

KEYWORD: Alcohol; Criminal Conduct

DIGEST: The Applicant has had seven alcohol-related arrests and convictions between 1978 and 2005, and is currently on probation for his last conviction. He was also convicted for an offense involving a physical altercation with his wife in 2002. He has attended several alcohol education and alcohol treatment programs, and has abstained from alcohol use for six months as of the time the record closed. However, the evidence is not sufficient to mitigate the case against him. He is not currently eligible for a security clearance. Clearance is denied.

CASENO: 04-12164.h1

DATE: 08/29/2007

DATE: August 29, 2007

In Re:	)	
	)	
	)	
-----	)	ISCR Case No. 04-12164
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**DECISION OF ADMINISTRATIVE JUDGE  
WILFORD H. ROSS**

**APPEARANCES**

**FOR GOVERNMENT**

Jeff Nagel, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

The Applicant has had seven alcohol-related arrests and convictions between 1978 and 2005, and is currently on probation for his last conviction. He was also convicted for an offense involving a physical altercation with his wife in 2002. He has attended several alcohol education and alcohol treatment programs, and has abstained from alcohol use for six months as of the time the record closed. However, the evidence is not sufficient to mitigate the case against him. He is not currently eligible for a security clearance. Clearance is denied.

### **STATEMENT OF THE CASE**

On October 11, 2006, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which 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 the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on December 6, 2006, and requested a hearing. The case was received by the undersigned on February 5, 2007, and a Notice of Hearing was issued on February 16, 2007.

A hearing was held on March 15, 2007, at which the Government presented ten documentary exhibits. Testimony was taken from the Applicant, who also submitted five hearing exhibits and two post-hearing exhibits. The transcript was received on April 5, 2007.

### **FINDINGS OF FACT**

The Applicant is 51, married (but separated) and has a high school diploma. He is employed by a defense contractor as a mechanic, and he seeks to retain a Secret-level DoD security clearance previously granted in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a continued security clearance, based upon the allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

Paragraph 1 (Guideline G - Alcohol abuse). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he abuses intoxicants to excess.

The Applicant admitted subparagraphs 1.b. through 1.m. under this Paragraph. Those admissions are hereby deemed findings of fact.

The Applicant has had an alcohol abuse problems for many years. The Applicant began drinking around the time he entered the Army, in 1973. The Applicant testified that he often drank to excess because he was involved in two bad marriages.<sup>1</sup> According to the Applicant, he stopped drinking for about nine years after his March 1994 arrest (further discussed below).<sup>2</sup> He resumed drinking in about 2001, because of marital problems he was undergoing. He stopped drinking between January and June 2006.<sup>3</sup> He further testified that he last drank alcohol on September 9, 2006.<sup>4</sup>

Beginning in 1978, the Applicant was arrested eight times for Driving Under the Influence of Alcohol. Seven of the arrests resulted in convictions: they were in October 1978 (1.b.),<sup>5</sup> December 1986 (1.c.),<sup>6</sup> January 1994 (1.d.),<sup>7</sup> March 1994 (1.f.),<sup>8</sup> September 2004 (1.j.),<sup>9</sup> October 2005 (1.k.),<sup>10</sup> and November 2005 (1.l.).<sup>11</sup>

The sentences the Applicant received for these convictions included various fines, jail time of various lengths, and terms of probation. He was also required to attend First Offender Alcohol Education programs several times. The Applicant is currently on five years probation for his last arrest, in November 2005. He was also sentenced to attend an 18 month alcohol program, which will be completed in November 2007.<sup>12</sup>

The Applicant was arrested for Driving Under the Influence in September 2002 (1.I). The District Attorney rejected the matter and no criminal charges were filed against the Applicant.<sup>13</sup> This subparagraph is found for the Applicant.

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<sup>1</sup>Transcript at 62-63, 66, 69. Including his current marriage, the Applicant has been married four times.

<sup>2</sup>Transcript at 59.

<sup>3</sup>Transcript at 85.

<sup>4</sup>Transcript at 100.

<sup>5</sup>Government Exhibit 9 at 2.

<sup>6</sup>Government Exhibit 9 at 2.

<sup>7</sup>Government Exhibit 8.

<sup>8</sup>Government Exhibit 9 at 2.

<sup>9</sup>Government Exhibit 5.

<sup>10</sup>Government Exhibit 2.

<sup>11</sup>Transcript at 79-81, Government Exhibit 10, Applicant's Exhibit D.

<sup>12</sup>Transcript at 96-97.

<sup>13</sup>Government Exhibit 3, Applicant's Exhibit D, Applicant's Exhibit F at 5.

The Applicant attended alcohol treatment from 1994 through 1996 (1.e.). He attended a different program after his last conviction, successfully completing the outpatient program in February 2007 (1.m.).<sup>14</sup> He was also hospitalized in 2002 for alcohol abuse (1.h.). The Applicant has attended Alcoholics Anonymous (AA) on a fairly regular basis since 1994. He testified, “I went to the meetings partially because I had to, and because I wanted to try and understand what is was about, going to AA.”<sup>15</sup> When he can, the Applicant continues to attend two to three AA meetings a week.<sup>16</sup>

Paragraph 2 (Guideline J - Criminal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in criminal acts.

2.a. The information set forth above concerning allegations 1.b., 1.c., 1.d., 1.f., 1.i., 1.j., 1.k., and 1.l., will be considered under this Paragraph as well.

2.b. The Applicant admitted that he got into a verbal argument with his spouse in June 2002. The story is somewhat confusing, but it appears that the Applicant and his wife go into a fight and he grabbed a telephone out of her hand. She alleged at the time that he scratched her when he took the phone away from her. The Applicant denies intentionally hurting his wife, but he was arrested anyway and charged with Inflicting Corporal Injury on Spouse and Preventing/Dissuading Witness to Report. He plead nolo contendere to an amended count of Challenge to Fight in Public. He was fined, given two years probation and sentenced to attend a 52 week anger management course. The Applicant has successfully completed the course.<sup>17</sup>

2.c. The Applicant admitted that he accidentally missed a court date in April 2006. When he next returned to court in October 2006, he was asked about why he missed the prior date and he explained the circumstances. The bench warrant was subsequently removed.<sup>18</sup>

### Mitigation.

The Applicant is described by his co-workers as a hard-working, responsible and dedicated employee.<sup>19</sup> He has received recognition from his employer with regards to his work.<sup>20</sup> The

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<sup>14</sup>Transcript at 82, Applicant’s Exhibit D at 2.

<sup>15</sup>Transcript at 68.

<sup>16</sup>Transcript at 100-104, Applicant’s Exhibit F at 2, Applicant’s Exhibit G at 2-3.

<sup>17</sup>Transcript at 89-91; Government Exhibits 4, 6 and 7.

<sup>18</sup>Transcript at 92-93, 98; Applicant’s Answer at 2.

<sup>19</sup>Applicant’s Exhibit A.

<sup>20</sup>Applicant’s Exhibit F at 4, 6; Applicant’s Exhibit G at 5, 7, 8, 9, 10, 12, 13, 14, 15 and 16.

Applicant also has received Honorable Discharges from the Army and his State's National Guard, as well as other recognition.<sup>21</sup>

### POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case will be set forth under CONCLUSIONS, below.

In addition, as set forth in Enclosure 2 of the Directive at pages 18-19, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

- (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) The voluntariness of participation
- (6) The presence or absence of rehabilitation and other pertinent behavior changes
- (7) The motivation for the conduct
- (8) The potential for pressure, coercion, exploitation or duress
- (9) The likelihood of continuation or recurrence."

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<sup>21</sup>Applicant's Exhibit E; Applicant's Exhibit F at 7, 8, 9, 10, 11, 13, 14, 15, 17 and 18.

The eligibility guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in alcohol related incidents or other criminal acts that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future." The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

## CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant has a long history of alcohol-related criminal incidents (Guidelines G and J); and that he had other criminal incidents as well (Guideline J).

The Applicant, on the other hand, has not introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's case against him, except in part. Under Paragraph 1 (Guideline G), as set forth above, subparagraph 1.i. is found for the Applicant. Subparagraph 2.c. under Paragraph 2 (Guideline J) is also found for the Applicant because he missed the court date do to an inadvertent error and not through an intentional act.

The Applicant has an almost 30 year history of alcohol related arrests and convictions. Four of these convictions occurred before 1994, and under other circumstances could be mitigated. However, the fact remains that his last three convictions occurred in September 2004, October 2005 and November 2005. He last drank alcohol in September 2006, meaning he only had about six

months of sobriety at the time the record closed in this case. Given the fact that he has previously had extended periods of sobriety followed by continuing alcohol abuse, it is simply too soon to say that his abuse of alcohol is behind him.

The following Disqualifying Conditions under Guideline G are applicable to this case: 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*; and 22(c) *Habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent*. None of the Mitigating Conditions are applicable. The evidence shows that the Applicant's conduct was not infrequent, that it did not occur under unusual circumstances and it does cast doubt on his current reliability, trustworthiness and good judgement. I have considered the fact that the Applicant has attended and successfully completed several alcohol education and/or treatment programs. However, he has returned to alcohol abuse after attending prior treatments, and as of the time of the hearing it had only been one month since he had completed his last treatment. Paragraph 1 is found against the Applicant.

Turning to Guideline J, Paragraph 2 is found against the Applicant. His seven arrests and convictions for alcohol-related offenses, plus his arrest and conviction for a case involving a physical dispute with his wife, puts him squarely within Disqualifying Conditions 31.(a) *A single serious crime or multiple lesser offenses* and 31(c) *Allegations or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*. In addition, the Applicant remains on probation for his last conviction, bringing his case within Disqualifying Condition 31.(d) *Individual is currently on parole or probation*. None of the Mitigating Conditions apply to this paragraph. Not enough time has passed to show that the conduct will not occur again, I am not convinced that he was pressured into the acts, nor is there sufficient evidence of rehabilitation at this point in time.

The Applicant's efforts at reform are noted, and he is commended for his decision to refrain from further alcohol use. If he continues to maintain his sobriety he may be eligible for a clearance in the future. He is not eligible now. Under the particular circumstances of this case, this evidence does not overcome the adverse information that has been presented by the Government.

On balance, it is concluded that the Applicant has failed to overcome the Government's information opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the conclusionary allegations expressed in Paragraphs 1 and 2 of the Government's Statement of Reasons.

### **FORMAL FINDINGS**

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph E3.1.25 of Enclosure 3 of the Directive, are:

- Paragraph 1: Against the Applicant.
- Subparagraph 1.a.: Against the Applicant.
- Subparagraph 1.b.: Against the Applicant.

Subparagraph 1.c.: Against the Applicant.  
Subparagraph 1.d.: Against the Applicant.  
Subparagraph 1.e.: Against the Applicant.  
Subparagraph 1.f.: Against the Applicant.  
Subparagraph 1.g.: Against the Applicant.  
Subparagraph 1.h.: Against the Applicant.  
Subparagraph 1.i.: For the Applicant.  
Subparagraph 1.j.: Against the Applicant.  
Subparagraph 1.k.: Against the Applicant.  
Subparagraph 1.l.: Against the Applicant.  
Subparagraph 1.m.: Against the Applicant.

Paragraph 2: Against the Applicant.

Subparagraph 2.a.: Against the Applicant.  
Subparagraph 2.b.: Against the Applicant.  
Subparagraph 2.c.: For the Applicant.

### **DECISION**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Wilford H. Ross  
Administrative Judge