

KEYWORD: Criminal Conduct; Alcohol Consumption

DIGEST: Applicant's alcohol abuse has resulted in at least three alcohol-related incidents, the last occurring in 2004. While Applicant continues to consume alcohol, he no longer consumes alcohol to excess, nor does he drive after consuming any alcohol. Mitigation has been shown. Clearance is granted.

CASENO: 06-12045.h1

DATE: 9/17/2007

DATE: September 17, 2007

_____)	
In re:)	
)	
-----)	ISCR Case No. 06-12045
SSN: -----)	
)	
Applicant for Security Clearance)	
_____)	

**DECISION OF ADMINISTRATIVE JUDGE
MARTIN H. MOGUL**

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's alcohol abuse has resulted in at least three alcohol-related incidents, the last occurring in 2004. While Applicant continues to consume alcohol, he no longer consumes alcohol

to excess, nor does he drive after consuming any alcohol. Mitigation has been shown. Clearance is granted.

STATEMENT OF THE CASE

On April 23, 2007, 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 Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

Applicant filed a notarized response, dated May 16, 2007, to the allegations set forth in the SOR, and requested a hearing before a DOHA Administrative Judge. On June 26, 2007, the case was assigned to this Administrative Judge to conduct a hearing. Pursuant to formal notice, dated August 6, 2007, a hearing was held on August 24, 2007.

At the hearing, Department Counsel offered five documentary exhibits (Government's Exhibits 1-5) and no witnesses were called. Applicant offered one documentary exhibit (Applicant's Exhibit A) and offered his own testimony. The transcript (Tr) was received on September 10, 2007. The record was left open to allow Applicant to introduce letters of reference and evaluations. A letter from Applicant and three character letters were timely offer into evidence. No objection being raised, the four letters are identified and entered into evidence as Applicant's Exhibit B.

FINDINGS OF FACT

In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline J (Criminal Conduct) and Guideline G (Alcohol Consumption) of the Directive. The SOR contains five allegations, 1.a. through 1.e., under Guideline J, and two allegations, 2.a., and 2.b., under Guideline G. Applicant admitted all of the specific SOR allegations except 2.a. The admitted allegations are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the admitted documents, and testimony of Applicant, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 53 years old. He is currently married for the fourth time, and he has three adult children. He has worked in the aerospace industry fro almost 35 years. He is currently employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Paragraph 1 (Guideline J - Criminal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in criminal acts.

1.a. Applicant was arrested in April 1985 for unlawful possession of a machine gun, which is a felony. Applicant testified that the gun he fired was an M16, which he had built, himself. He fired several rounds in his mother's backyard to show his sons how the gun worked. He plead guilty to discharging a firearm in the city limits, a misdemeanor, and he paid a fine and was placed on three years summary probation.

1.b. Applicant was charged in November 2004 with the illegal possession of a switch blade knife. This charge occurred at the same time that he was stopped for 1.e., as discussed below. The knife was part of a knife collection that he owned, and it was found in the glove compartment of his vehicle. He was not aware that the knife was considered an illegal switchblade. This charge was ultimately dismissed (Exhibit A).

1.c. In March 1986, Applicant was arrested and charged with 1) Driving Under the Influence (DUI) with bodily injury; and 2) DUI with a .08% blood alcohol level, with bodily injury; 3) DUI with a .08% blood alcohol level. Applicant plead no contest to Count 3 and Counts 1 and 2 were dismissed. He was placed on thirty six months summary probation, ordered to pay a fine, attend a 90 day alcohol awareness program, and his driver's license was restricted to driving to and from his employment.

1.d. In April 1987, Applicant was arrested and charged with 1) Driving Under the Influence (DUI); and 2) DUI with a .08% blood alcohol level or more. Applicant plead guilty to Count 2, and Count 1 was dismissed. He was placed on thirty six months summary probation, ordered to pay a fine, attend a one year alcohol awareness program, to attend 26 meetings of Alcoholics Anonymous (AA), and his driver's license was restricted for one year.

1.e. In November 2004, Applicant was arrested and charged with 1) Driving Under the Influence (DUI); and 2) DUI with a .08% blood alcohol level or more. Applicant plead guilty to Count 1, and Count 2 was dismissed. He was placed on thirty six months summary probation, ordered to pay a fine and other costs of \$2,625, which he paid, and to attend a one year alcohol awareness program (Exhibit A).

Paragraph 2 (Guideline G - Alcohol Consumption).

The Government alleges in this paragraph that Applicant is ineligible for clearance because he abuses alcohol to excess.

2.a. Applicant has consumed alcohol at times in excess and to the point of intoxication, from approximately 1986 to at least November 2004.

2.b. Applicant's conduct which has been alleged in the SOR as 1.c., 1.e., and 1.d.,

respectively, is included in this paragraph under alcohol consumption.

In his responses to interrogatories, that he signed on October 7, 2006, (Exhibit 3) Applicant stated, "It is my desire to stop drinking alcohol all together (sic)." Applicant testified that he continues to consume alcohol, although he claims to consume far less alcohol than he did previously, and it is still his stated desire to eventually abstain completely from alcohol consumption. Applicant was adamant and credible that he does not and will not drive after he consumes any alcoholic beverage.

Mitigation

Applicant introduced three character letters, one from his wife, the second from a co-worker and personal friend, and the third from his direct supervisor (Exhibit B). All of the individuals spoke very highly about Applicant's character and none of the three believed that Applicant had a continuing alcohol problem.

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.

As set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence.

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 acts of alcohol abuse and criminal conduct 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 Applicant has engaged in several criminal acts (Guideline J), that he has used and continues to use alcohol at times to excess (Guideline G). Applicant, on the other hand, has introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's case against him.

(Guideline J -Criminal Conduct)

The Government has established by substantial evidence that Applicant engaged in criminal conduct, as he was arrested for, and convicted of three DUI criminal offenses. Applicant also discharged a firearm illegally in the city.

In reviewing the Disqualifying Conditions (DC) under Guideline J, DC 31. (a), a single serious crime or multiple lesser offenses, applies in this case. Under Mitigation conditions (MC), I find that MC 32. (d) applies to this Applicant, as there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, and sincere remorse. Applicant has mitigated this allegation. Paragraph 1 is found for Applicant.

(Guideline G -Alcohol Consumption)

Applicant's alcohol consumption has resulted in three alcohol related arrests and convictions. As to the amount of alcohol he now consumes, as discussed above, Applicant continues to consume alcohol, but he consumes it far less frequently and in smaller amounts than previously. Of his three arrests, two occurred more than twenty years ago, 1986 and 1987, and the third happened in 2004.

The Government established, by substantial evidence, that Applicant was involved in alcohol-related incidents away from work, driving under the influence, which is DC 22. (a), and DC (c) that he engaged in habitual or binge consumption of alcohol to the point of impaired judgment. Applicant continues to consume alcohol on a regular basis, but he has reformed his habit of driving after consuming alcohol.

I find that MC 23. (a) applies as so much time as passed, certainly with his first two DUIs and almost three years since his most current DUI, and the behavior was infrequent, three times in a period of more than twenty years, that it is unlikely to recur and does not cast doubt on the individual's current reliability and trustworthiness. Paragraph 2 is found for Applicant.

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

FORMAL FINDINGS

Paragraph 1. Guideline J: FOR APPLICANT

Subparagraph 1.a.: For Applicant
Subparagraph 1.b.: For Applicant
Subparagraph 1.c.: For Applicant
Subparagraph 1.d.: For Applicant
Subparagraph 1.e.: For Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph 2.a.: For Applicant
Subparagraph 2.b.: For Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Martin H. Mogul
Administrative Judge