

DATE: October 18, 2007

In Re:)	
)	
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SSN: -----)	ISCR Case No. 06-14091
)	
Applicant Trustworthiness Determination)	

**DECISION OF ADMINISTRATIVE JUDGE
PAUL J. MASON**

APPEARANCES

FOR GOVERNMENT

Gina L. Marine, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant’s alcohol problem has not been mitigated due to his pattern of alcohol-related incidents, and his binge drinking to the point of impaired judgment. Though more than two years has passed since his most recent alcohol-related incident in December 2004, Applicant provided little or no evidence to show the measures taken to resolve his abusive use of alcohol. Application for a public trust position is denied.

STATEMENT OF CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a

security clearance for Applicant. On August 23, 2006, under Executive Order 10865 and Department of Defense Directive 5200.6, DOHA issued a Statement of Reasons (SOR) detailing the reasons for its security concerns raised under the alcohol consumption guideline (Guideline G) of the Directive. In his answer dated August 30, 2006, Applicant requested a decision be made on the record in lieu of a hearing. A copy of the Government's File of Relevant Material (FORM, the Government's evidence in support of the SOR) was sent to Applicant on June 4, 2007. Applicant received the FORM on June 12, 2007. Applicant's response to the FORM, was received by DOHA on July 27, 2007. The case was assigned to me for decision on August 13, 2007.

RULINGS ON PROCEDURE

As noted in Statement of Case, the Government submitted the FORM to Applicant on June 4, 2007. In section III of the FORM, the Government moved to amend the second and third lines of the first paragraph of the SOR by deleting the following words "paragraph 3-614, Department of Defense Regulation 5200.2-R and." The reason for this motion is that the cited regulation is inapplicable to trustworthiness cases. As stated in a memorandum by the Deputy Under Secretary of Defense on November 19, 2004, "pursuant to paragraph 2.4 of DoD Directive 5220.6, DOHA shall utilize the provisions of the Directive to resolve contractor cases forwarded by the Defense Security Service (DSS) or Office of Personnel Management (OPM) for a trustworthiness determination, to include those involving ADP I, II, and III positions." Since the motion applies to jurisdiction for DOHA to present this case, and neither diminishes nor encroaches upon the rights of the Applicant, the motion is granted under paragraph E3.1.17. of the Directive.

FINDINGS OF FACT

Applicant is 29 years old and has been employed as a claims processor with a Department of Defense contractor since June 2004. He seeks a public trust position.

Applicant admitted the four allegations listed under the alcohol consumption guideline of the SOR. See, Item 3. The first allegation is include consuming alcohol to the point of intoxication between 1997 and February 2005 (1.a.). The second allegation is that On May 8, 1997, Applicant was convicted of transporting intoxicants (1.b.) in a motor vehicle as a minor. In May 1999, Applicant was charged with operating a motor vehicle under the influence (OWI) with his blood alcohol level over .10% (1.c.). On November 1, 2004, he disclosed the May 1998¹ OWI in response to question 20 of his public trust application (PTA).

On February 10, 2005, Applicant provided an affidavit to an investigator from the Office of Personnel Management (OPM) in which he furnished information about one of his alcohol-related offenses and a description of his drinking history. In December 2004, according to Applicant, he was arrested and charged with OWI (1.d.), second offense, and also operating a motor vehicle with a prohibited blood alcohol level, second offense. Before he was arrested, Applicant was with a friend at a bar. After consuming about seven beers and two or three shots of alcohol over a five hour period, they left the bar, and Applicant decided to drive his friend's car home. During the drive, Applicant

¹. Although he cited 1999 and not 1998 as reflected in 1.c. of the SOR. .

tried to activate the front light, high beams so he could improve his view of the road. His friend, who was riding in the passenger seat, observed Applicant was having problems with the high beam lever, reached over and pulled the lever into the proper position. However, the friend's movement caused Applicant to swerve over the centerline of the road. After failing some field sobriety tests conducted by the arresting officer, Applicant was taken to jail. Applicant was sentenced to five days in jail, fined \$935.00, his license was revoked for a year, and he was required to undergo an alcohol assessment. Applicant provided no information about the assessment.

In December 2004 when the alcohol-related incident occurred, Applicant was drinking from three to ten beers at bars one or two times during the weekends. In February 2005, he claimed he reduced his consumption, drinking five beers between two and three times a month. Since the December 2004 OWI, Applicant has made certain that he always has a ride home so that he will not drive after drinking alcohol. The last time Applicant was intoxicated was during a sports event in February 2005. Applicant has never had counseling. He claims his alcohol consumption has never affected his employment.

Applicant provided a statement and performance evaluations in response to the FORM. He admitted making mistakes, but denied that he has ever been untrustworthy. Applicant is proud of his work in processing claims for the military in an expeditious manner. Applicant's evaluation for the period ending in October 2004 indicates his performance was consistent with job requirements and goals achieved. The October 2005 evaluation shows his performance either met or exceeded expectations. Though the October 2006 assessment reiterated Applicant's 2005 evaluation, there was also a notation that he had not met his attendance standard goal, and that future attendance deficiencies could impact his rating in the next review period.

POLICIES

Enclosure 2 of the Directive sets forth guidelines containing disqualifying conditions (DC) and mitigating conditions (MC) that should be given binding consideration in making security clearance determinations. These conditions must be considered in every case along with the general factors of the whole person concept. However, the conditions are not automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense.

Burden of Proof

Initially, the government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualifies, or may disqualify, the applicant from being eligible for access to classified information. *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988) "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. "[S]ecurity clearance

determinations should err, if they must, on the side of denials.” See *Egan*, 481 U.S. at 531; see Directive E2.2.2.

Alcohol Consumption (AC)

Excessive alcohol consumption often leads to the exercise of questionable judgment while raising the risk of security violations.

CONCLUSIONS

Applicant’s alcohol-related conduct falls within FC disqualifying condition (DC) E2.A7.1.2.1. (*alcohol-related incidents away from work, such as driving while under the influence*) Though he provided no details about his May 1997 conviction as a minor for transporting intoxicants in a motor vehicle, his admission of guilt to the charge raises a reasonable inference he was consuming alcohol in a motor vehicle while underage. Had there been no subsequent alcohol-related behavior after May 1997, his infraction before the age of majority could readily be attributed to a youthful indiscretion. However, the alcohol-related behavior continued to May 1999 when Applicant committed his second alcohol-related offense. Less than six years later, Applicant’s third alcohol-related offense occurred when he was arrested for his second OWI with his blood alcohol again greater than .10%. The seven beers and two or three shots of whiskey coupled with the poor judgment demonstrated in driving his friend’s car, provides ample reason for application of AC DC E2.A7.1.2.5. (*habitual or binge consumption of alcohol to the point of impaired judgment*).

There are four mitigating conditions (MC) under the AC guideline that may be utilized by an applicant to meet his ultimate burden of persuasion in showing that he warrants a public trust position. AC MC E2.A7.1.3.2. (*the alcohol-related incidents do not indicate a pattern*) does not apply as three alcohol-related offenses between 1997 and December 2004 creates a pattern of alcohol-related behavior. AC MC E2.A7.1.3.2. (*the problem occurred a number of years ago and there is no indication of a recent problem*) is removed from consideration as Applicant’s most recent alcohol behavior occurred less than three years ago.

E2.A7.1.3.3. (*positive changes in behavior supportive of sobriety*) provides an applicant an opportunity to explain in detail and show how he has modified his behavior to support sobriety or control over alcohol use and inevitable alcohol-related incidents. Applicant provided no information in his response to the FORM about his current alcohol use. Very little favorable weight can be assigned to Applicant’s February 2005 statement of reduced alcohol consumption because of his overall pattern of alcohol-related incidents, and the fact Applicant was still under the jurisdiction of the court for his alcohol-related incident in December 2004. Notwithstanding the upcoming court

date in March 2005, Applicant became intoxicated in February 2005, a short time before he provided the affidavit.

Applicant’s positive performance evaluations weigh in his favor, but provide little insight into his record of alcohol-related incidents and excessive alcohol consumption. The performance notations in his 2006 evaluation reveal an attendance problem that was so lacking that Applicant was warned his future evaluations could be negatively affected. The lack of any evidence to explain the

scope and frequency of his current alcohol use indicates that AC MC E2.A7.1.3.3. has not been met. AC MC E2.A7.1.3.4. (*following diagnosis of alcohol abuse or alcohol dependence, the individual has successfully completed inpatient or outpatient rehabilitation along with aftercare requirements, participates frequently in meetings of Alcoholics Anonymous or similar organization, has abstained from alcohol for a period of at least a year, and received a favorable prognosis by a credentialed medical professional or licensed clinical social worker who is a staff member of a recognized treatment program*) is not applicable due to the absence of a diagnosis and no evidence of counseling. Subparagraphs 1.a., 1.b., 1.c., and 1.d. are found against Applicant.

My findings against Applicant under the specific guidelines remain the same after an evaluation of the evidence under the whole person model. Applicant was only 19 when he committed his first alcohol-related offense. By December 2004 (at age 26), he committed two additional alcohol-related offenses, with the last offense resulting in five days in jail, a hefty fine, and revocation of his license for a year. With no evidence of counseling, Applicant has offered little to show positive steps taken to avoid alcohol abuse or alcohol-related conduct in the future. His pattern of alcohol-related behavior is likely to continue in the future. I find against Applicant under the AC guideline.

FORMAL FINDINGS

Paragraph 1(Alcohol Consumption, Guideline G): 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.

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 Applicant eligibility for assignment to sensitive duties. Application for a public trust position denied.

Paul J. Mason
Administrative Judge