 2005, at 2.
10. Exhibit 5, Docket Chronology, dated February 12, 2004, at 5.
11. Exhibit 6, Docket Chronology, (date illegible), at 1.
12. Exhibit 8, Docket Chronology, dated February 2, 2003, at 1.
13. Exhibit J, Certificate of Achievement, dated January 2, 1997.
14. Certificate of Completion of Domestic Violence Program, dated September 1, 1997.
15. Exhibit 10, Docket Chronology, (date illegible), at 1.
16. Exhibit 22, Signed, Sworn, Statement, dated May 20, 2004, at 9.

17. Exhibit 20, Department of Corrections Criminal Record Regarding Applicant, compiled July 8, 2004, at 41.
18. Judgment and Sentencing Order, dated May 17, 1999, as included in Exhibit 12, Miscellaneous Court Records, at 20.
19. *See* note 22 *supra*.
20. Exhibit 14, Docket Chronology, dated February 2, 2003, at 7.
21. *Id.* at 1.
22. Exhibit 16, Police Department Incident Report, dated July 9, 2001, at 3.
23. *See* note 14, *supra* at 2.
24. *Id.*
25. Exhibit L, Reference Letter from Admissions Counselor, dated December 12, 2005.
26. *See* note 15, *supra* at 10.
27. Tr. at 76.
28. *See* note 16, *supra* at 20.
29. *Id.*
30. Exhibit 18, Security Clearance Application, dated September 12, 2003, at 5.
31. *Id.* at 7-8.
32. *Id.* at 8.
33. Amended Answer, dated February 3, 2006, at 2.
34. *See* note 15, *supra* at 10.
35. 10 U.S.C. 986(c)(1)(2004).
36. 10 U.S.C. 986(d)(2004).
37. *See generally*, Directive, Sec. 2.3., Sec. 2.5.3., Sec. 3.2., and Sec. 4.2.
38. *See* note 7, *supra* at 7.