

KEYWORD: Alcohol; Criminal Conduct

DIGEST: Applicant is a 43-year-old executive of a company that contracts with the Department of Defense. Applicant had three alcohol related incidents from 1995 to 2003. After the last incident in 2003, Applicant has abstained from using alcohol and intends to never use it again. Applicant has mitigated the security concerns caused by his alcohol consumption and criminal conduct associated with alcohol. Clearance is granted.

CASENO: 03-20448.h1

DATE: 01/26/2005

DATE: January 26, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-20448

DECISION OF ADMINISTRATIVE JUDGE

CAROL G. RICCIARDELLO

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Elizabeth Newman, Esq.

SYNOPSIS

Applicant is a 43-year-old executive of a company that contracts with the Department of Defense. Applicant had three alcohol related incidents from 1995 to 2003. After the last incident in 2003, Applicant has abstained from using alcohol and intends to never use it again. Applicant has mitigated the security concerns caused by his alcohol consumption and criminal conduct associated with alcohol. Clearance is granted.

STATEMENT OF CASE

On May 27, 2004, 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 and Guideline J, criminal conduct. Applicant submitted a response to the SOR, dated June 14, 2004, and requested a hearing. In his SOR response, Applicant denied some allegations contained in the SOR, and admitted others while providing explanations in an effort to extenuate and mitigate the security concerns raised by the allegations.

The case was assigned to me on December 8, 2004. A notice of hearing was issued on December 30, 2004, scheduling the hearing for January 12, 2005. The hearing date was coordinated with Applicant and his attorney and they agreed to the scheduled date waiving the 15 days notice. The hearing was conducted as scheduled. The government submitted six exhibits that were marked as Government Exhibits (GE) 1-6 and admitted into the record. The Applicant testified, on his own behalf, and two witnesses also testified for the Applicant. Applicant submitted four exhibits that were marked as Applicant's Exhibits (AE) A-D and were admitted into the record. The transcript was received on January 21, 2005.

FINDINGS OF FACT

Applicant's admissions to the allegations 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 43-year-old college graduate. He has been married since 1981 and has three children. Applicant has worked for the same company since 1986. He excelled in his work and was promoted several times, culminating in his promotion to president of the company in 1999. Applicant's company contracts with the Department of Defense (DoD). Part of Applicant's job is to entertain clients. This entertainment often involves having dinner, drinks and other social activities with clients.

Applicant drank less than 2-3 drinks a week while attending college from 1979-1983. Applicant's alcohol consumption from 1983-1986 was approximately 3-4 drinks a month. When he started working with his present employer in 1986, Applicant's alcohol consumption increased to approximately 4-6 drinks on a monthly basis at company functions. Applicant's alcohol consumption increased from 1991-2003, to approximately 6-9 drinks a month.

As part of a team building effort the owner of the company would take his management team to dinner approximately twice a month. During those dinners Applicant would consume 2-3 drinks with dinner. Applicant did not drive home. Rather, he had his wife pick him up, or someone else would drive him home. The company later hired transportation to take people home.

When Applicant moved up through the ranks of the company into the executive echelon, he was expected to entertain clients. Many of the company's clients were European and their expectations of entertainment were much broader and involved more drinking than Applicant normally was accustomed to. During the "high season" from December through April, Applicant entertained clients approximately once every other week. While entertaining the clients, Applicant would consume alcohol. Applicant kept this entertainment schedule from approximately 1991 to 2003. Applicant rarely, if ever, drinks alcohol at home.

Applicant was arrested in 1995 for driving under the influence of alcohol (DUI), failure to drive on the right side of four lanes, failure to yield to an emergency vehicle, and careless driving. Applicant's blood alcohol content was .092 (BAC). The state legal limit is .08 BAC. Applicant paid a fine and court costs, and entered a diversion program. Applicant successfully completed the program and the charges were dismissed. Applicant admits he made a bad decision when he

chose to drive after drinking.

Applicant has a medical condition that is aggravated when he consumes certain types of alcoholic beverages. It is also aggravated when alcohol is mixed with the wrong type of foods.

In May 2001, Applicant was at dinner with his wife and friends. He was drinking and believes someone at the bar drugged his drink. He had a bad reaction and acted out of character. Applicant and his wife returned home and his wife confronted him with his behavior. Applicant hit his wife. Applicant was arrested for battery-bodily harm and domestic violence. Applicant's wife refused to press charges, so they were dropped. Applicant was remorseful and appalled at his behavior. Applicant apologized to his family.

In February 2003, Applicant was arrested for driving under the influence, driving the wrong way on a one way street, refusal to take a preliminary breath test, fail to yield right of way to emergency vehicle, and failure to signal turn. Applicant pled guilty to failing to take the preliminary breath test and contested the other charges. Applicant was acquitted of DUI and failure to yield right of way to an emergency vehicle. Applicant was found guilty of the other infractions. Applicant attributes his medical condition for producing what he thought was a higher than normal BAC reading and questioned the reliability of the BAC as scientifically unsound.

On the advice of his attorney and because Applicant wanted to determine if he had an alcohol problem, Applicant enrolled in a substance abuse program. He attended eight sessions and took the course seriously. Applicant received treatment for a condition diagnosed by a certified alcohol drug counselor as alcohol abuse. Applicant attended sessions with many different people and some had serious addiction problems. Applicant decided he did not want to become like them. The program caused Applicant to evaluate his whole life and make life changes. Applicant decided that he had achieved incredible success in his life and the three failures he had were directly related to his alcohol use. In February 2003, Applicant decided to never consume alcohol again. Applicant has a high profile position in a prestigious company and decided he was embarrassed and humiliated when he was arrested for DUI. He never wanted to be put in that position again.

Applicant has not had any alcohol since February 2003. Applicant has had no difficulty maintaining his abstinence. He does not crave alcohol and is not tempted to drink. Applicant continues to fulfill his duties with his company and entertain their clients. Applicant is not intimidated or pressured into drinking when he has to entertain. Applicant has refocused his life on not being a workaholic, but spending more time with his family. Applicant's attitude and abstinence from alcohol, especially when he is entertaining, has set a positive tone with the other employees of the company, whereby they do not feel pressure to drink when entertaining. Applicant's abstention from alcohol use has the support of his family and employer.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. 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, apply in this case. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. 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.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽²⁾ The government has the burden of proving controverted facts.⁽³⁾ The burden of proof is something less than a preponderance of evidence,⁽⁴⁾ although the government is required to present substantial evidence to meet its burden of proof.⁽⁵⁾ Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.⁽⁶⁾ 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.⁽⁷⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁸⁾

No one has a right to a security clearance⁽⁹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁰⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽¹¹⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽¹²⁾ 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.

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

Based on all the evidence, under Guideline G, I find 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*, applies in this case. Applicant had two DUI arrests. One incident was resolved by a diversion program and the other offense resulted in an acquittal of the charge. Applicant also had an incident of domestic violence after he had been drinking. After his last DUI arrest, he was diagnosed with alcohol abuse. I have also considered DC 3: *Diagnosis by a credentialed medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence*; and DC 4: *Evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program*, and conclude, although Applicant was diagnosed with alcohol abuse by a certified alcohol drug counselor his diagnosis does not fall within the specific parameters of either DC 3 or DC 4.

I have considered all the mitigating conditions under Guideline G, and specifically considered MC 3: *Positive changes in behavior supportive of sobriety*, and conclude it applies in this case. Applicant has not had any alcohol since February 2003. Applicant recognized that alcohol caused problems in his life and he does not want to ever have to deal with the type of problems he has had to confront due to his drinking. Applicant continues to entertain the company's clients, but refrains from drinking.

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.

Based on all the evidence, under Guideline J, I find DC 2: *A single serious crime or multiple lesser offenses*, applies in this case. Applicant was arrested and charged twice for DUI and once for domestic violence. I have considered all the mitigating conditions under Guideline J, and specifically considered MC 2: *The crime was an isolated incident*, and conclude it specifically applies to subparagraph 2.b. of the SOR. I have considered MC 5: *Acquittal*, and conclude it specifically applies to subparagraph 1.c. of the SOR, as it pertains to the DUI and the traffic infractions. I have considered MC 6: *There is clear evidence of successful rehabilitation*, and conclude it applies to the case as a whole. The legal problems that Applicant has had to deal with have all been related to alcohol. Applicant has abstained from drinking since February 2003, attended counseling, and does not intend to drink in the future.

In all adjudications the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes we should view a person by the totality of their acts, omissions, motivations and various other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I have considered all the evidence in this case, including Applicant's appearance, demeanor and credibility while testifying. I have also considered him under the "whole person" concept. I am satisfied that Applicant presented sufficient evidence of refutation, extenuation, and mitigation to overcome the case against him. Accordingly, Guideline G and J are decided for Applicant.

FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1 Guideline G 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

Paragraph 2 Guideline J FOR THE APPLICANT

Subparagraph 1.a. For the Applicant

Subparagraph 1.b. 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 Applicant. Clearance is granted.

Carol G. Ricciardello

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. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, ¶ E3.1.14.
4. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
5. ISCR Case No. 01-20700 (December 19, 2002) at p.3 (citations omitted).
6. ISCR Case No. 98-0761 (December 27, 1999) at p.2.
7. ISCR Case No. 94-1075 (August 10, 1995) at pp.3-4; Directive, Enclosure 3, ¶ E3.1.15.
8. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, ¶ E3.1.15
9. *Egan*, 484 U.S. at 531.
10. Id.
11. Id.,Directive, Enclosure 2, ¶ E2.2.2.
12. Executive Order 10865 § 7.