

KEYWORD: Alcohol; Criminal Conduct; Personal Conduct

DIGEST: Applicant was convicted of several alcohol related offenses between 1980 and 1984, Driving Under the Influence and Public Intoxication in 1991, and Driving Under the Influence and Child Endangerment in July 2002. He has failed to mitigate the security concerns that arise from his alcohol consumption and criminal conduct. Clearance is denied.

CASENO: 02-13697.h1

DATE: 08/31/2004

DATE: August 31, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 02-13697

**DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

**APPEARANCES**

**FOR GOVERNMENT**

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant was convicted of several alcohol related offenses between 1980 and 1984, Driving Under the Influence and Public Intoxication in 1991, and Driving Under the Influence and Child Endangerment in July 2002. He has failed to mitigate the security concerns that arise from his alcohol consumption and criminal conduct. Clearance is denied.

**STATEMENT OF THE CASE**

On August 6, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. [\(1\)](#) The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline G, alcohol consumption, Guideline J, criminal conduct, and Guideline E, personal conduct. Applicant submitted answers to the SOR on September 12, 2003, and November 12, 2003, requested a hearing, and admitted all SOR allegations except subparagraph 3.a.

The case was assigned to me on April 26, 2004. A notice of hearing was issued on May 20, 2004, scheduling the hearing for June 9, 2004. An amended notice of hearing was issued on June 3, 2004, changing the location of the hearing in the same city and on the same date and time as originally scheduled. The hearing was conducted as rescheduled. The Government submitted seven documentary exhibits that were marked as Government Exhibits (GE) 1-7, and admitted into the record without an objection. The Applicant testified at the hearing and called two witnesses to testify on his behalf. The record was kept open until July 2, 2004 at Applicant's request to provide him time to submit documentary evidence in support of his case. No documents were received by that date, and the record therefore closed. The transcript was received on June 17, 2004.

## **PROCEDURAL ISSUES**

During his opening statement, Department Counsel stated the Government would not be proceeding under Guideline E (SOR paragraph 3) based upon his review of the evidence. When questioned he stated he did not wish to withdraw the allegation but was only conceding that I should rule in Applicant's favor on that guideline. I have reviewed the evidence, including the two security clearance applications (GE 1 & 2) and conclude Department Counsel's concession is well founded and based upon record evidence. Accordingly, Guideline E is found to have been mitigated without further discussion.

## **FINDINGS OF FACT**

Applicant's admissions to the allegations contained in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, exhibits and testimony, I make the following findings of fact:

Applicant is a 44-year-old man who has been employed by a defense contractor as a boilermaker since July 1984. He was married in December 1987, and divorced in December 2001. He has one son who is eleven years old and lives with Applicant. Applicant's ex-wife was arrested in December 2001, and charged with soliciting an undercover police officer to murder Applicant and a town's chief-of-police. She was convicted of the offense and is presently serving an eight-year penitentiary sentence.

Applicant was arrested in November 1980 after a police officer who saw him driving an automobile asked him to take a field sobriety test which he failed. He was charged with Public Intoxication, spent the night in jail, and forfeited a \$35.00 bond. (GE 5) He was charged with Driving Under the Influence of Alcohol (DUI) in February 1981, however, the charge was dismissed when the results of a police administered blood test revealed his blood alcohol content (BAC) was under the legal limit. (GE 5)

Applicant was arrested in November 1981, and charged with Public Intoxication after he became involved in a dispute inside a fast food restaurant. (2) He spent the night in jail and forfeited a \$45.00 bond. (GE 5) He was charged with DUI in March 1984. That charge was reduced to reckless driving, he entered a plea of guilty, and was fined approximately \$162.00. (GE 5) Applicant was next arrested in March 1991, and charged with DUI and Implied Consent. He was convicted, fined approximately \$250.00, and served 48 hours in jail. (GE 1 & 4) He was charged yet another time with DUI in December 1991. That charge was reduced to Public Intoxication and he was ordered to perform eight hours public service work and fined \$50.00. (GE 1 & 4)

Applicant twice enrolled in alcohol treatment programs in approximately 1988-89. Despite the numerous alcohol related arrests and convictions he experienced during that time frame, he claims that neither treatment program was court-mandated, but rather was done at the suggestion of his parents.

Applicant was again charged with DUI and also Child Endangerment (CE) on July 28, 2002. He had spent Friday evening, along with his son, visiting at a friend's house. They stayed overnight, and then attended a pool party at the friend's house on Saturday. While driving home with his son in the car, he was stopped for speeding, failed a field sobriety test, and registered a BAC of 0.27. He entered a plea of guilty to both charges, and was fined \$350.00 on the DUI charge and \$1,000.00 on the CE charge. He was also sentenced to serve 11 months and 29 days in jail on each charge (all but seven days on the DUI charge and 30 days on the CE charge was suspended). He was placed on consecutive sentences of probation for that portion of the jail sentence that was suspended, and remained on probation at the time of the hearing. (GE 3 & 6; Tr. pp. 31-32) He is required to submit urine samples for testing when he visits his probation officer.

Applicant claims that prior to the last DUI arrest he normally drank less than a six pack of beer per month. He explained the 2002 charges to have been a situational occurrence that essentially arose from an attempt to relax and enjoy himself following an extremely stressful time in his life that included his parents dying, a custody battle between him and his wife over their son, his wife filing several false criminal charges against him, his wife attempting to run him and his son down with her car, and finally his wife being arrested after she tried to hire an undercover police officer to murder him. His explanation about the trying times he had been going through is corroborated by the witnesses he presented.

Following his 2002 arrest, Applicant enrolled in a 30-day alcohol treatment program. He was supposed to attend 90 alcoholics anonymous (AA) meetings as a follow-up to the treatment program, but actually only attended approximately 60 meetings. Although he continues to attend AA meetings on a somewhat sporadic basis, he has consumed alcohol on two occasions since his arrest. He primarily relies on an apparent support group consisting of friends who are recovering alcoholics, other responsible persons such as the witnesses who testified at the hearing, and people he associates with at church meetings.

## **POLICIES**

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline G, pertaining to alcohol consumption, and Guideline J, pertaining to criminal conduct, with their respective DC and MC, are most relevant in this case.

## **BURDEN OF PROOF**

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>(3)</sup> The government has the burden of proving controverted facts.<sup>(4)</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence<sup>(5)</sup>, although the government is required to present substantial evidence to meet its burden of proof.<sup>(6)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(7)</sup> Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.<sup>(8)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(9)</sup>

No one has a right to a security clearance<sup>(10)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(11)</sup> Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.<sup>(12)</sup>

## CONCLUSIONS

Under Guideline G, alcohol consumption is a security concern because 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. Those who abuse alcohol are more likely than others to engage in high risk, thoughtless, and sometimes violent behavior. Recurrent use of alcohol to the point of intoxication may affect an individual's ability to exercise the care, judgment, and discretion necessary to protect classified information.

Applicant committed numerous alcohol related offenses between 1980 and 1991, and again in 2002. 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*; and DC 5: *Habitual or binge consumption of alcohol to the point of impaired judgment* apply in this case.

Applicant, attended alcohol treatment programs twice in the 1988-89 time frame, and yet continued to consume alcohol, even if at a reduced level, until he was arrested again in 2002. He then attended a 30-day program, but failed to follow up with the recommended 90 days attendance at AA meetings. He remained on probation for the 2002 DUI and CE offenses at the time of the hearing, and was required to submit monthly urine samples for testing, but still consumed alcohol on two occasions while on that probation. He now attends AA meetings only occasionally, and instead relies upon a somewhat haphazard support system. Considering all evidence, I am unable to find any Mitigating Conditions exists. Guideline G is decided against Applicant.

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment,

reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the Nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

Applicant has been convicted of alcohol related offenses on at least six occasions since 1980, the last of which also involved a charge of Child Endangerment. The seriousness of his conduct in the 2002 offense is clearly illustrated by the 0.27 BAC level that was detected, and the severe sentence that was imposed. DC 1: *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*; and DC 2: *A single serious crime or multiple lesser offenses* apply in this case.

Clearly, no mitigating condition applies to Applicant's criminal conduct. The last offenses occurred just slightly more than two years ago, and he was still on probation for those offenses at the time of the hearing. While there was a significant period of time between his convictions in 1991 and 2002, his continued consumption of alcohol, even at a reduced level following the completion of two alcohol programs in 1988-89 and another in 2002 prohibits a finding that the last offense was an isolated incident, or there is evidence of successful rehabilitation. While Applicant's personal problems in 2001 might make somewhat understandable his over imbibing at a pool party, they in no way explain or justify his decision to then drive an automobile, let alone one with his son as a passenger. Guideline J is decided against Applicant.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find that Applicant has failed to overcome the case against him and satisfy his ultimate burden of persuasion. It is not clearly consistent with the national interest to grant Applicant a security clearance.

### **FORMAL FINDINGS**

SOR ¶ 1-Guideline G: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Subparagraph d: Against the Applicant

Subparagraph e: Against the Applicant

Subparagraph f: Against the Applicant

Subparagraph g: Against the Applicant

SOR ¶ 2-Guideline J: Against the Applicant

Subparagraph a: Against the Applicant

SOR ¶ 3-Guideline F: For the Applicant

Subparagraph a: For 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 Applicant.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. SOR subparagraph 1.e. alleges two arrests for public drunkenness, one occurring on October 8, 1981 and a second occurring on September 2, 1982. Those charges and the dispositions do not appear anywhere in evidence. However, Appellant did admit to this subparagraph and describes an arrest for Public Intoxication that occurred in November 1981 in GE 5.
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
5. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
10. *Egan*, 484 U.S. at 528, 531.
11. *Id* at 531.
12. *Egan*, Executive Order 10865, and the Directive.