

KEYWORD: Criminal Conduct; Alcohol

DIGEST: The Applicant had a serious alcohol abuse problem for many years, which eventually resulted in his being arrested for driving under the influence three times between 1992 and 2003. After the last arrest, the Applicant admitted that he was an alcoholic, totally abstained from alcohol for almost four years, attended alcohol treatment, established a church-based support network, and evinces a credible intent not to use alcohol in the future. Adverse inference is overcome. Clearance is granted.

CASENO: 06-18966.h1

DATE: 04/17/2007

DATE: April 17, 2007

In Re:)	
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SSN: -----)	ISCR Case No. 06-18966
)	
Applicant for Security Clearance)	

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

APPEARANCES

FOR GOVERNMENT

Jeff Nagel, Esquire, Department Counsel

FOR APPLICANT

Thomas M. Abbott, Esquire
McKenna, Long & Aldridge

SYNOPSIS

The Applicant had a serious alcohol abuse problem for many years, which eventually resulted in his being arrested for driving under the influence three times between 1992 and 2003. After the last arrest, the Applicant admitted that he was an alcoholic, totally abstained from alcohol for almost four years, attended alcohol treatment, established a church-based support network, and evinces a credible intent not to use alcohol in the future. Adverse inference is overcome. Clearance is granted.

STATEMENT OF THE CASE

On December 8, 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 January 8, 2007, and requested a hearing. The case was assigned to another administrative judge on February 5, 2007. The case was received by the undersigned on February 8, 2007, and a Notice of Hearing was issued on February 16, 2007.

A hearing was held on March 13, 2007, at which the Government presented nine documentary exhibits (Government Exhibits 1 through 9). Testimony was taken from the Applicant, who also submitted 24 exhibits (Applicant's Exhibits A through X). The transcript was received on March 23, 2007.

FINDINGS OF FACT

The Applicant is 51, married and has a Bachelor of Science degree. He is employed by a defense contractor, and he seeks to retain a Top 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. The Applicant admitted all of the factual allegations in the SOR. Those admissions are hereby deemed findings of fact.

Paragraph 1 (Guideline J - Criminal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in criminal acts.

Paragraph 2 (Guideline G - Alcohol consumption). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he uses intoxicants to excess.

The Applicant has had a serious alcohol abuse problem for many years. He began drinking alcohol in about 1969. The usage increased over time and eventually resulted in the Applicant being arrested three times for alcohol related driving offenses. The last arrest occurred in July 2003. The Applicant has been abstinent since the last arrest. (Transcript at 23-27.)

The first arrest occurred on April 23, 1992. The Applicant was involved in a serious automobile accident, which resulted in his being injured. The Applicant was not the direct cause of the accident, but the Highway Patrol report states that his drinking may have contributed to it. (Government Exhibit 8 at 26.) The Applicant had been drinking before the accident, but refused to take any alcohol tests. While the Highway Patrolman felt that the Applicant was under the influence, it is impossible to know the level, if any, of his intoxication. He was charged with Driving Under the Influence of Alcohol (DUI) and Reckless Driving. He pled Nolo Contendere to Reckless Driving and was sentenced to a fine and three years probation. He also was ordered not to drink and drive. This last requirement he failed to follow during his probation.(Transcript at 27-29.)

As a result of the above arrest, the Applicant's driver's license was suspended for a period of time. In 1995, the Applicant was stopped by police and charged with Speeding/Reckless Driving, Driving with a Suspended Driver's License due to a Previous DUI Conviction and Driving Without a Valid License. According to the Applicant, his license was no longer suspended at the time of this arrest, but he had not obtained a new one. He obtained a valid license to show the court, where he also pled guilty to the Speeding/Reckless Driving charge and Nolo Contendere to Driving Without a Valid License. He paid a fine for these offenses. (Government Exhibit 9, Transcript at 30-32.)

The Applicant was arrested a second time for DUI on August 19, 1998. An employee at a restaurant reported the Applicant to police because this person felt the Applicant to be intoxicated. The police stopped him and the Applicant was arrested and charged with DUI and Driving with a BAC of greater than .08%. He was found guilty and received a fine, jail time and five years probation. He was also required to complete a drinking and driving course, and have an ignition interlock device installed on his car. (Transcript at 32-35.)

The Applicant's third arrest for DUI occurred on July 25, 2003. The Applicant had a blackout while drinking and driving, crashed through a fence, almost hitting a person and wound up in a farmer's field. He was charged with DUI, a probation violation and Assault With a Deadly Weapon (his vehicle). He pled guilty to the DUI and probation violation. The sentence included a fine, jail time (electronic monitoring), a requirement that he attend an 18 month drinking and driving course, not consume alcohol or visit bars or liquor stores, and his drivers license was suspended for 15 months. He also received five years probation, due to end in October 2008. (Transcript at 35-37.) The Applicant has had nothing to drink since July 25, 2003, a period of almost four years.

Immediately after his last arrest, the Applicant spent a weekend contemplating his life and what he should do. At the end of that weekend he entered residential treatment for alcohol abuse. He was able to attend treatment for about three weeks. (Government Exhibit 7.) At that time the Applicant became extremely ill and was hospitalized with a potentially fatal condition. He was in a medically induced coma for 13 days, eventually recovered after several weeks in the hospital, and subsequently had months of rehabilitation. (Transcript at 36-40.)

The Applicant did not return to treatment. Rather, he turned to his church for help. While he had attended church for several years on a casual basis, his near-death experience evidently acted as a wake-up call for him. His wife, brother, other church members and the church hierarchy all submitted statements discussing the profound changes that have occurred in how the Applicant views his life, religion and drinking. (Applicant's Exhibits E, F, G, J, U, W and X.)

The Applicant has found that the church's bible study classes, mens group and other activities to be more useful to him than attendance at Alcoholics Anonymous or similar support groups. The people at church, many of whom know about his problem, help him be "accountable" and avoid alcohol in his life. He further testified that he has no desire for alcohol and evinces a credible intent not to return to drinking in the future. (Transcript at 21-23, 42-50.)

Mitigation.

The Applicant is very respected at his job. He submitted laudatory letters from several senior military officers, as well as civilian employees of the military, who have worked with the Applicant over the years. (Applicant's Exhibits A, B, C, D, I and V.) The Applicant's job entails working closely with these officers to ensure their safety, the safety of others, as well as that of important pieces of Government equipment. These people, with knowledge of the Applicant's history, emphatically state that the Applicant is trustworthy, reliable and worthy of having access to classified information.

Of particular import is the letter from the officer who was the Applicant's commander at the time of the last incident. He discusses at great length how and why he made the decision not to replace the Applicant at his job. This retired officer states that, "As a Commander, it was one of the best decisions I ever made." (Applicant's Exhibit V at 5.)

The record also shows that the Applicant's employer also appreciates how he conducts himself on the job. (Applicant's Exhibit L, M, N, O, P and T.) He is described by his supervisors as a "top notch" employee who is "always on time and rarely misses work." (Applicant's Exhibit H.)

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."

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 a criminal nature and alcohol abuse 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 abused alcohol, and been involved in three alcohol related criminal incidents (Guidelines G and J).

The Applicant, on the other hand, has successfully mitigated the Government's case. The evidence shows that, since he entered treatment in 2003, the Applicant has eliminated alcohol consumption. He has created and followed a church-centered self-help program that allows him to maintain sobriety. The Applicant has not successfully completed a recovery program, and he does not attend a "traditional" support group, such as Alcoholics Anonymous. However, for the following reasons, I find that this can be overcome. The Applicant has been completely abstinent from alcohol for almost four years as of the date of the hearing. The Applicant's compelling testimony shows that his alcohol abuse is a thing of the past, that he is very open about his prior struggle with alcohol, and that he is fully capable of continuing to abstain from alcohol. He is extremely remorseful for his alcohol abuse, as well as his alcohol related criminal convictions. He has a good employment record and is extremely involved in his community, as set out at length above and in the record.

With regards to his alcohol abuse, the following Disqualifying Conditions apply: (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; (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; (d) diagnosis by a credentialed medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence; and (g) failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

However, the record supports the application of the following Mitigating Conditions, which are sufficient to support the Applicant's position: (a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and (b) the 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).

Turning to the concomitant Criminal Conduct allegations, the following Disqualifying Conditions have application in this case: (a) a single serious crime or multiple lesser offenses; (d) the person is currently on parole or probation; and (e) violation of parole or probation, or failure to complete a court-mandated rehabilitation program.

The record in this case also supports the application of the following Mitigating Conditions, which provide support for the Applicant being granted a security clearance. They are: (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur or 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.

In addition, application of the General Factors is appropriate and supports a decision in the Applicant's favor. The Applicant is motivated to continue his sobriety (factor 7); he shows considerable evidence of rehabilitation (factor 6); there is little or no potential for pressure, coercion, exploitation or duress (factor 8); and, under the circumstances of this case, the probability that the Applicant will return to his drinking ways are virtually nil (factor 9).

On balance, it is concluded that the Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and 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 25 of Enclosure 3 of the Directive, are:

Paragraph 1: For the Applicant.
Subparagraphs 1.a. through 1.d.: For the Applicant.

Paragraph 2: For the Applicant.
Subparagraphs 2.a. through 2.c.: For the 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 the Applicant.

Wilford H. Ross
Administrative Judge