

KEYWORD: Criminal Conduct; Alcohol; Personal Conduct

DIGEST: Applicant is 44 years old and has worked for his current employer for 25 years. Over the course of the last twenty years, he has been arrested and charged with criminal conduct five times, four of which involved alcohol, the most recent being in July 2005. He was also charged with possessing marijuana at the time of that arrest. He remains on criminal probation until December 2007. When he completed his security clearance application in November 2005, he intentionally failed to disclose the marijuana charge. He failed to mitigate the Criminal Conduct, Alcohol Consumption and Personal Conduct security concerns. He mitigated the Drug Involvement security concerns. Clearance is denied.

CASENO: 06-23965.h1

DATE: 07/17/2007

DATE: July 17, 2007

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In re:
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 ISCR Case No. 06-23965
 SSN: -----
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Applicant for Security Clearance
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**DECISION OF ADMINISTRATIVE JUDGE
SHARI DAM**

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

James H. Shoemaker, Jr., Esq.

SYNOPSIS

Applicant is 44 years old and has worked for his current employer for 25 years. Over the course of the last twenty years, he has been arrested and charged with criminal conduct five times, four of which involved alcohol, the most recent being in July 2005. He was also charged with possessing marijuana at the time of that arrest. He remains on criminal probation until December 2007. When he completed his security clearance application in November 2005, he intentionally failed to disclose the marijuana charge. He failed to mitigate the Criminal Conduct, Alcohol Consumption and Personal Conduct security concerns. He mitigated the Drug Involvement security concerns. Clearance is denied.

STATEMENT OF THE CASE

On November 22, 2005, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On March 14, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, modified and revised.¹ The SOR alleges security concerns under Guidelines J (Criminal Conduct), G (Alcohol Consumption), H (Drug Involvement), and E (Personal Conduct). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In an answer notarized on April 2, 2007, Applicant responded to the SOR allegations and elected to have his case decided at a hearing. On April 18, 2007, the case was assigned to me. A Notice of Hearing was issued on May 15, 2007, setting the hearing for June 6, 2007. At the hearing, the Government introduced Government Exhibits (GX) 1 through 4 into evidence. Applicant testified and called two witnesses. He introduced two exhibits that were marked and admitted as Applicant Exhibits (AX) A and B without objection. The record was left open until June 18, 2007, to give Applicant an opportunity to submit additional exhibits. On June 13, 2007, Applicant submitted an exhibit that I marked AX C and admitted without objection by Department Counsel. DOHA received the hearing transcript (Tr.) on June 14, 2007.

PROCEDURAL ISSUES

¹On August 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guideline to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated January 1987, as amended, in which the SOR was issued on or after September 1, 2006.

Prior to the commencement of the Government's case, Department Counsel indicated that he did not intend to produce evidence in support of the allegation contained in SOR ¶ 1.b, which Applicant denied. That allegation is found in Applicant's favor.

FINDINGS OF FACT

Applicant's admissions are incorporated as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 44 years old. He has been married for 16 years. He has one child and one stepchild. He has been employed as a sheet metal mechanic with his current employer for 25 years. He refuels a U.S. Naval carrier. (Tr. 25). He has held a security clearance since 1983. He is subject to random drug testing as a condition of his job. (Tr. 26). His last test, in the fall of 2005, was negative. (Tr. 26).

Applicant has been arrested four times for charges related to alcohol consumption. In September and November 1988, he was arrested and charged with Driving Under the Influence of Alcohol (DUI). As a result he was ordered to attend alcohol counseling classes. In September 1992, he was again arrested and charged with DUI. He attended inpatient treatment for one month and subsequently attended Alcoholics Anonymous (AA) for one year. (Tr. 52-53). He also lost his driver's license for seven years and had to find alternate means of transportation to get to work. (Tr. 43). He stopped attending AA because he believed he had the problem "under control." (Tr. 53).

Applicant essentially maintained sobriety from 1992 until 2005. During that time, he drank on about five occasions, once when his father died in 1997. (Tr. 29; 45).

In July 2005, Applicant was arrested and charged with Misdemeanor DUI and Misdemeanor Possession of Marijuana-First Offense. He was found guilty of the DUI and sentenced to 60 days incarceration, suspended, fined \$350, and ordered to pay \$66 in court cost. He was placed on unsupervised probation for two years. His driver's license was restricted for one year and he was only permitted to drive to work or AA. (Tr. 44). He was also ordered to attend an alcohol-counseling program for 16 weeks. He successfully completed the alcohol safety action program in December 2006, but remains on criminal probation until December 2007. (AX C). He tries to attend AA once a week and estimates that he has gone at least 50 times over the last year. (Tr. 58). He does not have a sponsor, despite recognizing that it would be a good idea. (Tr. 59). He goes to church regularly. (Tr. 47-48). The marijuana charge was *nolle prossed*.

Prior to this arrest, Applicant and his wife became embroiled in a serious argument that arose from the accumulated stress of caring for his 44-year-old developmentally disabled sister-in-law, who has lived with them since 2004. (Tr. 31). After he left the house, he went to a local bar and "went on a drinking binge." (Tr. 32). While at the bar, one of the other patrons gave him some marijuana. He did not purchase it. (Tr. 42). On his way to his sister's home that night, he was stopped by the police for erratic driving, at which time the police discovered the marijuana.

He did not use the marijuana, but intended to. (Tr. 31-34; 39; 60). He has not used alcohol since that night, and has no intention of every using drugs or alcohol again. (Tr. 35). He knows he did not handle the situation with his wife very well. (Tr. 31).

Applicant admitted that he used marijuana in the 1980's and once in 1992 after he had an argument with his wife. The last time he used it was in 1997 when his dad died. (Tr. 28). He acknowledged using it after obtaining a security clearance in 1983. (Tr. 39).

Although Applicant disclosed his alcohol arrests in the SF 86, he did not list the 2005 marijuana charge on his SF 86. He admitted that he intentionally omitted it because he was very embarrassed and ashamed of his conduct. He knew the information would be discovered. (Tr. 48-49; 61). He is very "sorry for not telling the truth." (Tr. 37). He understands that future use of alcohol or drugs could adversely affect his job and family. (Tr. 38). He disclosed his problem to his supervisor, wife and stepson. (Tr. 61). In his answer, he admitted the allegations contained in SOR ¶¶ 4.a and 4. b pertaining to the falsification of the SF 86.

Applicant's wife testified. She does not allow alcohol in their home. She is aware of her husband's alcohol problem. To the best of her knowledge, he has not consumed alcohol since the 2005 arrest. He is a very good husband and father. He has been very helpful with her sister since she moved in. She was unaware that her husband ever used marijuana in the past. (Tr. 77).

Applicant's supervisor testified. He has a security clearance. He has known Applicant since 1982 and has supervised him for about eight to ten years. He is aware of Applicant's previous marijuana use and current problems. (Tr. 68). He considers Applicant to be a very reliable employee. (Tr. 65). He has no reason to believe Applicant poses a national security risk, as there have not been any complaints of him mishandling confidential or classified information over the years. (Tr. 69).

POLICIES

In an evaluation of an applicant's security suitability, an administrative judge must consider the "Adjudicative Guidelines for Determining Eligibility For Access to Classified Information" (Guidelines). In addition to brief introductory explanations for each guideline, the adjudicative Guidelines are divided into Disqualifying Conditions (DC) and Mitigating Conditions (MC), which are used to determine an applicant's eligibility for access to classified information.

These Guidelines are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, an administrative judge should apply these Guidelines in conjunction with the factors listed in the adjudicative process. Guideline ¶ 2. An administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," an administrative judge should consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. Guideline ¶ 2(c).

Specifically, an administrative judge should consider the nine adjudicative process factors listed at Guideline ¶ 2(a): "(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the

frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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."

Since the protection of the national security is the paramount consideration, the final decision in each case is arrived at by applying the standard that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." Guideline ¶ 2(b). In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, facts must be established by "substantial evidence."² The Government initially has the burden of producing evidence to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence and prove a mitigating condition. Directive ¶ E3.1.15 provides, "The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." The burden of disproving a mitigating condition never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).³

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

The scope of an administrative judge's decision is limited. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. Executive Order 10865, § 7.

² "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." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

³ "The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, 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 concerning criminal conduct stating, "[c]riminal 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 arrested and convicted of five criminal charges, and arrested for possession of marijuana, which was not prosecuted. He is currently on probation until December 2007.

The Government produced substantial evidence of these three disqualifying conditions, and the burden shifted to Applicant to produce evidence and prove 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."¹¹ 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 July, 2005, approximately two years before his hearing. This serious misconduct is too recent to merit application of Guideline ¶ 32(a), given his previous history of alcohol problems. Additionally, the circumstances leading to his alcohol consumption related to on-going family stresses, which cannot be considered to be entirely out of the ordinary or unusual as contemplated under this condition.

¹⁹See 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.).

Guideline ¶ 32(d) has limited application as there is some evidence of successful rehabilitation. Applicant paid his fine, successfully completed the alcohol counseling classes in December 2006, periodically attends AA, and has a good employment record. However, he remains on probation, and hence is unable to demonstrate successful rehabilitation until he is completes that term and is released from the court system.

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 that were related to alcohol consumption: twice in 1988, once in 1992, and once 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."

After reviewing all four of the Alcohol Consumption Mitigating Conditions under this Guideline, I conclude Guideline ¶ 23(b) provides some mitigation. It is applicable when "an 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)." Applicant acknowledged that he has had an alcohol problem for some time and has received treatment for it in 1992 and 2005. Over the last year, he thinks he has attended AA about 50 times although he has not obtained a sponsor, normally an integral part of the recovery program. Although he has not consumed alcohol in two years, that length of sobriety is not sufficient to establish a pattern of abstinence required under this condition, given his recent serious relapse after 13 years.

Guideline H: Drug Involvement

Guideline ¶ 24 sets forth the Government's concern about drug involvement: "Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations."

The Government raised a disqualification under Guideline ¶ 25(c): "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia." Based on his admission that he used it while holding a security clearance, the Government also established a case under Guideline ¶ 25(g): "any illegal drug use after being granted a security clearance."

Applicant admitted in his answer and during his testimony that he previously used marijuana and possessed it at the time of his arrest in July 2005, intending to use it. He vigorously stated that he has no intention of ever using it again, realizing the problems it has created for him and his employment situation. That assertion, along with his tremendous embarrassment over the situation, is sufficient to trigger the application of the mitigating condition set forth in Guideline ¶ 26(b): “a demonstrated intent not to abuse any drugs in the future.” I do not believe he will use it again.

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.”

Based on Applicant’s candid admissions that he intentionally withheld information from his e-QIP, the Government established a Personal Conduct Disqualifying Condition under Guideline ¶ 16(a): “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.”

I reviewed the seven Personal Conduct Mitigating Conditions, and conclude two of them provide some mitigation. (1) Guideline ¶ 17(d) is applicable when “the individual has acknowledged the behaviour and obtained counselling to change the behaviour or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behaviour, and such behaviour is unlikely to recur.” In this case, Applicant’s sincere acknowledgement of his wrongful conduct is noteworthy. However, he did not present evidence of counselling for the underlying behaviour that lead to the misrepresentation or of other positive steps taken to alleviate the stressor or factors causing the problem, which is necessary to support the entire application of the condition. (2) He disclosed his wrongful conduct to his wife and supervisor, indicating that he “has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress,” and warranting the application of Guideline ¶ 17(e).

“Whole Person” Analysis

In addition to the enumerated disqualifying and mitigating conditions, I have considered the general adjudicative Guideline related to the whole person concept under Guideline ¶ 2(a). As noted above, Applicant’s 2005 arrest and subsequent falsification of his SF 86 are sufficiently serious to raise a security concern. His actions were knowledgeable and voluntary. His crime occurred in July 2005 and he remains on probation. He is 44 years old, sufficiently mature to be fully responsible for his conduct. The motivation for his criminal offense was the culmination of

stress related to his family situation and the reason for the falsification related to his underlying embarrassment and disappointment with himself. His conduct in both situations was not prudent or responsible. These offenses “create doubt about [his] judgment, reliability, and trustworthiness, [and] call into question [his] ability or willingness to comply with laws, rules and regulations.”

Applicant presented some mitigating evidence, but not enough to mitigate all of the disqualifying conditions. He was extremely forthright and remorseful during his testimony about his alcohol problems and his shame over his drug involvement and failure to tell the truth about it. He is hard-working and dedicated to his job and employer. He appears to be a good family man, and has obviously assumed a tremendous burden in caring for his disabled sister-in-law. All of those facts attenuate the SOR allegations.

However, they are not sufficient to mitigate the security concerns raised, in particular, by his alcohol relapse and falsification. Although Applicant did not experience any alcohol related incidents for about 13 years, his relapse in 2005 was significant. Not only did he attempt to drive while inebriated, but he was willing to smoke marijuana after a long hiatus. Clearly, his alcohol problems are not minor and potentially dangerous. Although he participated in treatment in 1992 and attended AA for one year, he stopped because he thought the problem was “under control.”

While I believe Applicant is committed to sobriety, I find that he has not presented sufficient independent evidence of participation in a recovery program at this time to support his assertion that he will never drink again. Until he documents a pattern of solid ongoing participation in a program and addresses the stressors at home that triggered his relapse (possibly with professional assistance), I am concerned that he may backslide again. I also believe that as he continues with his recovery work, the likelihood that the falsification conduct would recur is minimal. Unfortunately, his rehabilitative efforts to-date have not sufficiently removed my doubts about his good judgment, as related to the concerns raised under Guidelines G and E. Until he is released from criminal probation, the security concerns raised under Guideline J remain. He has however, mitigated those raised under Guideline H.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my “careful consideration of the whole person factors”¹¹ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the Government’s case. For the reasons stated, I conclude he is not eligible for access to classified information.

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:

¹¹See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraphs 1.c-1.f:	Against Applicant
Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline H:	FOR APPLICANT
Subparagraph 3.a:	For Applicant
Subparagraph 3.b:	For Applicant
Paragraph 4, Guideline E:	AGAINST APPLICANT
Subparagraph 4.a:	Against Applicant
Subparagraph 4.b:	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 eligibility for a security clearance for Applicant. Clearance is denied.

Shari Dam
Administrative Judge