

KEYWORD: Sexual Behavior; Alcohol; Criminal Conduct

DIGEST: Applicant's excessive alcohol consumption has resulted in criminal alcohol-related incidents, involving Driving Under the Influence (DUI) and inappropriate sexual conduct, occurring from 1979 to 1996. Applicant's consumption of alcohol has been reduced significantly. Evidence of Applicant's alcohol reform is sufficient to mitigate his alcohol related history. Clearance is granted.

CASENO: 02-25867.h1

DATE: 03/08/2005

DATE: March 8, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-25867

**DECISION OF ADMINISTRATIVE JUDGE**

**MARTIN H. MOGUL**

**APPEARANCES**

**FOR GOVERNMENT**

Melvin A. Howry, Esq., Department Counsel

## **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant's excessive alcohol consumption has resulted in criminal alcohol-related incidents, involving Driving Under the Influence (DUI) and inappropriate sexual conduct, occurring from 1979 to 1996. Applicant's consumption of alcohol has been reduced significantly. Evidence of Applicant's alcohol reform is sufficient to mitigate his alcohol related history. Clearance is granted.

### **STATEMENT OF THE CASE**

On April 14, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed reasons 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 and recommended referral to an Administrative Judge to determine whether a clearance should be granted, denied or revoked.

In a signed, sworn statement, dated June 10, 2003, Applicant responded to the SOR allegations (Exhibit 3). He requested that his case be decided on the written record in lieu of a hearing. On September 12, 2003, Department Counsel prepared the Department's written case. A complete copy of the File of Relevant Material (FORM) was provided to Applicant, and he was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant filed no response to the FORM. The case was assigned to initially assigned to another Administrative Judge on November 4, 2003, but it was then reassigned to this Administrative Judge on April 26, 2004.

Department Counsel offered eight documentary exhibits (Exhibits 1-8), which have been admitted without objection. Applicant offered no documentary evidence into the record.

## FINDINGS OF FACT

The Government opposes Applicant's request for a security clearance, based upon the allegations set forth in the SOR. In the SOR, the Government alleges that a security risk may exist under Adjudicative Guidelines D, G, and J of the Directive. The SOR contains two allegations 1. a and 1.b., under Guideline D (Sexual Conduct), eight allegations, 2.a. through 2.h., under Guideline G (Alcohol Consumption), and five allegations, 3.a. through 3.e. under Guideline J (Criminal Conduct). Applicant admits allegations 2.d., 2.e., and 2.h., and he denies the other allegations. The admitted allegations are incorporated as Findings of Fact.

After a complete and thorough review of the evidence in the record, including the FORM, Applicant's Answer to the SOR, and the other admitted documents, and upon due consideration of that evidence, I make the following Findings of fact:

Applicant is 41 years old. He is employed by a defense contractor, and he seeks to retain a DoD security clearance in connection with his employment in the defense sector.

### **Paragraph 2 (Guideline D - Sexual Behavior)**

The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in sexual conduct that has involved criminal behavior and poor judgement.

In May 1997, Applicant was found guilty of violating Article 134 of the Uniform Code of Military Justice (UCMJ), and he received the non-judicial punishment by the United States Navy of a reduction in rank, and 45 days of extra duty for an incident of sexual assault that allegedly occurred in December 1996. The evidence indicates that another male individual accused Applicant of committing unwanted and inappropriate sexual conduct toward him (Exhibits 3, 5, 7, and 8). Applicant does not seem to contradict that a sexual incident occurred, but he contends, in his Response to the SOR (RSOR), that it was consensual (Exhibit 3). The specific facts of the case were resolved while Applicant was in the Navy, and they will not be litigated again in this venue. However, there is no disputing that he accepted the punishment described above.

In March 1990, Applicant was accused of sexually assaulting another service member on a Naval Base. He was ultimately charged with Sodomy; Homosexuality. In this incident, a male individual also accused Applicant of

committing unwanted and inappropriate sexual conduct toward him. In his RSOR, Applicant denies that a sexual incident occurred (Exhibit 3). An investigation was conducted by the U.S. Naval Investigative Service (Exhibit4), but no conclusion was reached and no further legal action was taken.

## **Paragraph 2 (Guideline G - Alcohol Consumption)**

The Government alleges in this paragraph that the Applicant is ineligible for clearance because he abuses alcohol.

In both of the two incidents that are described above, and that occurred in 1996 and 1990, Applicant had consumed a significant amount of alcohol, and based on the evidence, I conclude that it is highly likely that alcohol was a contributing factor in their occurrence.

Applicant's drinking has resulted in three additional alcohol related incidents, where he was arrested and found or pled guilty to Driving Under the Influence (DUI) or some other alcohol related action. They occurred in 1984, 1983, and 1979.

In 1984, Applicant was arrested and found guilty of Driving While Intoxicated. He was required to pay a fine, ordered to perform community service, and attend one year of meetings of Alcoholics Anonymous (Exhibits 3 and 8).

In 1983, Applicant was arrested for DUI. Applicant denies that he was driving the vehicle, but claims that he changed places with the driver, so that the driver could avoid legal responsibility (Exhibit 3). Ultimately, Applicant plead guilty to the reduced charge of Reckless Operation of a Vehicle. He was required to pay a \$90 fine (Exhibits 3 and 8).

In 1979, Applicant was arrested for Minor in Possession of Alcohol. He was a passenger in a vehicle with other underage youths, in which alcohol was present (Exhibit 3).

In 1992, Applicant was ordered to attend an alcohol education seminar by the U. S. Navy. Consumption of alcohol on the previous night contributed to his returning late to his duty station, which warranted the order (Exhibit 8).

Applicant enrolled in a treatment for his alcohol consumption at a Veterans facility after a request from DOHA to obtain an evaluation of his medical condition regarding alcohol consumption

(Exhibit 3). No evidence was introduced regarding that treatment.

In a statement made to a Defense Security Agent on March 8, 2002, Applicant stated that he now consumes two beers on an average of three times a month (Exhibit 8).

### **Paragraph 3 (Guideline J - Criminal Conduct)**

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in criminal acts. Applicant's conduct that occurred in 1996, 1990, 1984, 1983, and 1979, and which has been alleged in the SOR as 1.a., 1.b., 2.d., 2.e., and 2.f., respectively, is included in this paragraph as criminal conduct.

## **POLICIES**

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case.

As set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct

h. The potential for pressure, coercion, exploitation or duress

i. The likelihood of continuation or recurrence.

The eligibility guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in acts of alcohol abuse and criminal conduct that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future." The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

### CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance.

Since this matter is being decided without a hearing, my evaluation is necessarily limited to the contents of the various documents that are found in the case file.

### **(Guideline D - Sexual Behavior)**

Based on the evidence of record, the Government has established an initial reason to deny Applicant a security clearance because of Guideline D (Sexual Behavior).

Regarding Guideline D, Disqualifying Condition (DC) (E2.A4.1.2.1.) applies because Applicant's conduct was sexual behavior of a criminal nature, for some of which Applicant was given an Article 15. DC (E2.A7.1.2.4.) applies because the type of sexual behavior exhibited by Applicant reflects a lack of judgment and a failure to exercise sound discretion.

Regarding the Mitigating Conditions (MCs), I rule that MC (E2.A4.1.3.2.) applies because Applicant's conduct that occurred in 1990 and 1996 is not recent, and there has been no evidence of subsequent conduct of a similar nature. The finding is for Applicant.

### **(Guideline G - Alcohol Consumption)**

The Government has met its initial burden of proving by substantial evidence that Applicant has used alcohol to excess (Guideline G). Applicant on the other hand has introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's case against him.

Applicant has had a long history of consuming alcohol to excess. The Government established, by substantial evidence, that Applicant was involved in alcohol-related incidents away from work, such as driving under the influence, which is DC (E2.A7.1.2.1.). It has also been established by substantial evidence that Applicant has engaged in habitual or binge consumption of alcohol to the point of impaired judgment, which is which is DC (E2.A7.1.2.5.).

However, I have concluded that Mitigating Condition (MC) (E2.A7.1.3.2.) applies because the problem occurred a number of years ago, the last related alcohol related arrest occurred in 1996, and there has been no indication of a recent problem. While Applicant continues to consume alcohol, he has greatly reduced the amount of alcohol that he consumes. Paragraph 2 is concluded for Applicant.

### **(Guideline J -Criminal Conduct)**

The Government also established by substantial evidence that Applicant engaged in criminal conduct from in 1979 to 1996, as he was arrested for, and convicted of, DUI and other alcohol related criminal offenses. DC (E2.A10.1.2.1.), allegations or admissions of criminal conduct, regardless of whether the person was formally charged, and DC (E2.A10.1.2.2), a single serious crime or multiple lesser offenses, apply in this case. I find that MC (E2.A10.1.3.1) applies, because the criminal behavior, which was caused in large part by alcohol consumption, was not recent. Paragraph 3 is found for Applicant.

In this case, the Government has met its initial burden of proving by substantial evidence that Applicant engaged in inappropriate sexual behavior (Guideline D), has used alcohol to excess (Guideline G) and that he has engaged in criminal conduct (Guideline J). Applicant, on the other hand, has introduced persuasive evidence in rebuttal, explanation or mitigation that the conduct was not recent and he is not likely to engage in any such conduct in the future, which is sufficient to overcome the Government's case against him. Accordingly, the evidence supports a finding for Applicant.

### **FORMAL FINDINGS**

#### **Paragraph 1. Guideline D: FOR APPLICANT**

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

#### **Paragraph 2. Guideline G: FOR APPLICANT**

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: For Applicant

Subparagraph 2.d.: For Applicant

Subparagraph 2.e.: For Applicant

Subparagraph 2.f.: For Applicant

Subparagraph 2.g.: For Applicant



Subparagraph 2.h: For Applicant

**Paragraph 3. Guideline J: FOR APPLICANT**

Subparagraph 3.a.: For Applicant

Subparagraph 3.b.: For Applicant

Subparagraph 3.c.: For Applicant

Subparagraph 3.d.: For Applicant

Subparagraph 3.e.: For 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.

Martin H. Mogul

Administrative Judge