

KEYWORD: Alcohol; Criminal Conduct; Sexual Behavior

DIGEST: This 34-year-old technician for a defense contractor had four alcohol-related arrests, citations, and/or convictions in 1991 and 1999. He underwent counseling and has not returned to his old habits. In April 2002, he was masturbating in his car, which was situated on the edge of a large parking lot, when police approached and found him just sitting there. He admitted having masturbated there. He and his wife were trying to have a child and their doctor suggested frequent ejaculations might stimulate sperm production. No one had seen him on any of the 20 occasions over a two-year period when he did it that way. There was no "sexual" aspect to his conduct and he has not done it again. Mitigation has been established. Clearance is granted.

CASENO: 02-29035.h1

DATE: 02/28/2005

DATE: February 28, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-29035

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esquire, Department Counsel

FOR APPLICANT

B. Daniel Lynch, Esquire

SYNOPSIS

This 34-year-old technician for a defense contractor had four alcohol-related arrests, citations, and/or convictions in 1991 and 1999. He underwent counseling and has not returned to his old habits. In April 2002, he was masturbating in his car, which was situated on the edge of a large parking lot, when police approached and found him just sitting there. He admitted having masturbated there. He and his wife were trying to have a child and their doctor suggested frequent ejaculations might stimulate sperm production. No one had seen him on any of the 20 occasions over a two-year period when he did it that way. There was no "sexual" aspect to his conduct and he has not done it again. Mitigation has been established. Clearance is granted.

STATEMENT OF THE CASE

On May 26, 2004, 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, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding required under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether a clearance should be granted, denied or revoked.

By a reply to the SOR that was received at DOHA on July 23, 2004, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made by a DOHA Administrative Judge after a hearing. The matter was assigned to me for resolution on September 15, 2004. A Notice of Hearing was issued on November 10, 2004, setting the hearing for December 2, 2004. At the hearing, the Government introduced eight exhibits, which were marked and admitted as GX 1 - 8. Applicant testified, called another witness, and introduced six exhibits, which were marked and admitted as Applicant's Exhibits (AX) A - F. The final transcript was received at DOHA on December 16, 2004.

FINDINGS OF FACT

Applicant is a 34-year-old technician for a defense contractor. The May 26, 2004 SOR contains five allegations under Guideline J (Criminal Conduct), five allegations under Guideline G (Alcohol), and two allegations under Guideline D (Sexual behavior). In his Response to the SOR, Applicant *admits* all five Guideline G, all five Guideline G allegations, and both Guideline D allegations, many with explanations. The admissions are accepted and incorporated herein as Findings of Fact.

After considering the totality of the evidence derived from the evidence of record, I make the following additional FINDINGS OF FACT as to the status, past and present, of each SOR allegation:

Guideline J (Criminal Conduct)

As specified in the SOR, Applicant was arrested, cited, and/or charged as follows:

1.a. - May 27, 1991 in State A for Driving While Impaired (DWI). He was found guilty of the lesser included offense of Reckless Driving to Endanger and was ordered to pay approximately \$205.00 in fines and costs.

1.b. - April 16, 1999 in State A for (1) Speeding and (2) DWI. He pleaded guilty to Count 2, was sentenced to 30 days in jail, suspended, and was ordered to comply with an alcohol treatment program, to surrender his license, to not operate a motor vehicle until his license is restored by the Department of Motor Vehicles, and to complete 24 hours of community service.

1.c. - October 2, 1999 in State A for Possession of Alcohol in a State Park, a misdemeanor. He pleaded guilty and paid approximately \$110.00 in fines and costs.

1.d. - October 3, 1999 in State A for Driving While License Revoked. He pleaded guilty and was sentenced to 45 days in jail, suspended, and 18 months probation.

1.e. - April 11, 2002 in State B cited and charged with Disorderly Conduct, Lewd Acts in a Public Place, as alleged in SOR 3.a., below.

Guideline G (Alcohol)

2.a. - Applicant consumed alcohol, at times to excess and to the point of intoxication, from about 1987 to the present, when his drinking is limited to occasional beers and he does not drive after drinking (Tr at 50).

2.b. - the alcohol-related arrests cited in SOR 1.a. (1991) and 1.b. (April 1999), above;

2.c. - Applicant's employment at Laboratory X was terminated in November 1999 for consuming alcohol during working hours. His wife says Applicant was stopped by the police on his way home from work and an open container was found in his car (Tr at 54). However, I accept Applicant's testimony that he had been driving around in a company vehicle picking up samples and opened the container as he was returning to the company laboratory (Tr at 60-64).

I accept Applicant's testimony that he had an "alcohol reading" of .12% (Tr at 67). Applicant had previously been talked to by company officials because a customer reported smelling alcohol on his breath during business hours (Tr at 63);

2.d. - As a result of the April 16, 1999 arrest for DWI, Applicant was evaluated on or about April 20, 1999 in State A for a condition diagnosed as Alcohol Dependence (GX 6).

Guideline D (Sexual Behavior)

3.a. - Applicant was cited and charged on April 11, 2002 in State B with Disorderly Conduct, Lewd Acts in a Public Place, as alleged in SOR 1.e., above;

3.b. - Applicant masturbated in a public place, but unseen, on at least 20 occasions between May 2000 and April 9, 2002.

POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing 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 behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Because each security case presents its own facts and circumstances, it should not be assumed that the factors cited above exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment and conduct.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination based on the "whole person" concept required by the Directive, the Administrative Judge is not permitted to speculate, but can only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses.

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted on to safeguard classified information and material twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an applicant for a security clearance, in his or her private life or connected to work, may be involved in conduct that demonstrates poor judgment, untrustworthiness, or unreliability. These concerns include consideration of the potential, as well as the actual, risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either by the Applicant's admissions or by other evidence) and proves conduct that creates security concerns under the Directive, the burden of persuasion shifts to the Applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of conduct that falls within criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the Applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended, at E2.2.2., "any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

CONCLUSIONS

Applicant is 34 years old, having been born in January 1971.

Criminal Conduct and Alcohol Consumption - Applicant's history of five incidents of *criminal conduct*, four of which were *alcohol-related*, occurred in May 27, 1991, April 16, October 2, and October 3, 1999, and April 11, 2002, do establish a pattern of poor judgment, unreliability, and untrustworthiness that began when he was about 20 and has continued until 2002. Applicant admitted most of the allegations, and showed considerable maturity at the hearing in accepting responsibility. Applicant's wife testified that Applicant does not drink hard liquor and consumes only "occasional beers" when a good football game is on TV.

Disqualifying and Mitigating Conditions

Criminal Conduct - a history or pattern of criminal activity created doubt about a person's judgment, reliability, or trustworthiness.

Disqualifying Condition (DC) 1- any criminal conduct, regardless of whether the person was charged, and DC 2 - a single serious crime or multiple lesser offenses are applicable. I conclude that the acts cited in paragraph 1 qualify as "lesser offenses."

Mitigating Conditions - In context of the last alcohol/vehicular-related misdemeanors being in 1999 and the circumstances of the 2002 incident, I consider the criminal behavior to be not recent (MC 1); and there is clear evidence of successful rehabilitation, as shown by the passage of time without similar incidents and the positive input of the authors of Applicant's written submissions (MC 5).

Alcohol Consumption - Excessive alcohol consumption often leads to questionable judgment, unreliability, failure to control impulses, and increased the risk of unauthorized disclosure of classified information due to carelessness.

Disqualifying Conditions - DC 1 (alcohol-related incidents away from work, such as driving under the influence) and DC 2 (alcohol-related incidents at work) and DC 4 (habitual or binge consumption of alcohol to the point of impaired judgement) are applicable. Mitigating Conditions (MC) 2 (the problem occurred a number of years ago and there is no evidence of a recent problem) applies, as does MC 3 (positive changes in behavior supportive of sobriety). His last alcohol-related problem was in early 1999.

The most recent evaluation of Applicant, in September 2000, is that while he would benefit from "alcohol and drug education," he did not meet the "DSM IV criteria for [alcohol] dependency" (AX A1). Overall, I conclude that Applicant has demonstrated a willingness and ability to considerably reduce his drinking and minimize its impact on his life and actions. He no longer drinks and drives. His wife and work colleagues provide both valuable support and oversight. Applicant has provided adequate evidence of mitigation.

Sexual Behavior - Applicant's explanation for his masturbating in a public place on the date he was cited, and perhaps 19 other occasions, is an interesting one and can be described perhaps as *the doctor made me do it*. I note that Applicant had been noticed parking in the same lot on several occasions in the past and had actually been questioned by a law enforcement officer, because his parking near a bank had been observed and had caused suspicion (GX 5). In a sworn statement, Applicant admitted sitting in his car with his pants unzipped, looking at a magazine with pornographic pictures. He said "I'll just look at it and I'll masturbate to the point of ejaculation" (*Id.* at page 3). He also said that "other than physical stimulation, there is no reason that I perform this act in public" (*Id.* at page 4).

In his April 15, 2002 interview with military police, Applicant admitted just "playing with myself" and having done it in the area of the base theater "approximately 20 times" (GX 7). Applicant admits poor judgment in using the shopping center parking lot but offers the explanation that he made sure he was far way from any area where people were likely to be present. On the occasion he was cited, April 11, 2002, that clearly did not turn out to be the case.

According to Applicant, his and his wife were having reproductive difficulties, and his doctor suggested "twice a day stimulation to increase fertility strength" (Page 5 to response). Applicant's wife corroborates that they were going to a fertility doctor in 2001/2002 and that the doctor acknowledges he did suggest the "frequent ejaculation" method of increasing the number of his active sperm (Tr at 39 -41). Applicant states she was the one who purchased the magazine Applicant had in the car. She also gave Applicant a clean towel and a love note (Tr at 41).

Applicant has documented the involvement of the doctor (AX A2). Considering the totality of the evidence, including his wife's testimony and the doctor's letter, I conclude that while Applicant demonstrated extremely poor judgment in taking care of his needs in the way he chose, his conduct did not have the "sexual" aspect that would bring it under Guideline D. There is no suggestion that he has continued the practice and I conclude he is not likely to do it again.

Under DoD Directive 5220's Guidelines, Sexual Behavior becomes a security concern when it "involves a criminal offense, indicates a personal or emotional disorder, subjects the individual to undue influence or coercion, or reflects a lack of judgment or discretion." I do not find that any of the Disqualifying Conditions are applicable under the facts of this case.

I have carefully considered Applicant's overall evidence in mitigation. His exhibit A3 shows his long involvement with a recognized youth organization. He has submitted numerous letters of recommendation from people who have known him at work over a period of years. One views Applicant as having "good judgment" and a "high degree of level of integrity, responsibility, and dependability" (AX A at page 1); a 20-year-old sees Applicant as a "second father," who always gives good advice (AX A at page 2); a third person "fully trusts" Applicant and sees him as "very sincere and honest" (AX A at page 3); a fourth person, who has known Applicant for 20 years, sees him as "embodying the principles of the [youth organization] as well as being a good person and a great friend" (AX A at page 4); a fifth person sees his as a "conscientious, hard-working individual who will assist anyone with any request" (AX A at page 5). Other writers add similar thoughts about Applicant (AX A at pages 6-13).

Summary - After considering the entire record, and as a trier of fact, I conclude that Applicant's past conduct demonstrated considerable immaturity and lack of judgment in several areas of his life on scattered occasions. Applicant came across at the hearing as one of those individuals who have to be hit over the head, figuratively speaking of course, to get their attention and help them focus on what is important to their lives. However, I am satisfied he now understands the importance of taking care of his own interests and those of his family. The positive input from those who know him well suggests he has become considerably more mature and can be counted upon to exercise the good judgement required of anyone seeking access to the nation's secrets. I conclude that he is currently willing and able to protect the nation's secrets.

FORMAL FINDINGS

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

Guideline J (Criminal Conduct) For the Applicant

Subparagraph 1.a. For the Applicant

Subparagraph 1.b. For the Applicant

Subparagraph 1.c. For the Applicant

Subparagraph 1.d. For the Applicant

Subparagraph 1.e. For the Applicant

Guideline G (Alcohol) For the Applicant

Subparagraph 2.a. For the Applicant

Subparagraph 2.b. For the Applicant

Subparagraph 2.c. For the Applicant

Subparagraph 2.d. For the Applicant

Subparagraph 2.e. For the Applicant

Guideline E (Sexual Behavior) For the Applicant

Subparagraph 3.a. For the Applicant

Subparagraph 3.b. 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 Applicant.

Barry M. Sax

Administrative Judge