

KEYWORD: Alcohol; Criminal Conduct; Personal Conduct

DIGEST: Applicant was convicted numerous times and also received punishment under Article 15, UCMJ. His most recent arrest occurred in 2001. When he completed a Security Clearance Application, he failed list all of his arrests, including a felony arrest, and failed to indicate his clearance had been revoked. The record evidence is insufficient to mitigate or extenuate the negative security implications stemming from his alcohol use, criminal conduct and personal conduct. Clearance is denied.

CASENO: 01-26723.h1

DATE: 09/10/2004

DATE: September 10, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 01-26723

**DECISION OF ADMINISTRATIVE JUDGE**

**CLAUDE R. HEINY**

## **APPEARANCES**

### **FOR GOVERNMENT**

Marc E. Curry, Department Counsel

### **FOR APPLICANT**

*Pro Se*

## **SYNOPSIS**

Applicant was convicted numerous times and also received punishment under Article 15, UCMJ. His most recent arrest occurred in 2001. When he completed a Security Clearance Application, he failed list all of his arrests, including a felony arrest, and failed to indicate his clearance had been revoked. The record evidence is insufficient to mitigate or extenuate the negative security implications stemming from his alcohol use, criminal conduct and personal conduct. Clearance is denied.

## **STATEMENT OF THE CASE**

On October 20, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating that DOHA could not make the preliminary affirmative finding<sup>(1)</sup> it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On November 18, 2003, the Applicant answered the SOR and elected to have his case decided on the written record in lieu of a hearing.

On February 19, 2004, the Applicant received a complete copy of the file of relevant material (FORM) dated January 23, 2004, and was given the opportunity to file objections and submit material in extenuation, mitigation, or refutation. On March 17, 2004, Applicant's response to the FORM was received. Department Counsel (DC) did not object to the Applicant's response. In the FORM, DC presented 15 exhibits (Items). The Applicant submitted no exhibits. I was assigned the case on March 25, 2004.

### FINDINGS OF FACT

The SOR alleges Alcohol, Criminal Conduct, and Personal Conduct. The Applicant admits to the following: he was arrested in December 2001 and found guilty of Driving Under the Influence (DUI); he was arrested in October 1999 for assault and battery, the charge was nolle prosequi; he was arrested in October 1992 for drinking at a football game; he received punishment under Article 15, Uniformed Code of Military Justice (UCMJ) for being incapacitated to properly perform his duties due to overindulgence in liquor; he was arrested in April and August 1990 for Drunken Driving; he was arrested in July 1996 for assault and battery; he was cited in August 1995 for illegal dumping; he was arrested in June 1994 for distribution of cocaine but was acquitted; he was arrested in September 1992 for carrying a concealed weapon; and was cited in May 1990 for driving while his post privileges were suspended. He denies intentionally omitting information from his Security Clearance Application, Standard Form (SF) 86. These admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact.

Applicant is 38-years-old, has worked for a defense contractor, and is seeking to obtain a security clearance.

Applicant began drinking beer at age 17, then consuming six beers a week. At age 18, he entered the Army and his alcohol consumption steadily increased. By age 20, he was drinking a case of beer over the weekends. Following his marriage, also when he was age 20, his drinking increased to a fifth of liquor a week plus a case to a case and one half of beer a week. As of April 2000, Applicant said he had consumed a case of beer a week for the past ten years. (Item 5) He also said he had never felt he has had a drinking problem.

In April 1990, Applicant was arrested for Driving Under the Influence (DUI). His post driving privileges were suspended for six months. In May 1990, he received a speeding ticket on post and received punishment under Art.15 (UCMJ) for failure to obey an order for driving while his post privileges were suspended. He was reduced from E-5 to E-4, required to perform 30 days extra duties, restricted for 30 days, and ordered to forfeit \$560 per month for two months.

Also, in May 1990, he was charged with assault resulting from an argument with his wife. In August 1990, he was charged with drunken driving in violation of Article 111 UCMJ, and using a false and unauthorized visitor's pass. (Item 9) He was reduced in rank and paid a fine. Applicant's security clearance was revoked. (Item 15) In October 1991, he

was informed of the action to revoke his clearance and he submitted a signed form stating he did not intend to submit a statement for consideration in the final adjudication. In the Fall of 1990, he underwent a two month inpatient treatment program for alcohol abuse.

In March 1991, Applicant received punishment under Article 15 (UCMJ) for being incapable of performing his duties due to overindulgence with alcohol. (Item 8) He was reduced in grade from E-4 to E-3, required to perform 14 days extra duties, and was restricted to the post for 14 days.

In September 1992, Applicant was charged with carrying a concealed weapon. (Item 12) He and a friend were stopped, in his car, on suspicion of shoplifting. A search of the vehicle disclosed a gun under the passenger's seat. Applicant's uncle had put the gun there. Applicant paid a fine. In November 1992, Applicant received a summons for drinking in public on school grounds at a football game. He was fined \$25. (Item 7)

In June 1994, he was arrested for conspiracy to distribute cocaine, a felony, and distribution of cocaine, a felony. He was at a softball game with a friend when that friend sold cocaine to an undercover agent. (Item 11) In October 1994, Applicant was acquitted of both charges. In July 1996, Applicant was charged with assault and battery. (Item 10) He was involved in an argument with a former girlfriend. She hit him, he hit her. The charge was later dismissed.

In December 1998, Applicant completed a Security Clearance Application, SF86. He answered "no" to question 21 which asked if he had ever been charged with or convicted of any felony offense. Applicant says he understood the question to apply only to convictions. In response to question 24, which asked him about his alcohol-related police record, he listed a single 1989 DUI. He answered "no" to question 32, which asked if his clearance had ever been denied, suspended, or revoked.

In October 1999, he was again charged with assault and battery. (Item 6) He was involved in an argument with a different former girlfriend after failing to come home one night. He had been out drinking. An altercation occurred. The charge was nolle prosequi when his girlfriend failed to appear in court.

In response to interrogatories (Item 14), Applicant says he last drank beer in May 2002. He says he started Alcoholics Anonymous that month and attends "meetings when I can."

## POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive. The government has the burden of proving any controverted fact(s) alleged in the SOR, and the facts must have a nexus to an Applicant's lack of security worthiness.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

Alcohol Consumption, Guideline G, the Concern: Excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness.

Conditions that could raise a security concern and may be disqualifying include:

1. Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use. (E2.A7.1.2.1.)
2. Alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job. (E2.A7.1.2.2.)
5. Habitual or binge consumption of alcohol to the point of impaired judgment. (E2.A7.1.2.5.)

Conditions that could mitigate security concerns include:

None Apply.

Criminal Conduct, Guideline J, the Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Conditions that could raise a security concern and may be disqualifying include:

- a. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
  
- b. A single serious crime or multiple lesser offenses;

Conditions that could mitigate security concerns include:

None Apply.

Personal Conduct, Guideline E, the Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying include:

2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities. (E2.A5.1.2.2.)

Conditions that could mitigate security concerns include:

None Apply.

### **BURDEN OF PROOF**

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to "United States citizens . . . whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Executive Order 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances which indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, then the applicant has the ultimate burden of establishing his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

Security clearances are granted only when "it is clearly consistent with the national interest to do so." *See* Executive Orders 10865 § 2 and 12968 § 3.1(b). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2 "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." *See Egan*, 484 U.S. at 531. Doubts are to be resolved against the applicant.

## CONCLUSIONS

The Government has satisfied its initial burden of proof under Alcohol Consumption, Guideline G. In December 2001, the Applicant was arrested and convicted of DUI, in 1990 he was arrested twice for drunken driving, in 1992 he was arrested for drinking in public, and in 1991 he was incapable of performing his duties due to overindulgence of alcohol. Disqualifying conditions (DC) 1-(2), 2-(3), and 5-(4)

apply.

In the Fall of 1990, he underwent a two month inpatient treatment program for alcohol abuse.

The treatment appears to have had little positive impact for, following the treatment, Applicant was incapable of performing his duties in 1991. In 1992 he was charged with drinking in public at a football game and in 2001 was arrested for and later convicted of DUI. Additionally, following his treatment in the fall of 1990 until his statement of April 2000, Applicant consumed a case of beer a week. Applicant's conduct was serious, recent, frequent, and does establish a pattern. The Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation sufficient to overcome the Government's case against him. There is no show of positive changes in behavior supportive of sobriety, nor efforts to reform his behavior, change his friends, or lifestyle. Applicant has a long and extensive alcohol history. He says he stopped drinking in May 2002, but without more, his statement of abstinence is insufficient for a favorable determination. Because the Applicant meets the disqualifying conditions and none of the mitigating conditions, the alcohol consumption is resolved against the Applicant.

The Government has satisfied its initial burden of proof under Criminal Conduct, Guideline J. Under Guideline J, the security eligibility of an applicant is placed into question when that applicant is shown to have a history or pattern of criminal activity creating doubt about his judgment, reliability, and trustworthiness. In addition to the alcohol related arrest listed above, Applicant was arrest twice for assault and battery, arrested for carrying a concealed weapon, and received an Art. 15 for failing to obey an order when he drove on post following the suspension of his driving privileges. Because of his these incidents, DC a. (Allegations or admission of criminal conduct, regardless of whether the person was formally charged) and b. (A single serious crime or multiple lesser offenses) apply.

None of the mitigating conditions (MC) apply. MC a. (The criminal behavior is not recent) does not apply because his most recent arrest occurred in December 2001, which is recent criminal behavior. MC b. (The crime was an isolated incident) does not apply because there were nine related arrests or Art. 15's and therefore, his criminal behavior was not an isolated incident. MC c. (The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life) and d. (The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur) do not apply because the Applicant's conduct was not the result of pressure, coercion, or an involuntary act. There was no acquittal, so MC e. (Acquittal) is inapplicable. MC f. (There is clear evidence of successful rehabilitation) does not apply because the record does not establish clear evidence of successful rehabilitation. I find against the Applicant as to criminal conduct, SOR subparagraph 2, except for SOR subparagraph 2.c. wherein Applicant was cited for illegal dumping.

The Government has satisfied its initial burden of proof under guideline E, (Personal Conduct). Under Guideline E, the



security eligibility of an applicant is placed into question when that applicant is shown to have been involved in personal conduct which creates doubt about the person's judgment, reliability, and trustworthiness. Complete honesty and candor on the part of applicants for access to classified information is essential to make an accurate and meaningful security clearance determination. Without all the relevant and material facts, a clearance decision is susceptible to error, thus jeopardizing the nation's security. The nature of Applicant's actions, in providing false information to multiple questions on his December 1998 SF 86 poses a serious potential risk to the nation's security precautions.

In December 1998, when Applicant completed an SF 86 he answered "no" to question 21, which asked if he had ever been charged with or convicted of any felony offense. Applicant says he understood the question to apply only to convictions. The wording of the question does not so limit the question. His explanation does not mitigate his conduct because I did not believe him. In response to question 24, which asked him about his alcohol related police record, he listed a single 1989 DUI and failed to list his two 1990 drunken driving arrests, his 1992 arrest, and his 1994 arrest. He answered "no" to question 32, which asked if his clearance had ever been denied, suspended, or revoked. In October 1991, he was informed of the action to revoke his clearance and submitted a signed form (Item 15) stating he did not intend to submit a statement for consideration in the final adjudication.

None of the mitigating conditions apply to his false answers. His alcohol and drug related arrests and revocation of clearance were pertinent to a determination of judgment, trustworthiness, or reliability. The falsifications were not an isolated incident because he gave false answers to three different questions. There is no showing the Applicant make a prompt, good-faith effort to correct the falsification before being confronted with the facts. There is no indication his omissions were caused by improper or inadequate advice from authorized personnel or based on advice from legal counsel. Because of the serious nature of his falsifications, I find against the Applicant as to Personal Conduct, SOR subparagraph 3.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

### **FORMAL FINDINGS**

Formal Findings as required by Section 3., Paragraph 7., of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 Alcohol.: AGAINST FOR 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

Paragraph 2 Criminal Conduct.: AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

Subparagraph 2.b.: Against the Applicant

Subparagraph 2.c.: For the Applicant

Subparagraph 2.d.: Against the Applicant

Subparagraph 2.e.: Against the Applicant

Subparagraph 2.f.: Against the Applicant

Paragraph 3 Personal Conduct.: AGAINST THE APPLICANT

Subparagraph 3.a.: Against the Applicant

Subparagraph 3.b.: Against the Applicant

Subparagraph 3.c.: 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 or continue a security clearance for the Applicant. Clearance is denied.

**Claude R. Heiny**

**Administrative Judge**

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.
2. DC 1. Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use. (E2.A7.1.2.1.)
3. DC 2. Alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job. (E2.A7.1.2.2.)
4. DC 5. Habitual or binge consumption of alcohol to the point of impaired judgment. (E2.A7.1.2.5.)