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ISCR Case No. 07-05886

Applicant for Security Clearance

Appearances

For Government: D. Michael Lyles, Esquire, Department Counsel

For Applicant: *Pro Se*

April 10, 2008

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on October 28, 2007. The SOR is equivalent to an administrative complaint and it details the factual basis for the action. The issues in this case fall under Guideline J for criminal conduct, Guideline G for alcohol consumption, and Guideline E for personal conduct (falsification of a security-clearance application). For the reasons discussed below, this case is decided against Applicant.

In addition to the Executive Order and Directive, this case is brought under the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines) approved by the President on December 29, 2005.

¹ Executive Order 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended, and DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive).

The Revised Guidelines were then modified by the Defense Department, effective September 1, 2006. They supersede or replace the guidelines published in Enclosure 2 to the Directive. They apply to all adjudications and other determinations where an SOR has been issued on September 1, 2006, or thereafter.² The Directive is pending revision or amendment. The Revised Guidelines apply here because the SOR is dated after the effective date.

Applicant replied to the SOR on November 28, 2007, and requested a hearing. The case was assigned to me on December 26, 2007. The hearing took place as scheduled on March 11, 2008. The transcript (Tr.) was received on March 19, 2008.

Findings of Fact

Under Guideline J, the SOR alleges six incidents of criminal conduct, five of which are alcohol-related incidents—driving under the influence (DUI). Under Guideline G, the SOR cross-references to the five alcohol-related incidents under Guideline J. And under Guideline E, the SOR alleges Applicant falsified material facts on a security-clearance application because he disclosed only one of his five alcohol-related incidents. In his reply to the SOR, Applicant admits the Guideline J allegations, but he denies the allegations under Guidelines G and E. Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 32-year-old employee of a defense contractor. In May 2000, he was awarded a bachelor of science in electrical engineering technology. He has worked in the defense industry since June 2000. His current position is known as a system and network engineer. His day-to-day work involves supporting a ground-based missile-defense program. His annual salary is about \$69,000. He is seeking to retain a security clearance. He believes he was initially granted a security clearance via his military service in a state national guard unit where he worked with the same missile-defense program. He served in the guard for six years until his honorable discharge in 2000.

Applicant has never married, but he describes a woman as his common-law wife with whom he has two children, ages four and six. She is employed outside the home as a counselor working with children.

Applicant has a history of criminal conduct, which consists primarily of alcohol-related offenses (Exhibits 2 and 3). He described the incidents in a January 2007 interview (Exhibit 2), and the incidents are summarized as follows:

- January 1994—arrested and charged with unlawful breaking and entering of a motor vehicle; case ended in a dismissal or no bill.
- August 1998—arrested, charged, and convicted of DUI.

² See Memorandum from the Under Secretary of Defense for Intelligence, dated August 30, 2006, Subject: Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005).

- January 1999—arrested, charged, and convicted of DUI.
- June 1999—arrested and charged with DUI; disposition uncertain.
- March 2002—arrested, charged, and convicted of prowling and DUI.
- May 2003—arrested and charged with DUI; convicted in 2007.

The most recent DUI incident is discussed below.

Applicant was arrested for DUI in May 2003 when he was found sleeping in his auto on the side of the road. He had been drinking at his cousin's house in his hometown, which is more than 100 miles from the community where he lives and works. After leaving his cousin's house, he decided not to drive, and so he pulled over and went to sleep in the vehicle. The police arrived at some point and arrested him for DUI. He was held in jail overnight and released the next day.

Applicant says he lost track of the incident for various reasons, such as the geographic distance, moving and changing addresses, etc. (Tr. 52–53). He became aware of an outstanding arrest warrant during the January 2007 interview; the arrest warrant was issued in July 2003 (Exhibit 2). He then took action to have the case resolved and it concluded in September or October 2007 when he was convicted of DUI. He was fined \$815 and placed on two years of probation, which expires in about October 2009. The probation is supervised and requires him to report to a probation officer periodically. In addition to the conviction and probation, the state revoked his driver's license for three years. He believes it is revoked until sometime in 2011.

Applicant completed a security-clearance application in November 2005 (Exhibit 1). Concerning his police record, Question 23d asked him to answer the following question: "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?" He responded affirmatively and disclosed the March 2002 DUI incident. He did not disclose any of the other DUI charges and convictions.

He has abstained from alcohol since sometime after his arrest for the 2003 DUI. Doing so suits his lifestyle and his health concerns. In 2002, Applicant had successful surgery for brain cancer. As a result, he takes medicine to control seizures and he has been told by his doctors that he should not drink alcohol. In connection with this proceeding, Applicant sought out and participated in a substance-abuse program (Exhibit A). He successfully completed the program in January 2008. Applicant has not received a diagnosis of alcohol dependence or alcohol abuse.

Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. To start, no one has a right to a security clearance.³

³ *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) ("It is likewise plain that there is no 'right' to a security clearance, so that full-scale due process standards do not apply to cases

As noted by the Supreme Court in 1988 in the case of *Department of Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁴ A favorable decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.⁵ An unfavorable decision: (1) denies any application; (2) revokes any existing security clearance; and (3) prevents access to classified information at any level.⁶ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.⁷ The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.⁸ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.⁹ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁰ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹¹ The agency appellate authority has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.¹²

The Revised Guidelines set forth adjudicative guidelines to consider when evaluating a person’s security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept. A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it

such as Duane’s.”).

⁴ *Egan*, 484 U.S. at 531.

⁵ Directive, ¶ 3.2.

⁶ Directive, ¶ 3.2.

⁷ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

⁸ Directive, Enclosure 3, ¶ E3.1.14.

⁹ Directive, Enclosure 3, ¶ E3.1.15.

¹⁰ Directive, Enclosure 3, ¶ E3.1.15.

¹¹ *Egan*, 484 U.S. at 531.

¹² ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.¹³ Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

Analysis

Under Guideline J for criminal conduct,¹⁴ the concern is that "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."¹⁵

In general, a security concern is raised by Applicant's pattern of criminal conduct. In particular, DC 1,¹⁶ DC 3,¹⁷ and DC 4¹⁸ apply against Applicant as evidenced by his multiple arrests, charges, and convictions for DUI, as well as his status as a probationer until October 2009. In addition, the gap in time from the May 2003 DUI arrest to the conviction more than four years later in 2007 is of some concern. This circumstance suggests a degree of irresponsibility on Applicant's part. The breaking-and-entering charge in SOR ¶ 1.f, however, is not much of a concern because the charge was dismissed and it appears Applicant may have been at the wrong place at the wrong time. To sum up, the totality of the criminal conduct calls into question Applicant's judgment as well as his ability or willingness to comply with laws, rules, and regulations.

The guideline also contains several conditions that could mitigate security concerns, but none apply in Applicant's favor. It is true that his last arrest was nearly five years ago and he quit drinking alcohol the same year. But the 2003 DUI offense was not resolved until 2007, and Applicant is now a probationer until about October 2009. This means he is now serving a lawful sentence imposed by a state court. This is a key fact. And it explains why the criminal conduct guideline is being decided against Applicant while the alcohol consumption guideline is being decided for Applicant. His probationary status militates against a successful case in reform and rehabilitation. In other words, it is too soon to tell if Applicant will serve probation without violation and then go on to be a law-abiding citizen. Accordingly, Guideline J is decided against Applicant.

¹³ Executive Order 10865, § 7.

¹⁴ Revised Guidelines at 21–22 (setting forth the security concern and the disqualifying and mitigating conditions).

¹⁵ Revised Guidelines at 21.

¹⁶ DC 1 is "a single serious crime or multiple lesser offenses."

¹⁷ DC 3 is the "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted."

¹⁸ DC 4 is the "individual is currently on parole or probation."

Under Guideline G for alcohol consumption,¹⁹ the security concern is that “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.”²⁰

The guideline contains several conditions that could raise a security concern and may be disqualifying. In general, a security concern is raised by Applicant's pattern of drinking-and-driving. The most pertinent DC concerns alcohol-related incidents away from work,²¹ which applies against Applicant due to the multiple arrests, charges, and convictions for DUI. Taken together, these facts and circumstances raise questions about Applicant's judgment, reliability, and trustworthiness.

The guideline also contains four conditions that could mitigate security concerns. The most pertinent is MC 1, which provides as follows:

So much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment.²²

MC 1 applies in Applicant's favor because nearly five years have passed since the last alcohol-related incident. He has abstained from alcohol since sometime in 2003, and he is now a family man with a partner to whom he is committed and he is raising two children with her. Likewise, alcohol consumption is inconsistent with his medical condition and the prescribed medicines he takes for his condition. His excessive consumption of alcohol is in the past, and it no longer casts doubt on his current reliability, trustworthiness, or good judgment because he has established a pattern of abstinence. Accordingly, Guideline G is decided for Applicant.

Personal conduct under Guideline E²³ includes issues of false statements and credible adverse information that may not be enough to support action under any other guideline. In particular, a security concern may arise due to:

¹⁹ Revised Guidelines at 15–16 (setting forth the security concern and the disqualifying and mitigating conditions).

²⁰ Revised Guidelines at 15.

²¹ DC 1 is “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.”

²² Revised Guidelines at 15.

²³ Revised Guidelines at 10–12 (setting forth the security concern and the disqualifying and mitigating conditions).

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations [that may] 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.²⁴

A statement is false when it is made deliberately (knowingly and willfully). An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported.

At issue here is the truthfulness of Applicant's answer to Question 23d in his November 2005 security-clearance application. It is undisputed that Applicant was required to report all DUI charges and convictions in response to this question. He did not, reporting only the 2002 DUI incident. He contends that he answered the question in this way because: (1) he was told he only had to list felonies; and (2) he may have misread the question (Tr. 39–43, 68–71). His testimony is not credible. Given his military experience and his experience as an employee in the defense industry, he had to know his lengthy record of drunk driving might be a problem for his security clearance. He simply understated his record hoping he would pass. Moreover, his varying explanations undermine his credibility. The record evidence is sufficient to conclude that Applicant deliberately omitted or falsified material facts when he answered Question 23d by understating his history of alcohol-related offenses.²⁵ In other words, his answer to Question 23d was at best a half-truth—it was not a full, frank, and truthful answer.

All of the MC under Guideline E have been reviewed and none apply in Applicant's favor. Making false statements to the federal government during the security-clearance process is serious misconduct, and it is not easily explained away, extenuated, or mitigated. Accordingly, Guideline E is decided against Applicant.

To conclude, Applicant did not present sufficient evidence to explain, extenuate, or mitigate the security concerns. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, the falsification of the security-clearance application was given great weight, and the case would have been decided against Applicant on this basis alone. Likewise, the whole-person concept (including his honorable military service, the absence of workplace misconduct, and his alcohol-related rehabilitation efforts) was given due consideration

²⁴ Revised Guidelines at 10.

²⁵ DC 1 is the "deliberate omission, concealment, or falsification of relevant 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 that analysis does not support a favorable decision. This case is decided against Applicant.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	Against Applicant
Subparagraphs 1.a–1.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Paragraph 2, Guideline G:	For Applicant
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline E:	Against Applicant
Subparagraph 3.a:	Against Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Michael H. Leonard
Administrative Judge