

KEYWORD: Criminal Conduct; Personal Conduct; Alcohol

DIGEST: Applicant is 49-years-old, married, and a structural mechanic who has worked for a federal contractor for three years. Applicant has a history of criminal offenses, including driving under the influence (twice), assaults, numerous domestic violence charges and other offenses, dating from 1993 through 2004. Many of his offenses were alcohol-related and he continues to drink, sometimes to intoxication. Applicant failed to divulge all of his criminal and alcohol-related offenses on his security clearance application. Applicant failed to mitigate security concerns under Guideline J, criminal conduct, Guideline E, personal conduct, and Guideline G, alcohol consumption. Clearance is denied.

CASENO: 05-00840.h1

DATE: 02/15/2005

DATE: February 15, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-00840

DECISION OF ADMINISTRATIVE JUDGE

CAROL G. RICCIARDELLO

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 49-years-old, married, and a structural mechanic who has worked for a federal contractor for three years. Applicant has a history of criminal offenses, including driving under the influence (twice), assaults, numerous domestic violence charges and other offenses, dating from 1993 through 2004. Many of his offenses were alcohol-related and he continues to drink, sometimes to intoxication. Applicant failed to divulge all of his criminal and alcohol-related offenses on his security clearance application. Applicant failed to mitigate security concerns under Guideline J, criminal conduct, Guideline E, personal conduct, and Guideline G, alcohol consumption. Clearance is denied.

STATEMENT OF THE CASE

On October 5, 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), Guideline E (personal conduct), and Guideline G, (alcohol consumption).

In a sworn statement, dated October 31, 2005, Applicant responded to the SOR allegations and requested a hearing. In his SOR responses, Applicant admitted SOR allegations ¶¶ 1.a., 1.c., 1.d., 1.e., 1.f., 1.g., 1.h., 1.i., 1.j. He denied the allegations in SOR ¶¶ 1.b., 2.a., and 2.b., and failed to respond to ¶ 3.a. The case was assigned to me on December 1, 2005. A notice of hearing was issued on December 21, 2005, scheduling the hearing for January 12, 2006. The hearing was conducted as scheduled. The government submitted eighteen exhibits that were marked as Government Exhibits (GE) 1-18. The exhibits were admitted into the record without objection. Applicant testified on his own behalf, and did not submit any exhibits. DOHA received the hearing transcript (Tr.) on January 19, 2006.

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 49 years old, married to his third wife, has two children who do not live with him, and has worked as a structural mechanic for a federal contractor for three years. He served in the Marine Corps for four years and was honorably discharged.

Applicant was arrested on November 13, 1993, and charged with Driving Under the Influence of Alcohol (DUI). Applicant was convicted of this offense. He does not believe he was alcohol dependent at that time. Applicant recorded a .21% blood alcohol on the Breathalyzer. He was required to take an alcohol information class. No other information was provided.

On August 7, 1994, Applicant was charged with Assault-3rd degree and DUI. Applicant did not believe he was arrested for DUI, but believed he was arrested for a domestic violence incident with his first wife. They had an altercation while in his vehicle, and he hit her nose, while grabbing her, and it started to bleed. Applicant claimed he had had 3-4 beers before the incident, but did not think he was intoxicated. This arrest occurred less than a year after he was convicted for the above DUI.

Applicant was arrested on September 4, 1996, and charged with Assault-Domestic Violence and Disorderly Conduct. He had an argument with his sister and pushed her. Applicant was verbally abusive to the police and claimed he only vaguely remembers the incident. The charges were dismissed when his sister failed to appear for court.

Applicant was cited and charged on January 5, 1997, with driving with a license suspended/revoked/cancelled. Applicant pled guilty and was fined \$40.00.

On April 11, 1998, Applicant was charged with Disorderly Conduct/Language/Riot. Applicant's wife called the police when he came home drunk and grabbed her by the dress. Applicant testified he was not drinking and later changed his testimony and stated he had been drinking, was not sure how much he had been drinking, and did not remember if he was drunk. (2) He drove his vehicle after drinking. He denied he grabbed his wife's dress.

Applicant was cited and charged with no current vehicle registration and no mandatory insurance on April 9, 1999. He pled no contest to both charges and was fined \$72.00.

On November 30, 2002, Applicant was charged with assault, criminal damage and disorderly conduct. His wife alleged he had struck her in the chest. Applicant claimed his wife and stepdaughter lied about the incident. Applicant had been drinking, but did not believe he was drunk. He does not know how much he had to drink, but admitted he drove after drinking. (3) He later admitted he was intoxicated. (4) He had had an argument with his wife and she called the police. He left on his motorcycle before they arrived. He drove to a casino and was arrested there. Applicant admitted the incident in his answer. He later admitted he was intoxicated. (5) The case was dismissed because his wife failed to appear in court.

On December 9, 2002, Applicant was charged with No Eye Protection, Failure to Stop for a Stop Sign, Driving Under the Influence (DUI)-Blood Alcohol Level .08% or More and Extreme Driving Under the Influence-Blood Alcohol Content of 15% or More. Applicant's blood alcohol was .21%. He failed to appear in court and was charged with a misdemeanor. Applicant was found guilty of Extreme DUI and was sentenced to 10 days in jail, placed on 24 months probation, 12 months unsupervised, fined \$840.00, ordered to undergo an alcohol evaluation, complete the Mothers Against Drunk Driving Victim Panel, and pay probation fees of \$50.00 per month. The other charges were dismissed.

On February 24, 2003, Applicant had been drinking and his wife called the police because she claimed Applicant had threatened her and said he should kill her for all the trouble she caused him. (6) When the police arrived, Applicant fled because he thought they were going to arrest him. He was found hiding under a cactus tree. Applicant claimed he was sober, knew what he was doing, and had not been drinking when this incident occurred. He was arrested for assault and two counts of disorderly conduct. Applicant went to court on May 9, 2003, and a trial date was set for July 29, 2003. On the trial date the case was dismissed without prejudice.

On January 23, 2004, Applicant was arrested and charged with Assault-Knowingly Causing Injury. During his testimony he denied grabbing his wife by the arm as alleged. However, in his answer he admitted he committed the offense. He also testified and denied he threatened his wife. He also denied he broke a beer bottle during the argument. Applicant claimed he was not drunk. The case was dismissed because his wife failed to appear in court.

On June 18, 2003, Applicant filled out a security clearance application (SF 86) and answered "Yes" 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 the authority of 21 U.S.C. 844 or 18 U.S.C. 3607*), and listed his December 2002 arrest and charge for DUI, and wrote "1st Offense," whereas in fact he deliberately failed to disclose he had also been arrested for DUI on November 13, 1993, and August 7, 1994. Applicant claimed he misunderstood the question and thought he only had to list his convictions. He also stated he did not list his DUIs because he thought he had to only put down his alcohol related offenses for the past seven years,

despite what the question asked. He also claimed he filled out the form very quickly and stated "I had the general assumption that the government would only be interested in convicted charges."⁽⁷⁾ Applicant's testimony was not credible.

Applicant answered "No" to Question 26 (*Your Police Record-Other Offenses-In the last 7 years, have you been arrested or charged with ,or convicted of any offense(s) not listed in modules 21, 22, 23, 24, 25?(Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.) 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 18 U.S.C. 3607*). He deliberately failed to disclose that he had been arrested on September 4, 1996, January 5, 1997, April 11, 1998, April 9, 1999, November 30, 2002, December 9, 2002, February 24, 2003, and January 23, 2004. Applicant deliberately and intentionally failed to divulge his offenses, this violating Title 18 U.S. C. 1001.

Although not alleged Applicant also answered "No" to Question 23 (*Your Police Record-Pending Charges-Are there currently any charges pending against you for any criminal offenses? 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 had been arrested on May 9, 2003, and 40 days later filled out his SF 86, and failed to list his pending charges.⁽⁸⁾

Applicant remains married and stated he and his wife have gone through counseling. Applicant continues to drink alcohol, sometimes to intoxication.

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, pertaining to criminal conduct, Guideline E, pertaining to personal conduct, and Guideline G, pertaining to alcohol consumption, with their respective DC and MC, applies 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.⁽⁹⁾ The government has the burden of proving controverted facts.⁽¹⁰⁾ The burden of proof is something less than a preponderance of evidence.⁽¹¹⁾ 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.⁽¹²⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹³⁾

No one has a right to a security clearance⁽¹⁴⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁵⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽¹⁶⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽¹⁷⁾ 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.

Guideline G-Alcohol Consumption-a security risk may exist because 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.

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 Guidelines J, E, and G.

Applicant has numerous criminal offenses from 1993 through 2004. Many of the offenses were committed against his wife, who would later fail to appear in court and the charges would be dismissed. Some of his criminal offenses were alcohol-related. When filling out his SF 86, Applicant deliberately and intentionally failed to divulge his criminal history. His testimony and explanations for his falsifications were not credible. His falsifications were a violation of 18 U.S.C. § 1001, felonies. 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 offenses*) both apply.

I have considered all the mitigating conditions and especially considered Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1 (*The criminal behavior was not recent*), CC MC E2.A10.1.3.2 (*The crime was an isolated incident*), and CC MC E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*), and conclude none apply. Applicant's last arrest was in 2004, he deliberately concealed his criminal history, and he continues to drink. All these factors indicate a lack of evidence of clear rehabilitation. Due to the recency of Applicant's falsifications and his 2004 arrest, I find CC MC E2.A10.1.3.1 does not apply. I also find that the frequency that Applicant has been involved in criminal activities negates the application of CC MC E2.A10.1.3.2. Applicant's history of criminal activity is a grave concern. There is little indication that he has an appreciation for abiding within the parameters of the law. Applicant failed to mitigate Guideline J, 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.A5.1.2.4. (*Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail*) both apply in this case. Applicant failed to provide the required information on his SF 86. His explanation that he filled it out quickly is not credible. He failed to list his most recent arrest that occurred shortly before filling out his forms. Although not alleged and is not considered for purposes of disqualification, it does show a disturbing pattern and nonchalance about his criminal activity, and negates

his explanations for regarding interpreting the SF 86 questions. Applicant also has a history of domestic violence offenses, assaults and other charges, all of which make his personal conduct the type that could increase his vulnerability and affect his personal standings in the community.

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.A5.1.2.2 (*The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*), 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's falsifications were not isolated, as evidenced by the two times he lied on the SF 86. Applicant did not make a good faith effort to correct his falsifications. Applicant provided no evidence to show he has taken any steps to reduce his vulnerability to coercion or exploitation. His long history of domestic violence and criminal offenses raises concern about his personal conduct. Applicant failed to mitigate the security concerns raised by his personal conduct.

Based on all the evidence Alcohol Consumption Disqualifying Condition (AC 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*) applies. Applicant has numerous alcohol-related incidents or incidents where alcohol was a factor, beginning in 1993 through 2004. These include DUIs, domestic violence, assault, and disorderly conduct.

I have considered all the mitigating conditions and especially considered Alcohol Consumption Mitigating Condition (AC MC) E2.A7.1.3.1 (*The alcohol-related incidents do not indicate a pattern*), AC MC E2.A7.1.3.2 (*The problem occurred a number of years ago and there is no indication of a recent problem*), and AC MC E2.A7.1.3.3 (*Positive changes in behavior supportive of sobriety*). Applicant has a long history of incidents that are alcohol-related, the most recent in 2004. Although he has gone through marriage counseling, he continues to drink, sometimes to intoxication. Applicant failed to show that alcohol no longer has a negative impact on his life and his conduct remains too unpredictable. I find none of the mitigating conditions apply, and Applicant has failed to mitigate Guideline G.

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 considered the whole person and I find Applicant failed to mitigate the security concerns under Guidelines J, criminal conduct, Guideline E, personal conduct, and Guideline G, alcohol consumption. Therefore, 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, Guidelines J, E, and G 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. 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.: Against the Applicant

Subparagraph 1.j.: Against the Applicant

Subparagraph 1.k.: Against the 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

Paragraph 3. Guideline G: AGAINST THE APPLICANT

Subparagraph 3.a.: Against the Applicant

DECISION

In light of all of the circumstances 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. Tr. 33-35.
3. Tr. 38.
4. Tr. 39.
5. Tr. 39.
6. Tr. 43.
7. Tr. 58.
8. This information is not considered for disqualifying purposes, but is considered as part of the whole person and to clarify any confusion Applicant claimed he had when answering the other questions on the SF 86.
9. ISCR Case No. 96-0277 at p. 2 (App. Bd. Jul 11, 1997).
10. ISCR Case No. 97-0016 at p. 3 (App. Bd. Dec. 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.
11. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

12. ISCR Case No. 94-1075 at pp. 3-4 (App. Bd. Aug. 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.
13. ISCR Case No. 93-1390 at pp. 7-8 (App. Bd. Jan. 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.
14. *Egan*, 484 U.S. at 531.
15. *Id.*
16. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
17. Executive Order 10865 § 7.