KEYWORD: Alcohol; Personal Conduct

DIGEST: Applicant is a 30 years old married software engineer for a defense contractor. In his youth he was cited three times for underage possession of alcohol. He also was twice charged with operating a motor vehicle while intoxicated, successfully completing all requirements of probation in each case. Applicant changed his life, embarked on his engineering career, started a family, and has been a law-abiding citizen since 1998. Applicant did not disclose all his offenses on his security clearance application, but his failure was due to inadvertence and carelessness, not deliberate falsification. Applicant successfully mitigated the alcohol consumption and personal conduct security concerns. Clearance is granted.

CASENO: 02-13427.h1

DATE: 07/30/2004

DATE: July 30, 2004

In re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 02-13427

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Juan J. Rivera, Esq. , Department Counsel

FOR APPLICANT

Richard J. Burke, Esquire

SYNOPSIS

Applicant is a 30 years old married software engineer for a defense contractor. In his youth

he was cited three times for underage possession of alcohol. He also was twice charged with operating a motor vehicle while intoxicated, successfully completing all requirements of probation in each case. Applicant changed his life, embarked on his engineering career, started a family, and has been a law-abiding citizen since 1998. Applicant did not disclose all his offenses on his security clearance application, but his failure was due to inadvertence and carelessness, not deliberate falsification. Applicant successfully mitigated the alcohol consumption and personal conduct security concerns. Clearance is granted.

STATEMENT OF THE CASE

On September 11, 2003, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons under the personnel security Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct) 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. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked.

In a signed and sworn Answer, dated October 6, 2003, Applicant responded to the SOR allegations. He requested a hearing. The case was assigned to me on January 30, 2004.

A Notice of Hearing was issued on February 19, 2004 setting the hearing for March 4, 2004. Applicant waived the 15 day notice period (Tr. 5,6). On that date, I convened the hearing to consider whether it is clearly consistent with the

national interest to grant Applicant's security clearance. The Government presented nine exhibits which were admitted into evidence. Applicant appeared and testified. Applicant offered five exhibits which were admitted into evidence. I received the transcript (Tr.) of the hearing on March 16, 2004.

FINDINGS OF FACT

Applicant admitted the allegations in subparagraphs 1.a.,1.b., 1.c., 1.d., 1,e., 1.g., 1.i., and Paragraph 2. Those admissions are incorporated herein as findings of fact. Applicant denied the SOR allegations in subparagraphs 1.f. and 1.h. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is a 30-year-old software engineer for a defense contractor. He is married with one son. Applicant has a college degree, and is half-way through his masters degree study in computer science. Applicant started working for his employer in November 1998. (Tr. 15 to 17; Exhibits 2, A, and B)

Applicant was arrested in August 1998 for driving a motor vehicle in an intoxicated condition (DWI). Applicant was stopped by the police as he drove away from a camping site where he and friends, including his then girlfriend (now his wife) were staying during a float trip down a local river. Applicant and his girlfriend had a disagreement and Applicant wanted to get away from it, so he drove after consuming a six pack of beer that day during the float trip. Upon his plea, he was convicted of that offense and sentenced to two years suspended imposition of sentence, two years of probation, a $400 fine, $70 recoupment of police officers costs in attending court on the charges, court costs, and attendance at the substance abuse traffic offenders program (SATOP). Applicant paid all fines, and successfully completed the SATOP in February 1999 and his probation. (Exhibit 4 at 2, Exhibit 9, Exhibit D; Tr. 17 to 20, 53 to 55; Answer)

Applicant was arrested by the police on August 25, 1994, at a local casino where he had gone with some friends. While there, Applicant drank shots of alcohol, and became loud and disorderly. The casino security personnel attempted to have Applicant drink coffee to calm him down. Twice he was taken by those personnel to have coffee, and on the third time a security office pushed Applicant a little, and Applicant responded by pushing back. Applicant did not attack the security supervisor on the casino boat, as alleged. The security personnel called the local police, who came to the casino and arrested Applicant for battery. Applicant pled guilty to battery, was fined, and put on two years probation. Applicant successfully completed his probation. Applicant may have been intoxicated, but did not remember definitely if he was or not. The police report showed the officer checked the block which stated Applicant was under the influence of the alcohol in beer. (Exhibit 4 a t2, Exhibit 8; Answer; Tr. 23 to 25, 49 to 51)

Applicant was arrested in July 1993 for possession of alcohol while a minor. Applicant was the passenger in a car driven

by a friend who stopped at a store and purchased alcohol. Applicant's friend was also a minor. Applicant's friend shared that alcohol with Applicant, but Applicant did not make the purchase. (Exhibit 2 at 2, Exhibit 7; Tr. 26 to 29; Answer)

Applicant was arrested in December 1992 for operating a motor vehicle while in an intoxicated condition (DWI). In July 1993 Applicant pled guilty to a charge of operating a vehicle with excessive blood alcohol and paid a $100 fine and $24 court cost. Applicant's driver's license was suspended for 30 days, and he operated on a restricted driving permit for hardship and work purposes. (Exhibit 2 at 2, Exhibit 6; Tr. 26, 47; Answer)

On December 20, 1992, Applicant was given a summons for possession of alcohol while a minor. He pled guilty to a lesser offense, and paid a fine with court costs. Applicant was sitting in a local neighborhood with a friend in the friend's car, holding a open can of beer. They were seen by a local police officer holding the beer, and both were issued a summons. (Exhibit 2 at 2, Exhibit 5 a t1 to 3; Tr. 27, 29, 46, 47; Answer)

Applicant was never arrested in any Suffolk County of the United States. The allegation in subparagraph 1.f. of the SOR is not supported by any evidence in the record, is denied by Applicant, and conceded as erroneous by the Government. (Tr. 30, 83; Answer)

Sometime in 1990, at age 16 years old, Applicant was given a summons by a police officer for possessing alcohol while a minor. He pled guilty and paid a fine. He attended an alcohol and drug education program (ADEP) to learn about the effects of these substances on teenagers. Applicant was not intoxicated when he was given the summons. (Exhibit 2 at 2; Tr. 31, 32; Answer)

Applicant started drinking alcohol while in high school at age 13. He drank only on Friday nights with his friends. This pattern continued until about age 18. When he went to college his drinking frequency increased to three to five days a week. After his 1998 arrest and conviction for DWI, Applicant successfully participated in and completed the SATOP program. During his participation, Applicant did not consume alcohol and did not resume such consumption until four weeks after the conclusion of the program. When he did resume drinking alcohol, it was at a much reduced level and frequency, being only one or two beers on sporadic occasions. The Government conceded Applicant was abstinent for the period of time he asserted. Applicant sought medical assistance for a panic attack he had in 1998 after his DWI arrest. The panic attack was not related to Applicant's consumption of alcohol directly, but rather Applicant became upset with himself that he was about to start his career, obtain a college degree, and his arrest was going to adversely affect him. The physician he consulted advised him it was most likely anxiety he suffered, and gave Applicant a prescription for medication to help him relieve the anxiety, which worked well. Applicant has not suffered any anxiety attacks since 1998. (Exhibit 2 at 4, Exhibit 3, Exhibit E; Tr. 32, 42, 44, 48, 55, 56, 58, and 84; Answer)

Applicant only drinks now when he goes out to dinner with his wife, or when playing sports he may have one or two beers during the course of the game. Applicant is busy each day with work and doing his course work for his masters

degree study. He also has a new son less than one year old with whom he spends much time. Applicant does not socialize with the same group of people he did in the 1990s who liked to drink alcohol. He rarely sees his one family friend whom he was with when they both received summons for possessing alcohol. Applicant's alcohol use declined from ages 21 to 25, and continues to decline as he matures and has more familial and career obligations. The drinking pattern described in Exhibit 2 was accurate in February 2002 when the statement was made, but is not accurate now. (Exhibit 2 at 4, Exhibit 3, Exhibit E; Tr. 22, 32, 33, 38, 43, 48, 56, 57, 59; Answer)

Applicant disclosed his DWI convictions from 1992 and 1998 on his security clearance application (SCA) in his answer to Question 24 about charges or convictions related to alcohol or drug offenses when he completed it in February 2001. The SOR alleges Applicant did not list the casino arrest for battery in 1994, the 1993 arrest for being a minor in possession of alcohol, the 1992 summons for underage possession of alcohol, the Suffolk County DWI arrest, and the 1990 summons for possessing alcohol as a minor as part of his answer to this question. Applicant stated at the hearing he did not think these offenses, if he remembered them, were applicable to this question after he listed the DWI convictions. He thought the DWI convictions were the major offenses, and he did not intend to falsify or mislead anyone about his history. He also forgot some of these offenses or their dates. Observing Applicant's demeanor and frank answers to questions during the hearing, I found him credible in his answers to this allegation. The 1994 arrest was for battery, and Applicant did not categorize it as an alcohol offense. The three summons charges were minor and long ago. The Suffolk County allegation never occurred. Applicant disclosed all incidents when asked in general terms about undisclosed matters by the investigating agent in 2002. (Tr. 39, 40, 52, 67, 68)

Applicant did not list the 1994 battery charge in response to Question 26 on the SCA because he forgot about it, did not remember the date, or did not think it was applicable. He did not recall exactly why he did not list it in response to the question, but he had no intention to falsify any information. Question 26 has a seven year prior disclosure period. The battery offense was within the seven year period, but only by five months. If Applicant did not remember the date, then it is credible to believe his explanations as to why he did not disclose it. (Tr. 67, 68)

Applicant is a good worker and well thought of by his supervisor, who testified on his behalf. Applicant's work is of a high quality. Applicant has a good attendance record at work (Tr. 70 to 82; Exhibit C)

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 judgement, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing he use,

handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicted upon the applicant meeting the security guidelines contained in the Directive.

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. Enclosure 2 to the Directive sets forth adjudicative guidelines that must be carefully considered according to the pertinent Guideline in making the overall common sense determination required.

Each adjudicative decision must also include an assessment of:

(1) the nature, extent, and seriousness of the conduct;

(2) the circumstances surrounding the conduct, and the extent of knowledgeable participation;

(3) how recent and frequent the behavior was;

(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 (See Directive, Section E2.2.1. of Enclosure 2).

Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition 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, irresponsibility, or other behavior specified in the Guidelines.

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 that 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. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance. ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "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. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Exec. Or. 12968 § 3.1(b).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

Guideline G - 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. E2.A7.1.1.

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. E2.A7.1.2.1.

Conditions that could mitigate security concerns include:

(2) The problem occurred a number of years ago and there is no indication of a recent problem. E2.A7.1.3.2.

(3) Positive changes in behavior supportive of sobriety. E2.A7.1.3.3.

Guideline E - Personal Conduct:

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: E2.A5.1.2.

None

Conditions that could mitigate security concerns include: E2.A5.1.3

None

Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. I reached conclusions which have a reasonable and logical basis in the evidence of record.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions above, I conclude the following with respect to each allegation set forth in the SOR:

Regarding the alcohol involvement under Guideline G, the Government established its case that Applicant had two DWIs, the last conviction being in 1998. The Government also established three summons were issued by police officers for Applicant's underage possession of alcohol from 1990 to 1993. The Government did not establish several items in the SOR, such as Applicant attacking the security supervisor, the DWI in Suffolk County, abuse of alcohol from age 13, drinking alcohol while in the SATOP program, a five-day-a-week current drinking pattern, nor the connection between alcohol use by Applicant and current panic attacks. Disqualifying Condition (DC) 1 (*alcohol-related incidents away from work, such as driving while under the influence or other criminal incidents relating to alcohol use*) applies.

Mitigating Conditions (MC) 2 (*the problem occurred a number of years ago and there is no indication of a current problem*) and MC 3 (*positive changes in behavior supportive of sobriety*) apply. Applicant's last DWI or any alcohol related incident occurred in 1998, six years ago. Before that incident, the 1994 battery arrest was the last involvement Applicant had with law enforcement personnel. His underage use of alcohol disappeared as he aged and matured, as did his overall consumption of alcohol. Furthermore, he is now married and a father. Those events focused him on other activities instead of drinking with his buddies. Applicant also is working full time, and studying for a masters degree, taking one or two course a semester. Applicant does not have time to spend idly drinking with his male friends. Applicant successfully completed his two probation periods, and pled guilty to all offenses, showing his contrition for his transgressions. The passage of time, Applicant's positive changes in his life that support sobriety, and his maturity make the MC outweigh greatly the DC on these facts. Also, he has not been in any trouble with the law since 1998. Accordingly, I conclude for Applicant on Guideline G.

Considering Paragraph 2 and Guideline E, I conclude the Government established its case. Applicant did not disclose all of the minor alcohol offenses from 1990 to 1993 in reply to Question 24 of the SCA (subparagraphs 1.c., 1.e., and 1.g.). He did disclose the 1992 and 1998 DWI convictions, which were by far the more serious offenses which the Government needed to know. The 1994 battery offense was not an arrest for alcohol violations, but alcohol played a contributing factor to Applicant's behavior that night which led to the battery (subparagraph 1.b.). I believe Applicant when he says he forgot about that offense possibly being applicable as an answer to Question 24. Subparagraph 1.f. of the SOR was an allegation not supported by any evidence, so he could not have disclosed what did not occur. The Government also established Applicant did not disclose the battery arrest and conviction in response to Question 26. Applicant explained he did not intend to falsify any response to either question on the SCA, either forgetting the dates or sequence of the minor possession offenses, not thinking they were applicable to the information sought in the questions, or thinking the battery offense occurred outside the dates required by Question 26. Observing Applicant at the hearing, listening to his testimony, and considering his explanations, I conclude any of these omissions were inadvertent or careless, and not done deliberately. My analysis and consideration is strengthened by the fact Applicant revealed the most serious alcohol-related offenses, and it would not serve him any purpose to hide deliberately the three minor underage drinking charges. They no doubt did just blend into his memory with a lack of precision on the exact dates. The battery offense he saw as only that, and not as a directly alcohol related offense. I conclude Applicant's declarations as to his intent and state of mind on the disclosures are credible and persuasive. For these reasons, I would not apply DC 2 (*the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire or similar form used to conduct investigations or determine security clearance eligibility or trustworthiness*), which would be the only DC applicable here, because there was no deliberate falsification.

There are no mitigating conditions which I need apply to these facts. I will note though that Applicant fully disclosed all the information when the investigator talked to him a year after he completed his SCA. From the testimony at the hearing, it is clear to me his disclosures were voluntary and made with only a general prompting by the investigator as contrasted with an offense by offense cross-examination technique. Applicant obviously had nothing to hide, and when the full parameters of the inquiry were made known to him he freely disclosed all information. That attitude and cooperation also is a consideration and is viewed favorably toward Applicant. Consequently, I conclude for the Applicant on Guideline E.

FORMAL FINDINGS

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline G: For Applicant

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: For Applicant

Subparagraph 1.g.: For Applicant

Subparagraph 1.h.: For Applicant

Subparagraph 1.i.: For Applicant

Paragraph 2 Guideline E: For Applicant

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

DECISION

In light of all the circumstances and facts presented by the record in this case, it is clearly consistent with the national

interest to grant or continue a security clearance for Applicant. Clearance is granted.

Philip S. Howe

Administrative Judge