



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 09-06693
)
Applicant for Security Clearance)

Appearances

For Government: Francisco J. Mendez Jr., Esq., Department Counsel
For Applicant: *Pro se*

January 31, 2011

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny his eligibility for a security clearance to work in the defense industry. The evidence shows Applicant is a former federal employee with a history of alcohol-related incidents, which includes a 1995 manslaughter conviction. While in an alcohol-induced blackout in 1994, he had a hit-and-run accident hitting a pedestrian. He pleaded guilty to several criminal charges, to include aggravated involuntary manslaughter, and was sentenced to 15 years of incarceration with 5 years suspended. He has abstained from alcohol since the day of the accident. Since his release from prison in 2000, he reunited with his family, he obtained employment in his field of engineering, and he has a good employment record. Even though Applicant presented substantial evidence of reform and rehabilitation, it is outweighed by the nature, extent, and seriousness of his criminal conduct. Accordingly, as explained below, this case is decided against Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on May 6, 2010, the Defense Office of Hearings and Appeals (the Agency) issued a statement of reasons (SOR) explaining it was unable to find it is clearly consistent with the national interest to grant Applicant access to classified information. The SOR is similar to a complaint, and it sets forth the factual basis for the action under the security guidelines known as Guideline J for criminal conduct, Guideline K for handling protected information, and Guideline E for personal conduct. The SOR also recommended that the case be submitted to an administrative judge to decide whether to deny or revoke Applicant's security clearance.

Applicant answered the SOR and requested a hearing. In his Answer, Applicant admitted all allegations except for the falsification allegation in SOR ¶ 3.c. He also submitted a four-page memorandum in support of his application for a security clearance. His admissions are incorporated into the findings of fact below. The case was assigned to me September 7, 2010. The hearing took place October 13, 2010. The hearing transcript (Tr.) was received October 21, 2010.

Findings of Fact

Applicant is a 61-year-old employee who is seeking a security clearance for an engineering job with a federal contractor. His employment history includes 25-plus years working for the federal government that ended in 1995, when he resigned in light of a manslaughter conviction. His educational background includes a bachelor's degree in electrical engineering. He has been married to the same woman for more than 30 years, and they have two adult sons. One son suffers from autism, and it is necessary for him to live with Applicant and his wife.

The evidence shows Applicant has a history of alcohol-related incidents, which includes a 1995 conviction for aggravated involuntary manslaughter.² His history also includes two arrests for drunk driving that preceded the manslaughter conviction, neither of which resulted in substantial punishment. The first took place in 1984, when he was arrested and charged with driving under the influence of alcohol (DUI). The case was disposed of by placing it on the stet docket, which typically means the prosecutor decided not to proceed with the case for some reason. The second took place in 1991,

¹ This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

² Exhibits 1–29.

when he was arrested and charged with driving while intoxicated (DWI). The case was disposed of when Applicant pleaded guilty and paid a fine.

Applicant consumed alcohol for many years, and by 1994 he was a self-described “raging alcoholic.”³ In July 1994, while employed by the federal government, Applicant went to lunch and became intoxicated. He left the establishment and got in his car to return to work. He had a hit-and-run accident hitting a pedestrian crossing the street. To this day, Applicant claims to have no memory of the event due an alcohol-induced blackout.⁴ His recollection consists of waking up in jail at about 10:30 p.m., and he learned about what he had done when he was informed by the police. Applicant described himself as “flabbergasted” and “very ashamed” of himself.⁵

The police drew blood samples from Applicant that night, and his blood-alcohol content (BAC) was measured at levels of 0.21% and 0.20% several hours after the accident.⁶ A forensic toxicologist estimated his BAC was approximately 0.33% at the time of the accident.⁷

A search of Applicant’s car discovered a briefcase that was searched as well. Inside the briefcase, the police found classified information that Applicant used for work on a regular basis.⁸ Applicant admits keeping the classified information in his locked briefcase at home or in his vehicle without authorization from about 1992 until his arrest in 1994.⁹

The victim of the hit-and-run accident was not killed immediately, but his injuries left him in a vegetative state. The victim died about two months later. The death of the victim, a husband and father, was a terrible blow to his family as reflected in a victim-impact statement made by his daughter:

My whole family has been totally devastated because of this crime. No one can really understand what we are going through until they’ve actually gone through it themselves. What we cannot understand is how anybody can be so irresponsible to drink, especially during work, until they are totally intoxicated and then drive. [Applicant] is not a teenager; he is a family man who holds a government job with secret/top secret clearance.

³ Tr. 75.

⁴ Tr. 72–74.

⁵ Tr. 74.

⁶ Exhibit 18 at 3.

⁷ Exhibit 18 at 3.

⁸ Tr. 78–79.

⁹ Answer; Tr. 80–81.

He should know what's right and wrong. We can never forget or forgive what [Applicant] has done; he has taken from us, our only and loving father. He not only killed my father, but killed my family as well. Our whole family structure is destroyed (in our custom, it is the man who holds the family together). My mother does not speak English very well and my sister is handicapped. We all relied on my father for everything. Now that my father is gone, nothing will ever be the same again. We will never get over the loss. Living each day without my father has been so difficult for all of us especially for my mother. She has not been eating well and has lost a considerable amount of weight. She is in a state of depression and feeling very lonely and extremely frustrated. She is constantly worrying about her and my sister's future. It has made me to be constantly angry and stressed out. Angry in that it wasn't fair that this should have happened to my father who has done nothing wrong. He was a good man who believed in working hard and in taking care of his family. It makes me so sad to think that all his life, he worked hard and saved his money for any uneventualities and his life has been terminated. Too many people die because of drunk driving. We need to make the laws stricter so people will think twice before they get behind the wheel. [Applicant] has been convicted of DWI before. He is a repeat offender who has no regard for public safety. After being convicted before, he has never altered his behavior; my father paid for it with his life. Why do we keep hearing the victim is always the victim and the bad guys get away? When someone is killed, not only does that person die, but everyone who is related to that person dies. I just hope that the judge will sentence [Applicant] in prison for the maximum 26 years.¹⁰

Applicant entered into a plea agreement for the offenses of DWI, felony hit-and-run, and aggravated involuntary manslaughter.¹¹ He agreed to enter an *Alford* plea¹² to the offenses without a sentence limitation. For the manslaughter offense, the court sentenced Applicant to confinement in the state penitentiary for 15 years, with 5 years suspended, and placed him on probation for 5 years upon release.¹³ For the two other offenses, the court sentenced Applicant to confinement for lesser terms to be served concurrently with the 15-year sentence.

¹⁰ Exhibit 19.

¹¹ Exhibit 17.

¹² An *Alford* plea is a guilty plea that a defendant enters as part of a plea bargain, without actually admitting guilt, and it is based on the Supreme Court case of *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160 (1970).

¹³ Exhibits 21 and 22.

With credit for good time, Applicant served a little less than five years and was released on probation in early 2000.¹⁴ He was then unemployed for several months until he obtained an engineering job with his current employer. He has worked his way from a starting salary of \$60,000 to his current salary of more than \$120,000. He is considered an expert in a particular field of engineering.¹⁵ Applicant has a good employment record as verified by witness testimony and documentary exhibits.¹⁶

Applicant has abstained from alcohol since the day of the hit-and-run accident in 1994. He completed numerous treatment programs while in prison.¹⁷ He has been an active participant in Alcoholics Anonymous while in prison and upon his release. He completed his probation without a violation. He has a valid driver's license issued by his state of residence, which is different from the state where he was convicted and incarcerated.

Applicant completed security clearance applications in 2000 and 2008.¹⁸ In his 2000 application, he disclosed his employment at the state penitentiary, his departure from federal employment in 1995 under unfavorable circumstances, his manslaughter conviction and related offenses, the 1984 and 1991 drunk driving cases, and a pending action to revoke a security clearance he held as a federal employee. In his 2008 application, he disclosed essentially the same information except for the matter concerning his security clearance. He explained that he omitted the information due to an honest mistake or oversight.¹⁹ On this point, I found his testimony to be credible and worthy of belief.

Applicant expressed remorse for his criminal conduct throughout this proceeding, as he has done in the past.²⁰

Law and Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. The only purpose of a clearance decision is to decide if an applicant is suitable for access to classified information. The Department of Defense takes the handling and safeguarding of classified information seriously

¹⁴ Exhibits 24 and 25.

¹⁵ Tr. 26.

¹⁶ Tr. 45–58; Exhibits A(7) and B.

¹⁷ Exhibit A(1).

¹⁸ Exhibits 2 and 3.

¹⁹ Answer; Exhibit A(2)–(5).

²⁰ *E.g.*, Exhibit A(4); Tr. 76–77.

because it affects our national security, the lives of our servicemembers, and our operations abroad.

It is well-established law that no one has a right to a security clearance.²¹ As noted by the Supreme Court in *Department of Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”²² 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.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.²³ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.²⁴

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.²⁵ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.²⁶ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.²⁷ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²⁸ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.²⁹ The DOHA Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.³⁰

The AG set forth the relevant standards to consider when evaluating a person’s security clearance eligibility, including disqualifying conditions and mitigating conditions

²¹ *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) (no right to a security clearance).

²² 484 U.S. at 531.

²³ Directive, ¶ 3.2.

²⁴ Directive, ¶ 3.2.

²⁵ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

²⁶ Directive, Enclosure 3, ¶ E3.1.14.

²⁷ Directive, Enclosure 3, ¶ E3.1.15.

²⁸ Directive, Enclosure 3, ¶ E3.1.15.

²⁹ *Egan*, 484 U.S. at 531.

³⁰ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant facts and circumstances, the pertinent criteria and adjudication factors, and the whole-person concept.

The Government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.³¹ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Analysis

Under Guideline E for personal conduct,³² the suitability of an applicant may be questioned or put into doubt due to false statements and credible adverse information that may not be enough to support action under any other guideline. The overall concern under Guideline E is:

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.³³

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.

The issue here is the truthfulness of Applicant's answer to a particular question about his security clearance record when he completed his 2008 security clearance application. Based on the evidence as a whole, including Applicant's disclosure of the manslaughter conviction and the pending action to revoke his clearance on his 2000 security clearance application, I conclude that Applicant answered the question incorrectly due to an honest mistake or oversight. Applicant has been candid about the facts and circumstances of his past problems, and I am persuaded that he made no deliberate effort to hide, conceal, or omit information. On this basis, the falsification allegation is decided for Applicant.

³¹ Executive Order 10865, § 7.

³² AG ¶¶ 15, 16, and 17 (setting forth the security concern and the disqualifying and mitigating conditions).

³³ AG ¶ 15.

Under Guideline K for handling protected information,³⁴ the suitability of an applicant may be questioned or put into doubt when that applicant has a history of noncompliance with security rules and regulations. The overall concern under Guideline K is:

Deliberate or negligent failure to comply with rules and regulations for protecting classified or other sensitive information raises doubt about an individual's trustworthiness, judgment, reliability, or willingness to safeguard such information, and is a serious security concern.³⁵

The evidence here supports a conclusion that Applicant has a history of deliberate noncompliance with security rules and regulations. Keeping classified information in his briefcase without authorization over a period of years is ample proof of this conclusion. It is most probable that Applicant engaged in this conduct due to his abuse of alcohol and associated arrogance, in that he then believed he could do no wrong.³⁶ These facts and circumstances require consideration of the following disqualifying conditions:

¶ 34(b) collecting or storing classified or other protected information at home or in any other unauthorized location; and

¶ 34(g) any failure to comply with rules for the protection of classified or other sensitive information.

Guideline K also contains conditions that may mitigate security concerns as follows:

¶ 35(a) so much time has elapsed since the behavior, or it has happened so infrequently or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

¶ 35(b) the individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities; and

¶ 35(c) the security violations were due to improper or inadequate training.

Of those mitigating conditions, the most pertinent here is subparagraph 35(a). Applicant's deliberate noncompliance took place more than 15 years ago when his

³⁴ AG ¶¶ 33, 34, and 35 (setting forth the security concern and the disqualifying and mitigating conditions).

³⁵ AG ¶ 33.

³⁶ Tr. 87.

abuse of alcohol was at or near its peak. Crossing the ten-year mark is significant because it is a commonsense measurement of recency or remoteness. This is recognized in the law as well. For example, the law of evidence prohibits interrogation of witnesses about remote criminal convictions by imposing a ten-year time limit.³⁷ The passage of time since 1994, Applicant's abstinence from alcohol since 1994, and a more humble attitude is sufficient to mitigate the security concerns under this guideline.

Under Guideline J for criminal conduct,³⁸ the concern is that "[c]riminal activity creates doubts about a person's judgment, reliability, and trustworthiness." Applicant is a twice-convicted felon (both the hit-and-run and manslaughter offenses were felonies) and he has two prior arrests and one conviction for drunk driving. These facts and circumstances are sufficient to raise serious security concerns and require application of the following disqualifying conditions:

¶ 31(a) a single serious crime or multiple lesser offenses; and

¶ 31(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Guideline J also contains conditions that may mitigate security concerns. The most pertinent here are:

¶ 32(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

¶ 32(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.

Applicant receives substantial credit in mitigation under both conditions. He has done a remarkable job at changing his life from that of a "raging alcoholic" to that of a sober, productive, and law-abiding citizen, albeit one with two felony convictions. His abstinence from alcohol since 1994, his genuine remorse, and his good employment record are persuasive evidence of reform and rehabilitation.

Nevertheless, the evidence in disqualification is more persuasive. Felony-level criminal conduct has consequences, and sometimes those consequences last a long

³⁷ Fed. R. Evid. 609(b)(2) (describing the ten-year time limit and circumstances where the evidence of conviction older than ten years is admissible).

³⁸ AG ¶¶ 30, 31, and 32 (setting forth the security concern and the disqualifying and mitigating conditions).

time.³⁹ That is the situation here. Even though Applicant presented substantial evidence of reform and rehabilitation, it is outweighed by the nature, extent, and seriousness of his criminal conduct.⁴⁰ In 1994, the then 45-year-old Applicant became so intoxicated he has no recollection of the events surrounding the hit-and-run accident. His level of intoxication was high, measured at twice the legal limit several hours after the event, and it was estimated to be higher. His criminal conduct had a severe effect on the victim's family as shown by the victim-impact statement. This was clearly serious criminal conduct on its own. But it is viewed as even more egregious in light of Applicant's two prior arrests for drunk driving. Taken together, these matters continue to undermine his trustworthiness, reliability, and good judgment in a security-clearance context.

To conclude, the facts and circumstances surrounding Applicant's hit-and-run accident and convictions for two felonies justify current doubts about his suitability for a security clearance. Following *Egan* and the clearly-consistent standard, I resolve these doubts in favor of protecting national security. In reaching this conclusion, I gave due consideration to the whole-person concept⁴¹ and Applicant's favorable evidence.⁴² Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. This case is decided against Applicant.

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline J:	Against Applicant
Subparagraphs 1.a–1.c:	Against Applicant
Paragraph 2, Guideline K:	For Applicant
Subparagraph 2.a:	For Applicant

³⁹ It is well established in the law that a criminal conviction carries the risk of collateral consequences. These are the results of arrest, prosecution, or conviction that are not part of the sentence imposed by a court. Examples include: (1) administrative license suspensions; (2) adverse employment consequences, including suspensions and job loss; (3) revocation, suspension, or denial of professional or occupational license; (4) deportation or exclusion of non-citizens and related immigration concerns; (5) disciplinary proceedings including suspension and expulsion hearings; and (6) loss of civil rights, including the right to vote and the right to possess firearms.

⁴⁰ AG ¶ 2(a)(1).

⁴¹ AG ¶ 2(a)(1)–(9).

⁴² *E.g.*, Exhibits A–F.

Paragraph 3, Guideline E: For Applicant

Subparagraph 3.a: For Applicant⁴³

Subparagraph 3.b: For Applicant⁴⁴

Subparagraph 3.c: For Applicant

Conclusion

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

Michael H. Leonard
Administrative Judge

⁴³ Decided for Applicant under the same rationale as SOR ¶ 2.a.

⁴⁴ Decided for Applicant because this allegation does not allege any disqualifying conduct; instead, it alleges a consequence of Applicant's criminal conduct, which was adequately addressed under Guideline J.