

DATE: March 19, 2007

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 06-16781

ISION OF ADMINISTRATIVE JUDGE

JUAN J. RIVERA

APPEARANCES

FOR GOVERNMENT

Stephanie C. Hess, Esquire

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a general maintenance worker employed by a defense contractor. Between 1979 and 1998, he was arrested 15 times, convicted for six DUIs, one felony burglary, and two drug offenses. In 2005, he deliberately failed to disclose his past felony charges/convictions, and his drug and alcohol-related behavior in his security clearance application. Applicant failed to present sufficient evidence to mitigate security concerns raised by his criminal conduct, alcohol consumption, and personal conduct. Clearance is denied.

STATEMENT OF THE CASE

On August 31, 2006, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct). The SOR informed Applicant that, based on information available to the government, DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to grant him access to classified information. (1) On September 26, 2006, Applicant answered the SOR (Answer), (2) and requested a clearance decision based on the written record without a hearing.

Department Counsel prepared a File of Relevant Material (FORM) which was mailed to Applicant on December 4, 2006. He acknowledged receipt of the FORM on December 18, 2006, and did not object to anything contained in the FORM or submit additional information for consideration within the 30-day time period provided to him. The case was assigned to me on February 22, 2007.

FINDINGS OF FACT

Applicant admitted the SOR allegations in ¶¶1.a, 1.b, 1.e - 1.g, 1.j(1) - 1.o(1), 2.a, and 3.a - 3.c with explanations. He denied the SOR allegations in ¶¶1.c, 1.d, 1.h, 1.i, 1.j(2), 1.j(3), and 1.o(2). His admissions to the SOR allegations are incorporated herein as findings of fact. After a thorough review of the FORM evidence, I make the following additional

findings of fact:

Applicant is a 52-year-old general maintenance worker. Since February 2001, he has worked for defense contractors, including his current employer for whom he has worked since June 2004. (3) From July 1973 to July 1976, he served in the U.S. Army and achieved the rank of Private First Class (E-3). He was discharged after completion of his time in service. He married his wife in March 1984, and they raised two children, both of whom are now adults. He disclosed no education beyond junior high school.

A review of Applicant's criminal records during his background investigation disclosed his involvement in the following incidents: (4)

- a. In July 1979, he was convicted for driving under the influence (DUI) (refused an intoxication test), obstruction of an officer, and speeding. He was sentenced to probation and paid a fine.
- b. In August 1981, he was arrested and charged with DUI, a felony violation of the State's Controlled Substance Act (SCSA), and using abusive or obscene language. He was found guilty of the DUI and using abusive language. He was placed on probation, fined, and required to attend driving school. The SCSA charge was dismissed. Applicant denied any involvement with any controlled substance during this incident. (5)
- c. In October 1981, he was arrested for an alleged violation of the SCSA. No formal charges were filed against him. (6)
- d. In November 1981, he was arrested and for burglary/theft by taking. No formal charges were filed against him. (7)
- e. In or about February 1982, he was charged with felony burglary. Applicant plead guilty and was placed on probation for four years, fined, and required to make restitution. He admitted to taking some meat from a cooler, however, he does not believe he should have been charged with felony burglary.
- f. In or about August 1982, Applicant violated his probation and was charged with a misdemeanor. He paid a fine/court costs and the charge was dismissed.
- g. In February 1983, he was charged with being a habitual violator, DUI, driving with a suspended license, driving without insurance, and improper line use. Applicant admitted guilt to all the charges. (8)
- h. In July and October 1984, he was arrested and charged with simple battery. Applicant denied ever assaulting his spouse. The charges were dismissed after he participated in counseling.
- i. In July 1987, Applicant was charged with possession of marijuana, a felony violation of the SCSA, a violation of the SCSA with intent to distribute, and misdemeanor disorderly conduct. He was convicted of possession of marijuana, a felony violation of the SCSA. (9) He was placed on five years probation and paid a \$1,500 fine. The other two charges were dismissed.
- j. In April 1988, he pled *nolo contendere* to two misdemeanors: a violation of the SCSA, and public drunkenness. He was found guilty and sentence to 30 days confinement (suspended) and to pay a fine. Applicant explained the controlled substances in his possession were Motrin and Ibuprofen. The medications were not in an authorized container indicating they were issued to him. His possession of the medications under those circumstances was illegal under State law.
- k. In January 1991, he was convicted of DUI and failure to remain in lane. He paid a \$600 fine.
- l. In June 1992, Applicant was convicted of DUI and speeding. He was fined and sentenced to two days confinement and served 11 months, 28 days probation.
- m. In May 1993, he was charged with DUI and defective equipment. Applicant admitted guilt to both charges. (10)
- n. In or about October 1998, Applicant was charged with disorderly conduct and keeping a disorderly house. He

admitted guilt to the disorderly conduct charge, but denied the keeping a disorderly house charge. He was at his mother's home drinking with his brother and they became involved in an altercation.

In his May 2005 security clearance application,⁽¹¹⁾ Applicant answered "No" to question 21, which asked whether he had ever been charged with or convicted of a felony. Applicant failed to disclose his 1981 felony charge for violation of the SCSA (§1.b, later dismissed), his 1982 conviction for felony burglary (§1.e), and his 1987 felony conviction for violation of the SCSA (§1.j(1)).

Applicant also answered "No" to question 24, which asked whether he had ever been charged with or convicted of any offenses related to alcohol or drugs. Applicant failed to disclose the charges and/or convictions alleged in SOR §§1.a (DUI conviction), 1.b (DUI conviction and felony charge for violation of SCSA), 1.g (DUI conviction), 1.j (conviction for felony violation of SCSA), 1.k conviction for misdemeanor violation of SCSA and public drunkenness), 1.l (DUI conviction), 1.m (DUI conviction), and 1.n (DUI conviction).

In December 2005, Applicant participated in an interview conducted by a defense background investigator. He stated to the investigator that "I [he] have not been in any trouble since 1987."⁽¹²⁾ He failed to disclose his involvement in the incidents alleged in SOR §§1.k - 1.o.

Applicant admitted that he deliberately falsified his answers to SF 86 questions 21 and 24, and to the government investigator, because he believed the charges "should have come off my [his] record and [because of his] fear of losing my [his] job".⁽¹³⁾

POLICIES

The Directive sets forth adjudicative guidelines which must be considered in evaluating an Applicant's eligibility for access to classified information. Foremost are the Disqualifying and Mitigating conditions under each adjudicative guideline applicable to the facts and circumstances of the case. However, the guidelines are not viewed as inflexible ironclad rules of law. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive,⁽¹⁴⁾ and the whole person concept.⁽¹⁵⁾ Having considered the record evidence as a whole, I conclude Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct) are the applicable relevant adjudicative guidelines.

BURDEN OF PROOF

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information.⁽¹⁶⁾ The government has the initial burden of proving controverted facts alleged in the SOR. To meet its burden, the government must establish a prima facie case by substantial evidence.⁽¹⁷⁾ The responsibility then shifts to the applicant to refute, extenuate or mitigate the government's case. Because no one has a right to a security clearance, the applicant carries the burden of persuasion.⁽¹⁸⁾

A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest to ensure each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of protecting national security.⁽¹⁹⁾

CONCLUSIONS

Since this case is being decided without a hearing, my evaluation is necessarily limited to the contents of the various documents in the case file.

Under Guideline J (Criminal Conduct), a history or pattern of criminal conduct is a security concern because it may

indicate an unwillingness to abide by rules and regulations and may show the applicant to be lacking in judgment, reliability and trustworthiness. ⁽²⁰⁾ The government established its case under Guideline J by showing that Applicant was implicated in 15 offenses between 1979 and 1998. He was convicted of six DUIs, one felony burglary, and two drug offenses (one felony and one misdemeanor). I also find, as discussed below under Guideline E, that Applicant deliberately falsified his 2005 security clearance application. His falsification of the SF 86 is a violation of 18 U.S.C. 1001, a felony. ⁽²¹⁾ Disqualifying Condition (DC) 1: *Allegations or admission of criminal conduct*, ⁽²²⁾ and DC 2: *A single serious crime or multiple lesser offenses* ⁽²³⁾ apply.

Applicant's past behavior, from 1979 to 2005, forms a pattern of disturbing criminal activity that cannot be ignored. His falsification brings to the forefront the criminal conduct and alcohol consumption concerns raised by his past behavior. Although not alleged in the SOR, I am also required to consider Applicant's illegal drug behavior when evaluating the seriousness of the conduct alleged in the SOR to determine factors such as the extent to which his behavior is recent; whether it is isolated; the likelihood of recurrence; Applicant's explanations concerning the circumstances of the incidents alleged; and his rehabilitation. ⁽²⁴⁾

Under the totality of the circumstances, I find Applicant's criminal behavior is recent and not isolated. Applicant engaged in criminal misconduct over a period of at least 19 years, from the time he was 25 until he was 44. The available evidence indicates he has not been involved in criminal misconduct since 2005. However, considering his 25 year history of criminal behavior, the nature and seriousness of his misconduct, his falsification of the SF 86, and his prolonged, disregard for the law, I find his favorable information is not sufficient to mitigate the Guideline J security concerns. His behavior raises questions about his ability and willingness to follow the law, and ultimately, to protect classified information. His falsification weighs against a finding of rehabilitation and positive behavioral changes. Guideline J is decided against Applicant.

Under 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. ⁽²⁵⁾ The government established its case under Guideline G by showing that from 1979 to 1998, he was involved in eight alcohol-related incidents, including six DUI convictions. Applicant abused alcohol, resulting in his exercising questionable judgment and being convicted for six DUIs. Guideline G Disqualifying Condition (DC) 1: *Alcohol-related incidents away from work, such as driving while under the influence* ⁽²⁶⁾ applies.

There is no evidence that Applicant has been involved in any alcohol-related misconduct since 1998. As such, Alcohol Consumption Mitigating Condition (AC MC) 2: *the problem occurred a number of years ago and there is no indication of a recent problem*, may seem to apply. However, Applicant failed to provide sufficient information as to his current level of alcohol use. Nor does the evidence available establish a favorable diagnosis or prognosis for the Applicant, or that he has no alcohol related problems. Under the totality of the circumstances I conclude that none of the alcohol consumption mitigating conditions is applicable. ⁽²⁷⁾

Under Guideline E, personal conduct is always a security concern because it asks the ultimate question - whether a person's past conduct instills confidence the person can be trusted to properly safeguard classified information. An applicant's conduct is a security concern if it involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Such behavior could indicate that the person may not properly safeguard classified information. ⁽²⁸⁾

The government established its case under Guideline E by showing that Applicant deliberately failed to disclose material information in his answers to SF 86 questions 21 and 24, and that he made a false statement to a government investigator. In light of Applicant's admissions, the number of incidents that he failed to disclose, the seriousness of those incidents, and the circumstances surrounding those incidents, I find Applicant's omissions were made with the intent to mislead the government. Disqualifying Conditions (DC) 2: *The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire . . .*, ⁽²⁹⁾ and DC 4: *Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress . . .*, ⁽³⁰⁾ apply.

I specifically considered all Guideline E Mitigating Conditions (MC) and conclude that none apply. Applicant admitted the omitted information only after being served the SOR, and there is no evidence he has reduced his vulnerability to coercion, pressure, or duress. Additionally, for the same reasons outlined above under the discussion of Guideline J, incorporated herein, I conclude none of the MCs apply. Guideline E is decided against Applicant.

I have carefully weighed all evidence, and I applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guidelines. I specifically considered Applicant's age, the lack of any misconduct or questionable behavior since 1998 (except for the falsifications alleged in the SOR), and his six years working for defense contractors.

As previously discussed, Applicant's past behavior, from 1979 to 1998, forms a pattern of disturbing criminal activity and alcohol abuse that cannot be ignored. His falsification brings to the forefront the criminal conduct and alcohol consumption concerns raised by his past behavior. Considering the seriousness of his past behavior together with his recent falsifications, I conclude his behavior is recent. Applicant failed to present sufficient evidence of rehabilitation, and the likelihood of recurrence cannot be ruled out.

FORMAL FINDINGS

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1, Criminal Conduct (Guideline J) AGAINST APPLICANT

Subparagraphs 1.a - 1.b Against Applicant

Subparagraphs 1.c - 1.d For Applicant

Subparagraphs 1.e - 1.o Against Applicant

Paragraph 2, Alcohol Consumption (Guideline G) AGAINST APPLICANT

Subparagraphs 2.a Against Applicant

Paragraph 3, Personal Conduct (Guideline E) AGAINST APPLICANT

Subparagraphs 3.a - 1.c 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.

Juan J. Rivera

Administrative Judge

1. *See*, Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992) (Directive), as amended.

2. Government Exhibit (GE) 3 (Applicant's answer to the SOR).

3. GE 4 (Office of Personnel Management Security Clearance Application (SF86), dated May 16, 2005), unless indicated otherwise, is the source for the facts in this paragraph.

4. GE 5 (Federal Bureau of Investigation Identification Record, dated September 28, 2005) and GE 3.

5. GE 3. Unless otherwise indicated, Applicant's explanations to the SOR allegations are based on Applicant's answer to

- the SOR.
6. GE 5.
7. *Id.*
8. GE 3.
9. GE 5. The FBI Identification Record shows Applicant was charged and convicted of "dangerous drugs offense."
10. GE 3.
11. GE 4 (Office of Personnel Management Security Clearance Application (SF 86), date May 16, 2005).
12. GE 3.
13. GE 3.
14. Directive, Section 6.3. Each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate:
15. Directive, E2.2.1. ". . . The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. . . ." **The whole person concept includes the consideration of** the nature and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the age of the applicant; the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation; and the probability that the circumstances or conduct will continue or recur in the future.
16. *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
17. ISCR Case No. 98-0761 at 2 (App. Bd. Dec. 27, 1999) (Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.); ISCR Case No. 02-12199 at 3 (App. Bd. Apr. 3, 2006) (Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.); Directive, ¶ E3.1.32.1.
18. *Egan, supra* n.10, at 528, 531.
19. *See Id.*; Directive E2.2.2.
20. Directive, ¶ E2.A10.1.1.
21. It is a criminal offense to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation, or knowingly make or use a false writing in any matter within the jurisdiction of the executive branch of the Government of the United States. Security clearances are within the jurisdiction of the executive branch of the Government of the United States. (*Egan*, 484 U.S. at 527).
22. Directive, ¶ E2.A10.1.2.1.
23. Directive, ¶ E2.A10.1.2.2.
24. ISCR Case No. 04-09959 at.3 (App. Bd. May 19, 2006). I did not consider Applicant's illegal drug related behavior as a basis for disqualification.
25. Directive, ¶ E2.A7.1.1.

26. Directive, ¶ E2.A7.1.2.1.

27. Directive, ¶ E2.A7.1.3.

28. Directive, ¶ E2.A5.1.1.

29. Directive, E2.A5.1.2.2.

30. Directive, E2.A5.1.2.4.