

KEYWORD: Alcohol, Drug, Criminal Conduct, Personal Conduct

DIGEST: Between 1987 and 1998, Applicant was arrested six times, four of which were alcohol related. Between 1994 and 1999, he used marijuana and cocaine. Two of his answers on his Security Clearance Applicant were incorrect. The record evidence is sufficient to mitigate or extenuate the negative security implications stemming from Applicant's alcohol consumption, drug involvement, criminal conduct, and personal conduct. Clearance is granted.

CASENO: 02-25725.h1

DATE: 02/16/2005

DATE: February 16, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-25725

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esquire, Department Counsel

FOR APPLICANT

Claude E. Ducloux, Esquire

SYNOPSIS

Between 1987 and 1998, Applicant was arrested six times, four of which were alcohol related. Between 1994 and 1999, he used marijuana and cocaine. Two of his answers on his Security Clearance Applicant were incorrect. The record evidence is sufficient to mitigate or extenuate the negative security implications stemming from Applicant's alcohol consumption, drug involvement, criminal conduct, and personal conduct. Clearance is granted.

STATEMENT OF THE CASE

On December 9, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding [\(1\)](#) it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On December 23, 2003, Applicant's answer to the SOR and request for a hearing was received. September 1, 2004, I was assigned the case. On September 1, 2004, a Notice of Hearing was issued scheduling the hearing which was held on September 23, 2004. The transcript (tr.) of the hearing was received on September 30, 2004.

FINDINGS OF FACT

The SOR alleges Alcohol Consumption, Drug Involvement, Criminal Conduct, and Personal Conduct. The Applicant admits the following: being charged in 1987 with driving under the influence of alcohol (DUI), being charged in 1990 with driving while impaired (DWI), being charged in 1993 with DUI, admits using marijuana during 1986, 1987, and

from 1994 through 1999, admits using cocaine in 1992 and again in 1997 or 1998, admits using methamphetamine once in 1985 or 1986, and admits being arrested and charged with burglary of a motor vehicle. Those admissions are incorporated herein as findings of fact. After thorough review of the whole record, I make the following additional findings of fact:

The Applicant is 35 years old, has worked for a defense contractor since November 2001, and is seeking to maintain security clearance. The Applicant is regarded by those who know him as intelligent, highly motivated, hard worker, dedicated, persistent, detail oriented, man of his word; a sharp and thorough engineer, a strong team player, and possessing a strong work ethic. (App Ex A-E)

In 1984, Applicant--then age 15--first tried marijuana. From 1984 until January 1988, he used marijuana twice a week. (Gov Ex 6, page 4) At age 16 or 17, then a high school sophomore, Applicant used amphetamine one time. From January 1988 to August 1991, Applicant was in the military and did not use any illegal drug. During an August 1988 interview with Defense Security Service (DSS) he stated he had no intention of using marijuana or any other illegal substance in the future.

From December 1991 to May 1994, while in college, Applicant used marijuana twice a year, during finals in December and May. In 1992, he tried cocaine and then again in 1997 or 1998. In 1994, following college graduation, he moved to a new state and his marijuana use increased. He would smoke two or three times weekly for three or four weeks and then quit for a month or two and then start again. His last use was in January 1999. In January 1999, he was diagnosed with Crohn's colitis, i.e., an irritable bowel disease. He is highly sensitive to nicotine, alcohol, and caffeine. During a major flare up in 1999, he was unable to eat and lost 45 pounds.

Applicant no longer associates with those who use illegal drugs and he has no intention of using marijuana or any other illegal drug in the future. (Gov Ex 6) He will not use illegal drugs again because: they are illegal, he is now a father and provider, is responsible for his family, he maintains a state certificate, and is responsible for public safety. (tr. 41-42) He realizes rules exist for the benefit of society and it is irresponsible to go against the rules.

In February 1987, Applicant was convicted of DWI. (Gov Ex 9) He was 17 years old, in high school and had been drinking with friends. His blood alcohol content (BAC) was .17%. In June 1987, he was arrested and charged with trespassing. The charge was *nolle posequi*. Applicant has no memory of what happened during this incident. (tr. 23) In August 1987, Applicant was charged with burglary of a motor vehicle, a felony. He and a friend were stealing cassettes, loose change, and other items out of automobiles. After pleading guilty to criminal mischief he was fined \$1000. (Gov Ex 8) He thought this incident was a misdemeanor and not a felony. He clearly remembers pleading guilty to a misdemeanor. In January 1988, a few months after this incident, Applicant joined the military.

In August 1990, Applicant was arrested for DWI and driving the wrong way on a one way street. At the time of his

arrest his BAC was .20%. After pleading guilty to the DWI, Applicant was sentenced to six months in jail, 12 months withdrawn, unsupervised probation, 72 hours of community service, to pay \$210 in fine and court costs, and pay \$100 restitution. (Gov Ex 2)

In March 1993, Applicant was in another state on spring break with college friends and was charged with DWI. He did not remain in the state for his court date but returned to school thereby forfeiting his bond of \$400 to \$500.

In May 1994, he graduated college. His college grade point average was 3.97. He graduated *summa cum laude*, was a member of a general honor fraternity, and a member of an engineering honor fraternity. He graduated in three years instead of the normal five years for his major. During the summers he worked full time and took elective courses. He averaged 20 hours of course work per semester. He is working on his Master's degree, which he hopes to obtain in May 2005.

In March 1998, Applicant was arrested for DUI. He pleaded guilty was sentenced to one day in jail, 12 months probation, and to pay fines, court costs, surcharges, and other costs of \$860. (Gov Ex 5) Following this arrest, Applicant began to think he might have an alcohol problem. In March 1999, he dramatically decreased his consumption of alcohol. He currently consumes wine with dinner once every three to six weeks.

In January 2002, he completed a security clearance application, Standard Form (SF) 86. He answered "no" to question 21, which asked him about felony arrests. He thought his arrest for breaking into cars had been a misdemeanor and not a felony. In response to question 27, concerning illegal drug usage, Applicant listed his most recent marijuana usage, but failed to list his two uses of cocaine, once in 1992 and again 1997 or 1998. As he was completing the SF 86, he had forgotten about his cocaine usage. (tr. 52) He did not remember his cocaine use until questioning by the DSS refreshed his memory.

In 2000, he married and now has two children. Marriage and fatherhood have had a profound effect on him. Growing up, Applicant states he fell in with the wrong crowd. His way of thinking has changed. When younger he was not responsible. He is now more responsible. With his current medical condition he drinks little alcohol. He spends his free time with his family.

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations that are clearly consistent

with the interests of national security. In making overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive. The government has the burden of proving any controverted fact(s) alleged in the SOR, and the facts must have a nexus to an Applicant's lack of security worthiness.

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. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

BURDEN OF PROOF

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." 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 judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Executive Order 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

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 which 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. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, then the applicant has the ultimate burden of establishing his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

Security clearances are granted only when "it is clearly consistent with the national interest to do so." *See* Executive Orders 10865 § 2 and 12968 § 3.1(b). "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 "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." *See Egan*, 484 U.S. at 531. Doubts are to be resolved against the applicant.

CONCLUSIONS

The Government has satisfied its initial burden of proof under Alcohol Consumption, Guideline G. 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. Applicant was found guilty of four alcohol related incidents: a 1987 DUI, a 1990 DWI, a 1993 DUI, and 1998 DUI. Disqualifying conditions (DC) 1 (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.) and 5 (E2.A7.1.2.5. Habitual or binge consumption of alcohol to the point of impaired judgment.) apply.

Applicant's last alcohol related arrest occurred in 1998, which was six and a half years before the hearing. Although not completely abstinent, Applicant's alcohol consumption is limited to a glass of wine with dinner every three to six weeks. There is no indication of a current problem with alcohol. Mitigating Condition (MC) 2. (E2.A7.1.3.2. The problem occurred a number of years ago and there is no indication of a recent problem.) applies.

In 1999, Applicant was diagnosed with Crohn's colitis, i.e., an irritable bowel disease, which makes him highly sensitive to nicotine, alcohol, and caffeine. With his current medical condition he drinks little alcohol. In 2000, he married and has two children. Marriage and fatherhood have had a profound effect on him making him more responsible. He takes his role of father and provider seriously. These changes are supportive of sobriety. MC 3. (E2.A7.1.3.3. Positive changes in behavior supportive of sobriety.) applies. I find for Applicant as to alcohol consumption.

The Government has satisfied its initial burden of proof under Guideline H, Drug Involvement. Under Guideline H, the security eligibility of an applicant is placed into question when that applicant is involved with illegal drugs. From 1986 through 1987 and then from 1994 through 1996, Applicant used marijuana. He also used cocaine twice, once in 1992 and again in 1997 or 1998. DC 1 (E2.A8.1.2.1. Any drug abuse.) applies.

Applicant's most recent illegal drug usage occurred in January 1999, which was more than five and a half years before the hearing. Mitigating Condition (MC) 1. (E2.A8.1.3.1. The drug involvement was not recent.) applies. Applicant no longer associates with those that use illegal drugs and has no intention of using marijuana or any other illegal drug in the future. He will not use illegal drugs again because: they are illegal, he is now a father and provider, is responsible for his family, he maintains a state certificate, and is responsible for public safety. He realizes rules exist for the benefit of society and it is irresponsible to go against the rules. His stated reasons, taken together with his medical condition and changes in lifestyle, lend credence to his intention to never use illegal drugs again. MC 3. (E2.A8.1.3.4. A demonstrated intent not to abuse any drugs in the future.) applies. I find for Applicant as to Drug Involvement.

The Government has satisfied its initial burden of proof under Criminal Conduct, Guideline J. Under Guideline J, the security eligibility of an applicant is placed into question when that applicant is shown to have a history or pattern of criminal activity creating doubt about his judgment, reliability, and trustworthiness. In addition to the alcohol related arrest listed above, Applicant was arrested twice in 1987, once for trespassing which was *nolle prosequi* and once for burglary of a motor vehicle. Because of these incidents, DC 1. (E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged.) and 2. (E2.A10.1.2.2. A single serious crime or multiple lesser offenses.) apply.

The most recent arrest occurred in 1998, which was six and a half years before the hearing. This behavior is not recent. MC 1 (E2.A10.1.3.1. The criminal behavior was not recent.) applies. Marriage and fatherhood have had a dramatic positive impact on Applicant. His alcohol consumption has been greatly reduced. His lifestyle changes makes it unlikely the factors leading to the violations will recur. MC 4. (E2.A10.1.3.4. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur.) Only one of the arrests occurred since Applicant left college. Applicant's lifestyle changes show clear evidence of successful rehabilitation. MC 6 (E2.A10.1.3.6. There is clear evidence of successful rehabilitation.) I find for Applicant as to criminal conduct.

The allegations under Guideline E, (Personal Conduct) are unfounded. The Government has shown Applicant's answer to questions 21 and 27 were incorrect, but this does not prove the Applicant deliberately failed to disclose information about his felony arrests and illegal drug use. Applicant has denied intentional falsification. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government when applying for a security clearance is a security concern. However, every inaccurate statement is not a falsification. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully.

In 1987, Applicant was arrested for burglary of a motor vehicle when he and a friend broke into parked cars and stole cassettes, loose change, and other items. Applicant thought he had originally been charged with a misdemeanor and he knew he was found guilty of a misdemeanor. Believing the incident to be a misdemeanor, he did not list it in response to question 21, which asked him about felony arrests. In response to his illegal drug usage he disclosed his marijuana usage but had forgotten about two uses of cocaine. Usage he did not remember until DSS questioning refreshed his memory. Failing to list his cocaine use was not a deliberate falsification. I find there was no intentional falsification of the SF 86.

In mid 1988 Applicant told the DSS his intention was to never to use marijuana or any other illegal substance again. That was his intent at the time. He had joined the military in January 1988 and did not use marijuana while in the military. Six years later, after leaving the military he used marijuana again. But subsequent use does not prove he was lying in August 1988. I find for Applicant as to personal conduct.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

FORMAL FINDINGS

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

Paragraph 1 Alcohol Consumption: 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

Paragraph 2 Drug Involvement: 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

Paragraph 3 Criminal Conduct: FOR THE APPLICANT

Subparagraph 3.a.: For the Applicant

Subparagraph 3.b.: For the Applicant

Subparagraph 3.c.: For the Applicant

Paragraph 4 Personal Conduct: FOR THE APPLICANT

Subparagraph 4.a.: For the Applicant

Subparagraph 4.b.: For the Applicant

Subparagraph 4.c.: 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 the Applicant. Clearance is granted.

Claude R. Heiny

Administrative Judge

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.