KEYWORD: Alcohol

DIGEST: Applicant is 39 years old, married with two teenage sons. He works for a defense contractor as a computer image scanner operator. Applicant was arrested in 1995, 2000, and 2002 for driving under the influence of alcohol. He was convicted of the 2002 offense, and of lesser offenses in the two earlier incidents. Applicant did not mitigate the alcohol consumption security concern. Clearance is denied.

CASENO: 03-18877.h1

DATE: 03/28/2005

DATE: March 28, 2005

In re:

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

Applicant for Security Clearance

ISCR Case No. 03-18877

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Ronald P. Keller, Esq.

SYNOPSIS

Applicant is 39 years old, married with two teenage sons. He works for a defense contractor as a computer image scanner operator. Applicant was arrested in 1995, 2000, and 2002 for driving under the influence of alcohol. He was convicted of the 2002 offense, and of lesser offenses in the two earlier incidents. Applicant did not mitigate the alcohol consumption security concern. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On August 3, 2004, DOHA issued a Statement of Reasons[(1)] (SOR) detailing the basis for its decision-security concerns raised under Guideline G (Alcohol Consumption) of the Directive. Applicant answered the SOR in writing on August 19, 2004 and elected to have a hearing before an administrative judge. The case was assigned to me on October 8, 2004. On November 30, 2004, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government and the Applicant submitted exhibits that were admitted into evidence. DOHA received the hearing transcript (Tr.) on December 8, 2004.

PROCEDURAL MATTERS

On December 29, 2004, Applicant's attorney filed a motion to reopen the hearing or to submit new evidence. Counsel attached seven documents or sets of documents that he now sought to have considered by me. The Department Counsel objected in a response dated January 7, 2005, to the untimely filing of this motion, and also cited some of the documents were unsigned, or contained handwritten notations, or were not fully and properly identified. Department Counsel objected also to the lack of an opportunity to cross-examine the Applicant on this new evidence. An examination of the transcript shows Applicant did not request additional time to submit more exhibits. Applicant's counsel stated he had no further evidence and rested his case (Tr. 112). After careful consideration of the motion and response, the motion to reopen the hearing or submit additional documents is denied. The tendered documents have been marked with the

numbers listed in the Department Counsel's response and will be included in the file as appellate exhibits.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated here as findings of fact. After a complete and thorough review of the evidence in the record, and full consideration of that evidence, I make the following additional findings of fact:

Applicant is 39 years old, married with two sons 16 and 14 years of age, and works for a defense contractor. Applicant works in the imaging and computer area. His performance evaluations and character statements show him to be a competent and hard-working person. Applicant received several company awards for good customer service to the Air Force with whom his employer has the contract. He also submitted two letters of appreciation for his work on a retirement function in 1998 for another employee. (Tr. 17, 74-76; Exhibits 1, A-C, E-O, Q, R)

On May 2, 1995, Applicant was arrested for DUI and carrying a concealed weapon in his Plymouth Horizon's glove compartment. Applicant finished delivering pizzas about 11:30 p.m., closed the store, and about 1 a.m. drove to another town some distance away from his home to check out a bar that he heard advertised on the radio. He wanted to play pool, but they did not have a table, so after 45 minutes he decided to leave. He consumed alcohol to some extent great enough to be spelled on his clothing by the police later in the morning. As he was leaving, he drove off the paved or graveled area of the parking lot into mud for some distance, and became stuck in the mud even with the front wheel drive of his vehicle. He asked someone present in the parking lot to call a tow truck, and when a tow truck arrived so did the local police. They asked him to take sobriety tests, and he refused because it was raining, he was cold, and the police had on rain gear he did not have. He even refused to take the blood alcohol test later at the police station. The police officers smelled alcohol on his clothing when he opened the car door. The police found a pistol and ammunition in his car, he explaining the pistol as being protection for when he delivered pizzas in the bad areas of his delivery area. He was arrested, he pled no contest to the DUI, was found guilty of reckless driving and fined $250 plus court costs. While Applicant now denies he drank that night, he admitted in his September 18, 1996, and his July 28, 2003, statements that he was drinking. (Tr. 20-26, 57, 60, 77; Exhibits 3, 4, 11)

Applicant was arrested on June 21, 2000, for DUI. He pled guilty to reckless operation and was fined $100. Applicant had dinner about 10:30 p.m. that night, and one drink of scotch. He then returned to work about midnight. Between midnight and 4 a.m., he claims now his contact lenses needed adjustment, so he went to the bathroom to put saline solution in them. Applicant described the bathroom as small. Yet somehow he managed to fall over a wastebasket in the bathroom while allegedly putting saline solution in one eye. He claims he knocked himself out when his head hit the

floor. He awoke, not knowing how long he had been knocked out, when the cleaning lady opened the bathroom door and hit his leg. She departed and called the police about 4:30 a.m., who came to the office building as Applicant was leaving out the back door and driving away. The police apprehended Applicant about two blocks away in his car. They thought he was a breaking and entering suspect, and asked him to back up toward them with his shirt pulled up to demonstrate he had no weapons on him. They asked him to take a breath and sobriety test, but he was offended by their overbearing and aggressive attitude and behavior, so he refused. He refused the tests a second time at the police station. Applicant claimed he had a concussion, but had no medical evidence to support his assertion. He did not consult with a physician until after the coached his son's baseball team later in the day. His attorney later advised him to plead guilty to the reckless driving charge and pay the $100 fine, and he did so. Applicant denies alcohol, either from the one drink at home at 10:30 p.m. or later drinking at the office or in a nearby bar, played any part in this incident. Applicant apparently never made the 8 a.m. meeting he was allegedly preparing for when he was at his office overnight. (Tr. 27-37, 62-64 78-83; Exhibits 7, 8, D)

Applicant was arrested on June 27, 2002, by a police department for driving under the influence of alcohol (DUI), a seat belt violation, and a marked lane violation. He pled no contest to DUI and was found guilty. Applicant was fined $400, served three days in jail and had 177 days suspended if he successfully completed the three day weekend intervention program, got two years probation, and his drivers license was suspended for nine months. Applicant was diagnosed to be alcohol dependent. He remained alcohol abstinent for one year. He did start drinking in the summer of 2004 after a tennis game with his brother-in-law. He drank a Mike's Hard Lemonade. The night he was arrested, sometime between 2 and 3 a.m. on his way home, he had a Long Island Iced Tea at a sports bar. His blood alcohol content (BAC) was .107 with that one drink. Applicant stated on his interrogatories that he drinks Mike's Hard Lemonade and Long Island Iced Tea, but only one type at a time now. According to Applicant's testimony, the one Long Island Iced Tea led to his BAC of .107 in 2002, yet he continues to drink that concoction. (Tr. 38-45, 68, 84, 85, 96, 97, 110, 112; Exhibits 1, 2, 5, 6, 9, 10)

Applicant was treated at the weekend intervention program (WIP) from February 6, 2003, to February 9, 2003. He was diagnosed as alcohol dependent and was recommended to an outpatient chemical dependence recovery program. Applicant completed the program, and the probation from the court sentence. Applicant disputes the description of his alcohol relationship from the alcohol assessment, particularly that he had painful hangovers, episodic loss of consumption control, blackouts, or other unfavorable events or reactions resulting from alcohol consumption. The staff at the WIP recommended Applicant have follow-on counseling with a specific counselor in his home area. Applicant did have several counseling sessions with that person, but does not know that counselor's recommendations. He spent time with the counselor from March 1, 2003 to March 18, 2003. There is no record of that counselor's evaluation on the record. He thinks he can drink responsibly now and does not have a problem with alcohol. Applicant tried to distinguish being "out drinking" from going out to dinner with family or friends and having a drink then which he did not perceive as being "out drinking". (Tr. 43, 61, 66, 93-97; Exhibits 9, 10)

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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information with Industry*

§ 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

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 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline that must be carefully considered in making the overall common sense determination required.

In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. Those assessments include: (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.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996). 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

CONCLUSIONS

The Government established that Applicant was arrested in 1995, 2000, and 2002 for alcohol related offenses. Applicant consumed alcohol again in 2004 after a year's abstinence, and in fact he admits consuming the Long Island Iced Tea drink that led to his 2002 DUI arrest and conviction. The WIP program evaluated Applicant as having an alcohol dependence, yet his self-perception is that he can drink alcohol with no adverse effects. The history of his arrests and convictions belie that perception. All this evidence shows that Disqualifying Conditions (DC) E2.A7.1.2.1 (*Alcohol-related incidents away from work, such as driving while under the influence*), DC E2.A7.1.2.4 (*Evaluation of alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program*) apply.

A major issue in this case is Applicant's credibility with his explanations of what happened in 1995 and 2000, and how the WIP staff misunderstood his situation. He certainly downplays the role of alcohol in each of his arrests, to such a degree that now he denies drinking alcohol in the 1995 incident when his statements on September 18, 1996, and July 28, 2003, admit he drank alcohol that night. I do not believe the local police would have confronted him at that time if he were merely stuck in the parking lot mud, and they had to have some reason other than to pull him out of the mud to appear that night. I do not find Applicant credible on his explanations regarding this incident.

Nor do I believe he fell down in the bathroom in 2000 merely because he was putting saline solution in his eye and

tripped over a wastepaper basket. His story about having a concussion, but not seeking medical attention until well after coaching his son's baseball team is not credible either. His reasons for refusing the sobriety and BAC tests in 1995 and 2000 are puerile.

He also has an explanation for the WIP staff report designed to diminish its diagnosis, including now denying he had amnesia, "painful and severe hangovers", and episodic loss of consumption control and other comments he made in 2002. I believe the contemporaneous statements the WIP staff recorded on the form that is an exhibit in this hearing. I do not believe Applicant or his justifications and explanations now.

Applicant also tried to argue with the Department Counsel over the meaning of being "out drinking" (Tr. 61), seeking to establish a nuance that would put his actions in a favorable light. I do not believe or find persuasive his distinctions. It is a distinction without a difference.

Finally, after the WIP diagnosis of alcohol dependence, and with three DUI arrests on his record, Applicant thinks he can drink alcohol responsibly, and resumes his drinking. He comes to the hearing with no evidence from a professional alcohol treatment provider that someone with alcohol dependence and his driving record could safely resume drinking. Applicant had ample time and opportunity to obtain witnesses, statements, or professional evaluations to support his assertions. He did not do so, and I, based on the totality of the evidence, do not believe his self-diagnosis and justifications.

Consequently, I can find no Mitigating Conditions (MC) that apply here. All the MC in fact are contrary to the facts of this case. Therefore, based on this evidence, I conclude this guideline against Applicant.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline G: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: Against Applicant

Subparagraph 1.f: Against Applicant

DECISION

In light of all of 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.

Philip S. Howe

Administrative Judge

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).