

KEYWORD: Criminal Conduct; Alcohol; Personal Conduct

DIGEST: Applicant is 42 years old and works for a federal contractor. From 1986 to 2005, he was charged several times for incidents involving criminal conduct, some of which related to alcohol consumption. He remains on probation until the end of November 2007 for the last offense. When he completed his security clearance application in May 2002, he failed to disclose all of the charges against him. In a subsequent interview relating to his criminal history, he did not disclose pertinent information about one of the charges. He failed to mitigate security concerns raised by his criminal conduct, alcohol consumption and personal conduct. Clearance is denied.

CASENO: 06-25258.h1

DATE: 07/23/2007

DATE: July 23, 2007

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In re:)	
)	
-----)	ISCR Case No. 06-25258
SSN: -----)	
)	
Applicant for Security Clearance)	
_____)	

**DECISION OF ADMINISTRATIVE JUDGE
SHARI DAM**

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 42 years old and works for a federal contractor. From 1986 to 2005, he was charged several times for incidents involving criminal conduct, some of which related to alcohol consumption. He remains on probation until the end of November 2007 for the last offense. When he completed his security clearance application in May 2002, he failed to disclose all of the charges against him. In a subsequent interview relating to his criminal history, he did not disclose pertinent information about one of the charges. He failed to mitigate security concerns raised by his criminal conduct, alcohol consumption and personal conduct. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan. 2, 1992), as amended, DOHA issued a Statement of Reasons (SOR) on March 15, 2007, detailing the basis for its decision-security concerns raised under Guidelines J (Criminal Conduct), G (Alcohol Consumption) and E (Personal Conduct) of the Adjudicative Guidelines, issued on December 29, 2005, and implemented by the Department of Defense effective September 1, 2006. Applicant answered the SOR in writing on April 9, 2007, and elected to have a hearing before an administrative judge. The case was assigned to me on April 25, 2007. DOHA issued a Notice of Hearing on May 15, 2007, setting the case for June 6, 2007.

At the hearing, Department Counsel introduced Government Exhibits (GX) 1 through 6 into evidence without objections. Applicant testified in his case and introduced Applicant Exhibits (AX) A through G into evidence without objections. DOHA received the hearing transcript (Tr.) on June 20, 2007.

PROCEDURAL MATTERS

_____ At the commencement of the hearing, Department Counsel indicated that the Government did not intend to produce any evidence on the allegation contained in SOR ¶ 3.a. That allegation is found in Applicant's favor. (Tr. 9).

FINDINGS OF FACT

Based on the entire record, including Applicant's admissions in his Answer to the SOR and at the hearing, I make the following additional findings of fact:

Applicant is 42-years-old. He comes from a military family. His father and three brothers were in the Navy. (Tr. 59). He enlisted in the Navy in 1986 at the age of 21. At the time he left in 1993, he was a jet engine test cell operator (E4). (GX 1). He was married to his first wife from 1986 to 1995. He married his current wife in 2000. They have a young child. He was on active reserve duty from October 2001 until October 2004 as an air crewman. (GX 2; Tr. 25). After leaving the Navy, he had various job until he started his civilian current position in January 2003 with a federal contractor. He works on interactive courseware for a missile satellite program. (Tr. 28). He completed a Security Clearance Application (SF 86) in May 2002, and another one in March 2006. He has held an interim secret security clearance since 2002. (Tr. 62).

Applicant admitted that he has a history of criminal charges and arrests, involving ten offenses, dating from 1986 to 2005. They are listed as follows in the SOR:

(¶1.a) In June 1986, he was charged with trespassing, a misdemeanor, after he and a friend were in a physical altercation at a hotel pool party. He paid a fine. He was 21 years old at the time. (Tr. 29; Answer).

(¶1.b) In October 1989, while in the military, he was charged with Drinking in Public. He believes this involved his former wife. He did not disclose the incident on the May 2002 SF 86 because he had forgotten about it. (Tr. 30; 44).

(¶1.c) In August 1992, he was charged with Assault and Battery after he and his former wife were involved in a physical altercation. In October 1993, the charge was dismissed and the court advised them to attend marital counseling. (Answer).

(¶1.d) In February 1993, he and his former wife became embroiled in another physical altercation. Both were charged with assault. He paid a fine and the case was dismissed. He was ordered to attend anger management. (Tr. 32-33).

(¶1.f) In 1999, he was involved in a traffic accident and charged with (1) Driving without Insurance, (2) Following Too Closely, and (3) Leaving the Scene of an Accident. The charges were reduced to Following Too Closely. He was fined and the other two charges were dismissed. (Tr. 35).

(¶1.g) In November 1999, he was charged with Unlawful Use of a Drivers License, as his driver's license had been suspended for failing to pay a fine. (Tr. 35).

(¶1.h) In November 2001, Applicant was charged with (1) Driving Under the Influence (DUI), (2) Refusal to Take a Breathalyzer, and (3) Trespassing after he ran off the road. He was found guilty on the trespassing charge and fined \$150. (Tr. 35-36). He did not disclose this charge under question 24, relating to alcohol offenses, in the May 2002 SF 86 because the Drug and Alcohol Program Administrator told him not to disclose it and because he was convicted of trespassing and not an alcohol related incident. (Tr. 45-47). Prior to the arrest, he and his friends were celebrating his re-enlistment into the reserves. (Tr. 35-36; GX 4 at 2).

(¶1.i) On January 8, 2002, Applicant was charged with Drunk in Public after he and his neighbor got into an argument about her dog. (Tr. 36-37). He was found guilty, fined \$15 and paid court costs. He did not disclose this charge under questions 24 and 26, relating to alcohol offenses or other offenses in the May 2002 SF 86, because the Drug and Alcohol Program Administrator told him not to disclose it and it had not been resolved at the time he completed the SF 86. (Tr. 45; GX 4 at 3).

(¶1.j) On January 23, 2002, a Capias was issued because Applicant violated the conditions of his earlier release when he was arrested in early January on the Drunk in Public charge. The Capias charge was later dismissed. (Tr. 38). He did not disclose this charge under question 26, relating to criminal arrests, for the same reasons he did not disclose the January 8, 2002 charge. (Answer; Tr. 38).

(¶1.k) In May 2005, Applicant was arrested and charged with DUI and Refusal to Take a Breathalyzer. In November 2005, he was found guilty of the DUI charge and sentenced to 90 days in jail (suspended), fined \$250, and placed on probation for two years. His driver's license was restricted for one year. He was ordered to go through an alcohol evaluation and education program, which he completed in February 2006. (Tr. 39-42). He is on probation until November 29, 2007. He and his friends were drinking and celebrating prior to his arrest. (Answer).

In his August 2002 statement, Applicant disclosed all charges and provided detailed explanations of the circumstances surrounding the offenses. (GX 4). In that statement he admitted that prior to the November 2001 arrest, he had been drinking. (*Id.* at 2). However, he was not as forthright in his subsequent August 2006 interview about it, and essentially denied that he was drinking before his car went off the road. He later admitted that he misstated the facts relating to his drinking that night. He did not tell the truth to the investigator because he was very embarrassed about his conduct. (Tr. 50; Answer). He disclosed all pertinent charges on the March 2006 SF 86.

Applicant admitted that he did not timely file his federal income tax returns for the years 1997, 1998 and 1999 until after the deadline. He was under the mistaken belief that he could wait three years and file all years in the fourth year. He subsequently filed the returns and paid all taxes in full. (Tr. 34).

Applicant acknowledged that many of these incidents were related to alcohol consumption. (Tr. 53). He believes he has changed in the past couple years, especially since the birth of his young child. Completing the alcohol education program and participating in some Alcoholics Anonymous (AA) meetings have helped him understand his alcohol problems. However, he no longer attends meetings and claims he rarely drinks. (Tr. 54-55).

POLICIES

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has “the authority . . . 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.” *Id.* at 527. The President authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). Each security clearance decision “must be a fair and impartial common sense determination based upon consideration of all relevant and material information and the pertinent criteria and adjudication policy.” Directive ¶ 6.3. 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).

The revised Adjudicative Guidelines (AG) set forth potentially disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication

the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

Upon consideration of all facts in evidence and application of all appropriate adjudicative factors and pertinent legal standards, I conclude the following with respect to the allegations set forth in the SOR:

Guideline J: Criminal Conduct

Guideline ¶ 30 articulates the Government's concern about criminal conduct: "Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations."

Based on the evidence, the Government raised a security concern under three Criminal Conduct Disqualifying Conditions: "a single serious crime or multiple lesser offenses," an "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted," and the "individual is currently on parole or probation." Guideline ¶¶ 31(a), (c), and (d). Applicant was charged with criminal misconduct on ten separate occasions. He was convicted in several instances and is currently on probation until the end of November 2007 for the last offense that occurred in May 2005.

After the Government produced substantial evidence of three disqualifying conditions, the burden shifted to Applicant to produce evidence of a mitigating condition. Two Criminal Conduct Mitigating Conditions are potentially applicable under Guideline ¶ 32 and the facts of this particular case:

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and
- (d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

There are no “bright line” rules for determining when a crime is “recent.”¹ If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” *Id.* Applicant’s last SOR-alleged criminal conduct was in May 2005, approximately two years before his hearing. This misconduct is too recent to merit application of Guideline ¶ 32(a), given his history of criminal infractions that spans twenty years. Additionally, the underlying event leading to his last arrest and conviction was related to his decision to drink excessively and then drive. It did not involve an unusual situation, contemplated under this mitigating condition. In this instance, his decision to drink and drive does cast doubt on his good judgment.

Guideline ¶ 32(d) has limited application as there is some evidence of rehabilitation. He has paid the last fine imposed after the May 2005 arrest and had his driver’s license restored to an unrestricted status. He also expressed great remorse over his behavior and appears to be establishing a good employment record. However, as long as he remains on criminal probation he is unable to demonstrate successful rehabilitation that would warrant full application of this condition.

Guideline G: Alcohol Consumption

Guideline ¶ 21 articulates the Government’s concern about alcohol consumption: “Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual’s reliability and trustworthiness.”

The Government raised a security concern under this Guideline. Applicant has been arrested and charged four times for incidents related to alcohol consumption, the last one occurring in 2005. Those charges established a disqualification under Guideline ¶ 22(a): “alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse, abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent.”

Four Alcohol Consumption Mitigating Conditions under Guideline ¶ 23(a)-(d) are potentially applicable:

- (a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment;
- (b) the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser);

¹See generally, e.g. ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (Although the passage of three years since Applicant’s last act of misconduct did not, standing alone, compel the Judge to apply CC MC 1, as a matter of law, the Judge erred by failing to give an explanation why he did not apply that mitigating condition.)

(c) the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress;

(d) the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings in Alcoholic Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized treatment program.

Based on my evaluation of the record evidence as a whole, I conclude none of the conditions apply. Guideline ¶ 23(a) does not apply for essentially the same reasons that Guideline ¶ 32(a) does not apply. Although Applicant candidly acknowledges he has a problem with alcohol, he did not produce any independent evidence that he is actively and consistently participating in a recovery program, despite a history of alcohol related offenses. Hence, Guideline ¶ 32(b) cannot provide any mitigation. The mitigating conditions contained in Guideline ¶ 32(c) and (d) are not applicable because he is not participating in an employee assistance program and has not completed a formal rehabilitation program.

Guideline E: Personal Conduct

Guideline ¶ 15 articulates the Government's concern about personal conduct: "Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process."

The Government alleged in SOR ¶¶ 3.b and 3.c that Applicant falsified his May 2002 SF 86 by failing to disclose the 1989, 2001, 2002 and 2002 charges under questions 24 and 26, relating to his police record and that the omission established a disqualification under Personal Conduct Disqualifying Condition. Under Guideline 16(a), an individual raises a concern when there is a "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, determines security clearance eligibility or trustworthiness, or award fiduciary responsibilities." Although Applicant admitted he did not disclose the information, he denied that he intentionally mislead the government.

When a falsification allegation is controverted or denied, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time the omission occurred. ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004)

(explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004).

Applicant completed the SF 86 in May 2004. He did not disclose four criminal charges because he forgot about an old one and was advised not to disclose the others, partially because two of them were still pending. Based on that explanation, along with his thorough explanation in his subsequent statement and disclosure on the 2004 SF 96, I conclude, he did not intend to falsify his earlier SF 86. Accordingly, the allegations contained in ¶¶ 3.b and 3.c are concluded in his favor.

However, Applicant honestly admitted that he intentionally falsified his response to the investigator's questions about the November 2001 incident, as alleged in SOR ¶ 3.d. Based on that admission, the Government established a Personal Conduct Disqualifying Condition under Guideline ¶ 16(a). After reviewing all of the Personal Conduct Mitigating Conditions, I considered one to be potentially applicable. Guideline ¶ 17(d) provides mitigation when "the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstance, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur." Although Applicant honestly admitted his mistake and attributed it to his sense of embarrassment, he has not provided evidence that he obtained counseling to more fully understand his previous behavior. I find it troubling that he fully disclosed the details surrounding the 2001 incident in his August 2002 statement to the investigator, but four years later he attempted to shade the truth in a similar interview. That conduct leads me to believe that he has not alleviated or resolved his internal conflict over his conduct. Hence, Guideline ¶ 17(d) cannot apply.

Whole Person Analysis

In addition to evaluating the disqualifying and mitigating conditions under each guideline, the adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at a balanced decision. The essence of scrutinizing all appropriate variables in a case is referred to as the "whole person" analysis. Directive ¶ E2.2. In evaluating the conduct of the applicant, an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 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.

I considered the totality of the evidence in view of the "whole person" concept, including Applicant's middle age, his demeanor while testifying, and candid disclosure about the criminal charges and personal conduct issues. I took into account his military service and commendations, his commitment to family, and his current employment situation. However, I am concerned that since completing an alcohol program he has not continued to participate in a recovery program, given his history of legal problems related to alcohol consumption. Until he takes additional steps to document a substantial period of sobriety and remains outside of the criminal justice system for a longer period of time, I am concerned that similar events may recur in the future. Thus, Applicant failed to mitigate the security concerns raised by his criminal conduct, alcohol considerations, and personal conduct. Accordingly, Guidelines J, G and E are concluded against him.

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 as follows:

Paragraph 1: Guideline J (Criminal Conduct)	AGAINST APPLICANT
Subparagraphs 1.a.–1.k.:	Against Applicant
Paragraph 2: Guideline G (Alcohol Consumption)	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3: Guideline E (Personal Conduct)	AGAINST APPLICANT
Subparagraph 3.a.:	For Applicant
Subparagraph 3.b.:	For Applicant
Subparagraph 3.c.:	For Applicant
Subparagraph 3.d.:	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 Applicant a security clearance. Clearance is denied.

Shari Dam
Administrative Judge