

KEYWORD: Alcohol

DIGEST: Applicant has failed to successfully mitigate the security concern raised by his four alcohol-related incidents (arrests for drinking and driving) during the seven-year period of September 1991 to August 1998, especially since he failed to appear in court to answer to the 1998 charge and it is still unresolved. Clearance is denied.

CASENO: 02-22350.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. 02-22350

**ISION OF ADMINISTRATIVE JUDGE**

**MICHAEL H. LEONARD**

**APPEARANCES**

**FOR GOVERNMENT**

Stephanie C. Hess, Esq., Department Counsel

**FOR APPLICANT**

### **SYNOPSIS**

Applicant has failed to successfully mitigate the security concern raised by his four alcohol-related incidents (arrests for drinking and driving) during the seven-year period of September 1991 to August 1998, especially since he failed to appear in court to answer to the 1998 charge and it is still unresolved. Clearance is denied.

### **STATEMENT OF THE CASE**

On December 15, 2003, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. [\(1\)](#) The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline G for alcohol consumption. Applicant answered the SOR on January 7, 2004, and requested a hearing. In particular, Applicant admitted to four allegations of alcohol-related incidents (drunk driving) in subparagraphs 1.a through 1.d

Department Counsel indicated she was ready to proceed on May 3, 2004, and the case was assigned to me June 10, 2004. A notice of hearing was issued on June 22, 2004, scheduling the hearing for July 20, 2004. Applicant appeared without counsel and the hearing took place as scheduled. DOHA received the transcript July 27, 2004.

### **FINDINGS OF FACT**

Applicant's admissions to the SOR allegations are incorporated into my findings. After a thorough review of the record evidence, I make the following essential findings of fact:

Applicant is a 57-year-old widowed man. He is the father of three adult daughters, one of whom currently lives with Applicant. He is seeking to retain a security clearance for his employment as a staff network engineer.

From August 1965 to July 1995, Applicant served as a soldier on active duty with the U.S. Army. He retired after 30 years of honorable service at the rank of sergeant major (pay grade E-9). Approximately 23 years of his military duty consisted of serving as a military recruiter or retention noncommissioned officer. His DD Form 214 (Exhibit A) reveals decorations, medals, citations, etc. that are consistent with a long and successful career as an enlisted soldier. Two of the four drunk driving arrests took place when Applicant was on active duty.

In September 1991, Applicant was arrested in State #1 for the charge of driving while intoxicated (DWI) (Exhibits 7 and 8). On or about February 27, 1992, he pleaded guilty to the offense, and he was fined \$600 (\$300 suspended), was ordered to serve 60 days in jail (suspended), had his driver's license suspended for six months, and was required to attend an alcohol safety awareness program. He completed the program successfully in June 1992 (Exhibit 9). In addition to the state court action, Applicant received a letter or memorandum of reprimand from the Army.

In September 1994, he was arrested in nearby State #2 for the charge of driving under the influence of alcohol (DUI) (Exhibit 6 at p. 2). On or about June 22, 1995, he pleaded guilty to the offense and received probation before judgment. He was fined and assessed court costs for \$150 in total. He was also placed on probation for one year. In addition to state court action, Applicant received a officer letter or memorandum of reprimand from the Army. Applicant retired from the Army the following month, July 1995.

In March 1997, Applicant was arrested in State #2 for the charge of DWI (Exhibit 6 at p. 3). On or about June 6, 1997, he pleaded guilty to the offense. He was fined and assessed court costs for \$250 in total. He was placed on probation for three years until June 19, 2000.

In August 1998, while on probation, Applicant was arrested in State #2 for the charge of DWI (Exhibit 5). Court records reflect a disposition of failure to appear as of October 6, 1998. Court records also reflect that various notices sent by the court were returned. During his testimony, Applicant indicated he had not been to court on this matter, and he had not taken any action to address it despite it being raised as an issue during his background interview in 2002 or after he received the SOR in December 2003. To date, the DWI charge is unresolved.

The government exhibits include four different security-clearance applications submitted by Applicant in 1992, 1998, 2000, and 2001. Concerning where he has lived, the applications are consistent in that Applicant described the periods and locations he lived as follows:

- February 1989 to June 1996, at an apartment address in State #1;
- June 1996 to July 1997, at a street address in State #2; and
- July 1997 to present, at his current address in State #2.

The various court records also contain addresses for the Applicant. Of note, the records concerning the August 1998 DWI (Exhibits 5 and 6 at p. 1) have an address for the Applicant as living in State #1 that does not match the State #2 address provided by Applicant in his security-clearance applications. Indeed, this particular State #1 address does not match any of the addresses provided by Applicant in his security-clearance applications.

Applicant testified he currently has a driver's license from State #1. He has lived in State #2 since 1996, but he has never held a State #2 driver's license. Likewise, he has never been to the department of motor vehicles in State #2. Applicant admits he pays income taxes to State #2, owns a home and pays county property taxes in State #2, and that he and his daughter own a car registered in State #2. His explanation for not having a driver's license from State #2 is that when he retired from the Army in 1995 he lived in State #1, and he sometimes spends a little time with a daughter in State #1, so he still has a State #1 driver's license (Transcript at pp. 44-45).

Applicant presented character evidence supporting his application for a security clearance (Exhibits A through K). In general, the exhibits show a successful military career as well as successful civilian employment after retiring from the Army.

## **POLICIES**

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on 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.

## **BURDEN OF PROOF**

The only 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>(2)</sup> There is no presumption in favor of granting or continuing access to classified information.<sup>(3)</sup> The government has the burden of proving controverted facts.<sup>(4)</sup> The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than a preponderance of the evidence.<sup>(5)</sup> The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.<sup>(6)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(7)</sup> Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against him.<sup>(8)</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(9)</sup>

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(10)</sup> Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

## CONCLUSIONS

Under Guideline G,<sup>(11)</sup> a history of excessive alcohol consumption raises a security concern because of the potential for deliberate or inadvertent mishandling of classified information due to intoxication. The concern is that excessive 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.

Here, based on the record evidence as a whole, the government has established its case under Guideline G. Applicant engaged in excessive alcohol consumption with negative consequences. The four DUI/DWI arrests from 1991 to 1998 qualify as alcohol-related incidents away from work.<sup>(12)</sup> During a seven-year period, Applicant engaged in high-risk behavior putting himself and the public at risk by drinking and driving. His actions are indicative of questionable judgment.

In addition, the problem is ongoing because the 1998 DWI in State #2 remains unresolved. The court records indicate Applicant failed to appear. The court records also indicate the various notices sent to Applicant were returned, but this is hardly surprising since the court records indicate a State #1 address where Applicant has never lived according to his security-clearance applications. It appears Applicant has acted to avoid or evade the legal consequences from his fourth DUI/DWI as well as the likely probation violation stemming from his 1997 DWI. It is simply implausible to believe Applicant, a retired Army sergeant major and repeat DUI/DWI offender, thought the 1998 DWI went away because he never heard anything from the court system of State #2. It also appears Applicant is gaming or working the system to retain a driver's license issued by State #1, a place he has not resided since approximately June 1996. Obviously, as a

nonresident of State #1, he is no longer entitled to a driver's license from State #1. And just as obvious, as a resident of State #2, he is required to obtain a driver's license from State #2 if he intends to operate a motor vehicle. He has not done so in order to avoid or evade the likely legal troubles, including possible confinement, stemming from the 1998 DWI. At bottom, the unresolved 1998 DWI is indicative of questionable judgment.

I have reviewed the mitigating conditions under the guideline and conclude none apply. MC 1 <sup>(13)</sup> does not apply because four drunk driving arrests during seven years does indicate a pattern. MC 2 <sup>(14)</sup> does not apply because the 1998 DWI is still unresolved. MC 3 <sup>(15)</sup> does not apply because the negative security implications stemming from the unresolved 1998 DWI override the positive changes in behavior made by Applicant. MC 4 <sup>(16)</sup>

is inapplicable based on the facts and circumstances. To sum up, Applicant has failed to successfully mitigate the security concern based on four alcohol-related incidents during seven years, one of which remains unresolved. Accordingly, Guideline G is decided against Applicant. In reaching my decision, I have considered the evidence as a whole, both favorable and unfavorable, as well as the whole-person concept and other appropriate factors and guidelines in the Directive.

## FORMAL FINDINGS

As required by ¶ E3.1.25 of Enclosure 3 to the Directive, below are my conclusions as to the allegations in the SOR:

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

## 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. Clearance is denied.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
5. *Department of 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. Directive, Enclosure 2, Attachment 7.
12. E2.A7.1.2.1. 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.
13. E2.A7.1.3.1. The alcohol-related incidents do not indicate a pattern.
14. E2.A7.1.3.2. The problem occurred a number of years ago and there is no indication of a recent problem.
15. E2.A7.1.3.3. Positive changes in behavior supportive of sobriety.
16. E2.A7.1.3.4. Following diagnosis of alcohol abuse or alcohol dependence, the individual has successfully completed inpatient or outpatient rehabilitation along with aftercare requirements, participates frequently in meetings of Alcoholics Anonymous or a similar organization, has abstained from alcohol for a period of at least 12 months, and received a favorable prognosis by a credentialed medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.