

KEYWORD: Alcohol; Criminal Conduct

DIGEST: Applicant has a history of six alcohol-related arrests over a compressed period of time between 1998 and 2003 that resulted in convictions, jail time, fines and reduction in grade as to those incidents that were addressed by military authorities. Twice, Applicant was diagnosed alcohol dependent, and after relapsing in 2003 has only recently returned to sustained sobriety. His restorative efforts to date, while encouraging, are insufficient to enable safe predictive assessments about Applicant's ability to avoid recurrence in the foreseeable future. While Applicant fails to fully mitigate government security concerns about his alcohol abuse, he is able to mitigate security concerns associated with his criminal offenses. Clearance is denied.

CASENO: 02-08714.h1

DATE: 09/29/2004

DATE: September 29, 2004

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-08714

**DECISION OF ADMINISTRATIVE JUDGE**

**ROGER C. WESLEY**

**APPEARANCES**

**FOR GOVERNMENT**

Eric C. Borgstrom, Department Counsel

## FOR APPLICANT

*Pro Se*

### SYNOPSIS

Applicant has a history of six alcohol-related arrests over a compressed period of time between 1998 and 2003 that resulted in convictions, jail time, fines and reduction in grade as to those incidents that were addressed by military authorities. Twice, Applicant was diagnosed alcohol dependent, and after relapsing in 2003 has only recently returned to sustained sobriety. His restorative efforts to date, while encouraging, are insufficient to enable safe predictive assessments about Applicant's ability to avoid recurrence in the foreseeable future. While Applicant fails to fully mitigate government security concerns about his alcohol abuse, he is able to mitigate security concerns associated with his criminal offenses. Clearance is denied.

### STATEMENT OF THE CASE

On December 15, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to 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 clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on January 20, 2004, and requested a hearing. The case was assigned to me on June 2, 2004. Pursuant to notice of July 8, 2004, a hearing was scheduled for July 20, 2004, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny or revoke Applicant's security clearance. A hearing was convened as scheduled on July 20, 2004. At hearing, the Government's case consisted of ten exhibits; Applicant relied on four witnesses (including himself) and eight exhibits. DOHA received the transcript (R.T.) on July 28, 2004.

## **SUMMARY OF PLEADINGS**

Under Guideline G, Applicant is alleged to have (a) a history of alcohol consumption, at times in excess and to the point of intoxication, from approximately 1973 to at least September 2003, despite counseling, treatment and a dependence diagnosis, (b) been involved in two driving under the influence (DUI) incidents in 1998 and 2003, respectively, (c) been arrested for disturbing the peace/drunken in August 1998, for which a bench warrant was issued for contempt of court for failure to appear for arraignment, and he later pled guilty and was reduced in grade, (d) been arrested in July 1998 for disturbing the peace/public intoxication, for which he received a general court martial, pled guilty and was sentenced to a reduction in grade, (e) attended a substance abuse center from March 1999 to April 1999, where he was diagnosed alcohol dependent in remission, prescribed Antabuse at discharge, and recommended to attend follow-up counseling, attend AA meetings (90 in 90 days) and work a 12-step program with a sponsor, and (f) attended an alcohol and drug abuse prevention and control program (ADAPCP) in June 1998 (self-referred), in which he was initially assessed as alcohol dependent and recommended for inpatient rehabilitation.

Under Guideline J, Applicant is alleged to have engaged in criminal conduct in three separate incidents: (i) in September 1998, in which he was arrested at his military facility for aggravated assault and pled guilty at a convened court martial, (ii) in September 1998, in which he was arrested for theft by check, pled guilty and was fined and ordered to make restitution, and (iii) in July 1998, in which he was arrested for public intoxication and resisting an officer.

For his answer to the SOR, Applicant admitted each of the allegations without any explanation or defenses.

## **FINDINGS OF FACT**

Applicant is a 43-year-old data collector for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference adopted as relevant and material findings. Additional findings follow.

Applicant was introduced to alcohol in 1973 at the very young age of 12. Upon joining the Army in 1980, he began consuming alcohol regularly: approximately a 12-pack of 12-ounce beers and a half of a fifth of bourbon on weekends (*see ex. 3*). He continued this pattern of alcohol consumption through 1996.

When Applicant deployed overseas with his Army unit in 1996, he increased his alcohol consumption to approximately a fifth of bourbon and a case of twenty-four 12 ounce cans of beer a week (ex. 3). Applicant maintained this level of alcohol consumption for the duration of his overseas tour (*i.e.*, until July 1997).

After returning to the U.S. in 1997, Applicant reduced his drinking to a fifth of bourbon and 12 cans of beer a week. He continued drinking at this level until April 1998, after which he increased his consumption rate once again: this time to three or four fifths of bourbon a week, following an incident in his command that prompted military police to forcibly relieve him from his duty station assignment (ex. 3). Concerned about his excessive drinking he referred himself to ADAPCP in June 1998. His treatment counselors' initial assessment was alcohol dependence, and they recommended inpatient rehabilitation for him. Applicant declined their recommendation, though, and continued his excessive drinking through at least September 1998.

Applicant's drinking abuses resulted in several alcohol-related arrests and charges between July and September 1998. In July 1998, he was arrested by military police for disturbing the peace/public intoxication and drunken driving at his military installation (both misdemeanors) (ex. 3). Several months later (in September 1998), while these alcohol-related charges were still pending, Applicant was arrested by military police and charged with aggravated assault. In January 1999 he received a general court martial on the combined assault and drunken driving/disturbing the peace charges. At his convened courts martial, he pled guilty and was sentenced to a reduction in grade, from an E-7 to an E-4.

In August 1998 (just one month after his July 1998 arrest and before his courts martial) he was arrested again: this time for disturbing the peace/drunken. After failing to appear for the court hearing on the charge, the court issued a bench warrant on Applicant for contempt of court for failing to appear for his arraignment. Applicant pled guilty to the underlying disturbing the peace/drunken charge in September 1998 and was sentenced to 10 days in jail (of which four days were suspended and was credit was given for six days served) and fined \$284.00.

Applicant was arrested in July 1998 for public intimidation and resisting an officer. However, he was not prosecuted on this charge. In September 1998 (while his other charges were still pending), Applicant was charged with theft by check (a misdemeanor), to which he pled guilty in October 1998, was fined, and ordered to make restitution.

Due to his increased drinking in the Spring of 1998, Applicant's marriage deteriorated. After returning from authorized leave in April 1998, he separated from his wife and rented a house. In May 1998, his wife served him with divorce papers. With counseling assistance from his first sergeant, Applicant sought counseling (with his spouse) over his drinking excesses. At this time, he was still in denial over drinking problems. Still in denial, he declined treatment recommendations from his counselor and resumed his excessive drinking after a brief period of abstinence.

Concerned about his drinking excesses, Applicant attended a recognized outpatient substance abuse program between March and April 1999 (28 days in all). In this program he was diagnosed with alcohol dependence, in remission. His treatment counselors recommended follow-up counseling and AA participation (90 meetings in 90 days) for him, as

well as work on a 12-step AA program with a sponsor. Additionally, he was prescribed 250 mgs. of Antabuse at the time of his discharge. Applicant is credited with completing his outpatient treatment program and getting one of his stripes back.

Following his treatment discharge in April 1999 (*i.e.* between 1999 and 2002) , Applicant participated in a few AA meetings, but never obtained a sponsor. While he worked several steps in his 12-step program, he never completed his program. He practiced abstaining for short periods following his April 1999 discharge, but no sustained periods that he can corroborate (*see* R.T., at 88-91). For the most part, he consumed alcohol on an occasional basis, mostly in social situations, according to a friend and supervisor who knows Applicant and has seen him in social situations over the past four years (*see* R.T., at 135-37).

After drinking in a local bar in September 2003, Applicant struck a car on his way home. He was arrested, in turn, after testing over the legal limit and was charged with DuI. At his October 2003 court hearing, he pled guilty to an amended charge of reckless operation (ex. D). Notwithstanding his plea, inferences warrant that the incident was alcohol-related. On the recommendation of his employer, Applicant attended a 30-day outpatient treatment program in October 2003 with an accredited detoxification center (*see* ex. C). He returned to AA meetings and worked the 12-step program during his 30-day stay at the treatment center. And with the aid of counseling, his sponsor and the AA support he received during his 30-day inpatient stay, he has been able to maintain his abstinence from alcohol for ten months now. However, he does not have a current sponsor and only attends AA meetings on a monthly basis, not enough to qualify for regular attendance (R.T., at 111). Nor does he provide a favorable prognosis from credentialed medical professional or licensed substance abuse counselor (R.T., at 104-06).

Applicant is well regarded by his supervisor, former members of his Army command, VA counselor, and ranking officials of his Government customer who interfaces with him (*see* ex. G). All describe him as dedicated and trustworthy. Both a fellow AA member and a former Army colleague of Applicant's who has regularly socialized with him since their respective military retirements believe he is committed to maintaining his sobriety. This former Army colleague has not personally observed Applicant take a drink since a company barbeque in August 2003 (R.T., at 135-37). Since his military retirement Applicant has made considerable progress in an undergraduate college program and has received certificates of appreciation from his Government customer in recognition of his training contributions.

## **POLICIES**

The Adjudicative Guidelines of the Directive (Change 4) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation

and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2

of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

### **Alcohol Consumption**

*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.

#### **Disqualifying Conditions:**

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.

DC 3 Diagnosis by a credentialed medical professional.

DC 6 Consumption of alcohol, subsequent to a diagnosis of alcoholism by a credentialed medical professional and following completion of an alcohol rehabilitation program.

#### **Mitigating Conditions:**

MC 3 Positive changes in behavior supportive of sobriety.

### **Criminal Conduct**

## **Disqualifying Conditions:**

DC 1 Allegations or admission of criminal conduct.

DC 2 A single serious crime or multiple lesser offenses.

## **Mitigating Conditions:**

MC 1 The criminal behavior was not recent.

MC 6 There is clear evidence of successful rehabilitation.

## **Burden of Proof**

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

## CONCLUSION

Applicant is a data collector for a defense contractor with over 20 years of meritorious military service, during which he held a security clearance for most of his career. His five documented alcohol-related incidents over a compressed five-year period reflect alcohol abuse by Applicant and documented proof of his having a recurring problem with alcohol.

Applicant's history of alcohol-related incidents and dependence diagnoses reflect both a recent pattern alcohol abuse and a dependency problem that are security significant. On the strength of the evidence presented, several disqualifying conditions (DC) of the Adjudication Guidelines for alcohol consumption may be applied: DC 1 (alcohol-related incidents away from work), DC 3 (diagnosis by a credentialed medical professional), and DC 6 (consumption of alcohol, subsequent to a diagnosis of alcoholism by a credentialed medical professional).

To his credit, Applicant has sought counseling and abstained from alcohol since his last alcohol-related incident (in September 2003). However, his lack of a sponsor, limited time in AA attendance, and failure to furnish a favorable prognosis preclude application of any of the mitigating conditions of the Guidelines. His renewed commitment to abstinence does reflect positive changes in behavior supportive of sobriety, and for these efforts Applicant is to be commended. Favorable views of his progress from work colleagues who know him are also helpful in gauging the strength of his commitment to sobriety.

All in all, though, Applicant's mitigation efforts to date reflect too little sustained commitment to AA and its tenets of sobriety to conclude he is no longer at risk to recurrence. Without a favorable prognosis, it would be imprudent to relax the time requirements of Guideline G's MC 4 (Post-diagnosis completion of successful inpatient or outpatient rehabilitation) or credit Applicant generally with successful rehabilitation at this point in his still ongoing recovery.

Considering the record as a whole, Applicant fails to make the convincing showing that he has both the maturity and resource support at his disposal to avert any recurrent problems with judgment lapses related to alcohol to warrant safe predictions that he is no longer at risk to judgment impairment associated with such conduct. Unfavorable conclusions warrant with respect to the alcohol-related allegations covered by sub-paragraphs 1.a through 1.g of Guideline G.



While Applicant's three other arrests and dispositions (covered by allegations 2.a through 2.c) are neither isolated nor totally unrelated to the period associated with his alcohol-related incidents, they require separate consideration under the Adjudicative Guidelines covering criminal conduct. The arrests reflect mistakes of judgment (even if they didn't all result in convictions) which are security significant. Our Appeal Board has repeatedly stated that the government can prove applicant engagement in criminal conduct, even in the absence of a criminal conviction. *Cf.* ISCR Case No. 94-1213 (June 7, 1996). Two disqualifying conditions of the Guidelines covering criminal behavior apply: DC 1 (allegations or admission of criminal conduct) and DC 2 (a single serious crime or multiple lesser offenses).

Applicant's restorative efforts (which now exceed five years since his last incident in 1998) are of sufficient probative value to enable him to mitigate concerns associated with his judgment lapses that mark his three criminally-linked incidents in 1998. Applicant may claim the benefit of several mitigating conditions of the Guidelines: MC 1 (the criminal behavior was not recent) and MC 6 (clear evidence of successful rehabilitation). Favorable conclusions warrant with respect to sub-paragraphs 2.a through 2.c of Guideline J.

In reaching my decision, I have considered the evidence as a whole, including each of the E 2.2 factors enumerated in the Adjudicative Guidelines of the Directive.

## **FORMAL FINDINGS**

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the FINDINGS OF FACT, CONCLUSIONS, CONDITIONS, and the factors listed above, this Administrative Judge makes the following FORMAL FINDINGS:

### **GUIDELINE G (ALCOHOL): AGAINST APPLICANT**

Sub-para. 1.a: AGAINST APPLICANT

Sub-para. 1.b: AGAINST APPLICANT

Sub-para. 1.c: AGAINST APPLICANT

Sub-para. 1.d: AGAINST APPLICANT

Sub-para. 1.e: AGAINST APPLICANT

Sub-para. 1.f: AGAINST APPLICANT

Sub-para. 1.g: AGAINST APPLICANT

Sub-para. 1.h: AGAINST APPLICANT

GUIDELINE J (CRIMINAL CONDUCT): FOR APPLICANT

Sub-para. 2.a: FOR APPLICANT

Sub-para. 2.b: FOR APPLICANT

Sub-para. 2.c: FOR 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 Applicant's security clearance. Clearance is denied.

Roger C. Wesley

Administrative Judge