

KEYWORD: Alcohol; Personal Conduct

DIGEST: Applicant has had a history of consuming alcohol to excess, which resulted in at least four alcohol related convictions for Driving Under the Influence (DUI) from 1982 through 1995. While there have been no DUI arrests since 1995, Applicant continues to regularly drive after consuming alcohol in the same quantity as he did during his prior DUI arrests and convictions. Additionally, Applicant' credibility is extremely suspect, as he has not been truthful or candid with information regarding his DUI convictions, that he furnished to the United States Government. Mitigation has not been shown. Clearance is denied.

CASENO: 06-13634.h1

DATE: 1/12/2007

DATE: January 12, 2007

In Re:	)	
	)	
	)	
-----	)	ISCR Case No. 06-13634
SSN: -----	)	
Applicant for Security Clearance	)	
	)	
	)	

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

**APPEARANCES**

**FOR GOVERNMENT**  
Candace Le'i, Esq., Department Counsel

**FOR APPLICANT**  
*Pro Se*

## **SYNOPSIS**

Applicant has had a history of consuming alcohol to excess, which resulted in at least four alcohol related convictions for Driving Under the Influence (DUI) from 1982 through 1995. While there have been no DUI arrests since 1995, Applicant continues to regularly drive a vehicle after consuming alcohol in the same quantity as he did during his prior DUI arrests and convictions. Additionally, Applicant's credibility is extremely suspect, as he has not been truthful or candid with information regarding his DUI convictions, that he furnished to the United States Government. Mitigation has not been shown. Clearance is denied.

## **STATEMENT OF THE CASE**

On July 18, 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 Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

Applicant filed a signed and sworn, notarized response, dated September 27, 2006, to the allegations set forth in the SOR. He requested a clearance decision based on a hearing record before a DOHA Administrative Judge.

On November 8, 2006, this case was assigned to this Administrative Judge to conduct a hearing and issue a written decision. A Notice of Hearing was issued to the parties on November 15, 2006, and the hearing was held on December 6, 2006.

At the hearing, Department Counsel offered ten documentary exhibits (Exhibits 1 - 10) and no witnesses were called. Applicant offered no documentary exhibits, but did testify on his own behalf. The transcript (Tr) was received on December 18, 2006.

## **FINDINGS OF FACT**

The Government opposes Applicant's request for a security clearance, based upon the allegations set forth in the SOR. In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct) of the Directive. The SOR contains five allegations, 1.a. through 1.e., under Guideline G, and one allegation, 2.a., under Guideline E. In his Response to the SOR (RSOR) Applicant admits allegations 1.c., 1.d., and 1.e.. He denies 1.a., 1.b., and 2.a.. The admitted allegations are incorporated 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 the live testimony, and upon due consideration of that evidence, I make the following additional findings of fact:

Applicant is 63 years old. He is married and has two children. He has a Masters Degree in Electrical Engineering. Applicant is an independent contractor, employed by a defense contractor, and he seeks to retain a DoD security clearance in connection with his employment in the defense sector.

**Paragraph 1 (Guideline G - Alcohol consumption).**

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

Applicant's drinking has resulted in at least four alcohol related convictions for DUI. They occurred in 1982, 1986, and two times in 1995.

On April 29, 1982, Applicant was arrested and charged with two Counts; 1) Driving Under the Influence of Alcohol/Drugs, and 2) BA Level over .10%. He pled guilty to Count 1, and he was sentenced to three year summary probation (RSOR, Exhibit 4).

On January 28, 1986, Applicant was arrested and charged with two Counts; 1) Driving Under the Influence of Alcohol/Drugs, and 2) BA Level over .10%. He pled guilty to Count 1, and he was sentenced to three year summary probation (RSOR, Exhibit 4).

On February 7, 1995, Applicant was arrested and charged with two Counts; 1) Driving Under the Influence of Alcohol/Drugs, and 2) BA Level over .20% or greater. He pled No Contest, and he received 100 hours of community service (RSOR, Exhibits 3, 7, 8).

On December 19, 1995, Applicant was arrested and charged with three Counts; 1) Driving Under the Influence of Alcohol/Drugs, 2) Driving with BA .08% or More, and (3) Driving with Suspended/Revoked License. He was found guilty on all counts (Exhibit 6, 9) (Tr at 99) . Applicant admitted that he was arrested and found guilty for this DUI. The Government's also alleges that a Bench Warrant was issued on April 26, 1996, for Applicant's failure to appear, but he denies that this occurred. Department Counsel offered Exhibit 9, a Booking Sheet, dated May 24, 2004, to establish that a bench warrant had been issued against Applicant. I find that Exhibit 9 is not sufficiently clear to establish that a bench warrant was issued against Applicant for failure to appear, and the bench warrant allegation has not been proven.

On October 19, 1989, a hearing was conducted by Directorate for Industrial Security Clearance Review (DISCR), the Government agency that is the predecessor to DOHA, to determine if Applicant should be allowed to hold a security clearance. The primary concern was Applicant's consumption to excess of alcohol. The result of that hearing was that Applicant was denied a security clearance.

In a sworn statement signed on January 7, 2004, (Exhibit 3), Applicant averred that he "drinks moderately at home and occasionally at restaurants." He added that he has no intention to modify his personal lifestyle. Applicant also testified that he continues to drive after one or two alcoholic drinks, and while he does not think he would be above the legal limit, he conceded that he has no way of knowing what his blood alcohol count would be, since he did not believe he was above the limit, when he was found guilty of the DUIs in the past.

## **Paragraph 2 (Guideline E - Personal Conduct)**

The Government alleges in this paragraph that Applicant is ineligible for clearance because he furnished untruthful information to the Government. Applicant completed a signed, sworn Security Clearance Application (SCA) on March 14, 2003 (Exhibit 1). Question #24 asked whether Applicant was "ever charged with or convicted of any offense(s) related to alcohol or drugs?" Applicant answered "No." As discussed above, Applicant was charged with or convicted of four DUIs in the years 1982, 1986, and two times in 1995. Applicant should have listed these four DUI convictions.

Applicant contended that he did not include these incidents because he was instructed by a security representative to only go back five years in his responses. While testifying at the hearing Applicant conceded that some questions on the SCA requested that the individual completing the SCA should refer back for the previous seven years, while other questions did not ask for a time limit, but rather asked whether this question ever applied to the individual. Applicant acknowledged that these questions were inconsistent with the instruction he claimed to have received to only go back five years for any question, and he did concede that the wording of the question did indicate that the Government wanted more than a five year history (Tr at 92).

Based on his prior 1989 hearing, which resulted in a denial of a security clearance for alcohol consumption, Applicant certainly should have been aware that the Government was concerned about his alcohol consumption and would want to know about his entire alcohol conviction history.

Finally, Applicant testified that if the record was held open, he would offer a statement from the security officer verifying that he was instructed to only go back five years in all of his answers. While the record was held open, no statement was ever offered.

Clearly in this case, Applicant was not honest with the information that he furnished to the Government. His explanation that he was instructed to only refer back five years is not credible, and he knew or should have known that he should have included all four DUI convictions on his 2003 SCA.

## **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.

### **(Guideline G - Alcohol Consumption)**

In this case, the Government has met its initial burden of proving by substantial evidence that Applicant has used alcohol to excess (Guideline G). Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's case against him.

Applicant has had a long history of consuming alcohol, at times to excess, which has caused him four DUI convictions. While there have been no DUI arrests since 1995, Applicant continues to regularly drive a vehicle after consuming alcohol in the same quantity as he did during his prior DUI arrests and convictions.

The Government has established that Applicant was involved in alcohol-related incidents away from work, which is Disqualifying Condition (DC) (E2.A7.1.2.1.), and that he has engaged in habitual or binge consumption of alcohol to the point of impaired judgment, DC (E2.A7.1.2.5.).

In reviewing the Mitigating Conditions (MC), it could be argued that MC (E2.A7.1.3.2.) applies because Applicant's last DUI conviction occurred in 1995. However, since Applicant continues to drive after consuming alcohol in the amounts that resulted in his DUI convictions, the underlying conduct, that is of concern, has not abated. Overall, the disqualifying conditions outweigh the mitigating conditions, and Guideline G is concluded against Applicant.

### **(Guideline E -Personal Conduct)**

With respect to Guideline E, the evidence establishes that Applicant furnished to the Government less than a complete, honest answer by failing to list any of his four DUI convictions, in a 2003 SCA.

The Government relies heavily on the honesty and integrity of individuals seeking access to our nation's secrets. When such an individual intentionally falsifies material facts or fails to furnish relevant information to a Government investigator, it is extremely difficult to conclude that he nevertheless possesses the judgment, and honesty necessary for an individual given a clearance. In this case, I do not find Applicant's explanation for his failure to inform the Government about his four DUIs credible or reasonable. I conclude that Applicant knowingly and willingly failed to give complete, honest information to the Government.

In reviewing the DCs under Guideline E, I conclude that DC (E2.A5.1.2.2.) applies because Applicant was not candid and truthful in information that he provided to the Government in the SCA. Applicant's conduct, considered as a whole, including his alcohol consumption and his dishonesty exhibits questionable judgement, unreliability, and a lack of candor. I resolve Paragraph 2, Guideline E against Applicant

## **FORMAL FINDINGS**

### **Paragraph 1. Guideline G: AGAINST APPLICANT**

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

**Paragraph 2. Guideline E: AGAINST APPLICANT**

Subparagraph 2.a.: 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 a security clearance for the Applicant.

Martin H. Mogul  
Administrative Judge