

KEYWORD: Alcohol; Drugs; Criminal Conduct; Personal Conduct

DIGEST: Applicant abused marijuana and alcohol until at least 2003, resulting in multiple arrests and hospitalizations. He has failed to mitigate the security concerns caused by his history of alcohol consumption, drug abuse, and related criminal conduct. Clearance is denied.

CASENO: 03-21158.h1

DATE: 02/22/2005

DATE: February 22, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-21158

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant abused marijuana and alcohol until at least 2003, resulting in multiple arrests and hospitalizations. He has failed to mitigate the security concerns caused by his history of alcohol consumption, drug abuse, and related criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

On July 30, 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), Guideline H (drug involvement), Guideline J (criminal conduct), and Guideline E (personal conduct). Applicant submitted an answer to the SOR that was received by DOHA on August 30, 2004, and requested a clearance decision based on the written record without a hearing. In his answer, Applicant admitted all SOR allegations except subparagraphs 1.m. and 4.a.

Department Counsel prepared a File of Relevant Material (FORM) on October 19, 2004, that was mailed to Applicant on October 22, 2004, and informed him he had 30 days from receipt of the documents to submit his objections or information he wished to be considered. Applicant submitted a request for additional time to submit further evidence of mitigation that was addressed to Department Counsel and received by DOHA on November 29, 2004. Applicant thereafter submitted a response to the FORM dated January 5, 2005, which contained three enclosures. Applicants' response was forwarded to Department Counsel on January 6, 2005. On January 7, 2005, she indicated she did not object to Applicant's submission. The case was assigned to me January 21, 2005.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the pleadings and exhibits, I make the following findings of fact:

Applicant is 45 years old and was employed by a defense contractor from July 1982 until sometime in 2003. He has been employed by a different defense contractor since December 2003. Applicant received a bachelor of science degree in electrical engineering in June 1982. He has been married since June 1983, and has two children, a 16-year-old daughter and a 9-year-old son. Applicant has possessed a security clearance since August 1982, and there has apparently been no previous action to revoke or downgrade that clearance.

Applicant has been a recovering alcoholic for more than 10 years who has had numerous relapses. From 1993 to the present, he has been hospitalized, and/or admitted to alcohol rehabilitation programs on numerous occasions. Hospitalizations in November 2002, April 2003, and May 2003 resulted in diagnoses by medical doctors of alcohol abuse, alcohol dependence, and alcoholic liver disease, acute and chronic alcoholism, acute withdrawal, and alcoholic hepatitis. any of the hospitalizations occurred after Applicant was arrested; while others followed binge drinking episodes of days or weeks wherein he would consume as much as a fifth of vodka in a day.

Applicant's first reported arrest was in November 2002 when his wife called police after she found him passed out on the roof of their house and was unable to revive him. He was charged with public intoxication, pled no contest, and was sentenced to serve two days in jail (time considered served) and ordered to pay a fee of \$130.00. Applicant's blood alcohol concentration (BAC) was 0.42 at the time of his arrest.

In March 2003, Applicant became involved in a tussle with his wife over car keys, the police were called, and he was charged with Corporal Injury to Spouse. In June 2003 he was charged with Driving Under the Influence of Alcohol (DUI) and Driving While Having a 0.20% or Higher Blood Alcohol. His BAC was .30 at the time of the arrest. On July 24, 2003, he entered a plea of no contest to the DUI, and the Corporal Injury to Spouse and 0.20 BAC charges were dismissed. He was sentenced to three years probation, 180 days jail (all but five days suspended for three years), \$1,600.00 fines and costs, and ordered to live in an alcohol treatment residence for six months. His driving privileges were also restricted for 90 days. An order of protection was entered along with the sentence protecting Applicant's wife that will remain in effect until July 2006.

Applicant was charged with public intoxication in July 2003 after he became involved in an accident while riding a bicycle. He was arrested in August 2003 (GE 10), apparently for the failure to appear for a urinalysis as a condition of his probation (as alleged in subparagraph 1.b.), and was incarcerated for approximately three weeks. Although not alleged in the SOR, probation officers went to Applicant's place of work on September 9, 2003, seeking to arrest him for further probation violations. On September 24, 2003, he notified his employer he was once again in jail awaiting a court date for a probation violation. (GE 10)

SOR subparagraph 1.m. alleges that Applicant's "alcohol abuse has caused frequent attendance problems at your *current* place of employment." (Emphasis added) Applicant denied this allegation stating: "I have had two such incidents in seven months of employment." It is clear the SOR was referring to the job Applicant left sometime in 2003 where he was absent on numerous occasions because he was either in jail, hospitalized, or engaged in binge drinking, and not the job Applicant held at the time the SOR was issued.

Applicant also abused marijuana on a regular basis between 1982 and March 2003. He estimates his use of the drug consisted of taking three to five hits off a cigarette once to several times a day, although not necessarily every day, because there were times during those years when he would go for days to as long as a week without using it. He also abused a prescription medicine for a short time in 2001.

Applicant appears to be aggressively working to resolve his addiction problems. As of August 27, 2004, he had been residing in an alcohol treatment residence since May 15, 2004 that required two house meetings per week, random testing, and a curfew. He has been involved in an outpatient treatment program, is working with his estranged family to recover from the damage his drinking has done, and he attends alcoholics anonymous (AA) meetings at least three times per week. His current employer is aware of Applicant's alcohol condition and adjusts his work schedule to accommodate his program requirements. Applicant has been under the care of a psychologist who indicates he is "reasonably optimistic" about Applicant's continued recovery.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon 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. Considering the evidence as a whole, Guidelines G, pertaining to alcohol consumption, Guideline H, pertaining to drug involvement, Guideline J, pertaining to criminal conduct, and Guideline E, pertaining to personal conduct, with their respective DC and MC, are most relevant in this case.

BURDEN OF PROOF

The sole 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.⁽²⁾ The government has the burden of proving controverted facts.⁽³⁾ The burden of proof in a security clearance case 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 classified information must be resolved in favor of protecting national security.⁽¹¹⁾

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.

Applicant has been a recovering alcoholic for many years who has suffered many relapses. His recent alcohol abuse has consisted of repeated episodes of binge drinking that has resulted in numerous hospitalizations and arrests. He has repeatedly been diagnosed by physicians as suffering from alcohol abuse, alcohol dependence, and acute and chronic alcoholism. His last alcohol related arrest occurred in September 2003. His last hospitalization was in July 2003. He continues in treatment programs at present.

Disqualifying Condition (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*; DC 3: *Diagnosis by a credentialed medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence*; DC 5: *Habitual or binge consumption of alcohol to the point of impaired judgment*; and DC 6: *Consumption of alcohol, subsequent to a diagnosis of alcoholism by a credentialed medical professional and following completion of an alcohol rehabilitation program* apply.

Applicant is making a strenuous effort to overcome his alcohol dependence. He is regularly attending AA meetings, is involved in an outpatient program, may still be residing in a recovery home, and is undertaking treatment with a psychologist. There is no indication that Applicant has consumed alcohol in the past 18 months. However, considering the extent of his alcohol abuse and the problems it has caused in his life, too little time has passed for application of Mitigating Condition (MC) 2: *The problem occurred a number of years ago and there is no indication of a recent problem*.

Applicant has abstained from alcohol for more than 12 months, is regularly attending AA meetings, and has received what can best be termed a "guarded" prognosis from a psychologist. However, he is still undertaking outpatient treatment, and will most likely have many months, if not years of aftercare requirements. The nature of the prognosis and Applicant's continuing care prohibit granting Applicant credit under MC 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 or 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 licensed clinical social worker who is a staff member of a recognized alcohol treatment program*.

Applicant has done all that can be asked of him over the past year and a half to continue in his efforts to recover from alcoholism. His continued sobriety, work record, treatment history, and efforts at family reconciliation entitle him to full credit under MC 3: *Positive changes in behavior supportive of sobriety*. Still, based on his history, it is far too early to be able to make any reliable prediction that he will not resume drinking in the future. I have carefully considered the disqualifying and mitigating conditions in this case and am unable to conclude that Applicant has overcome the case against him. Guideline G is decided against Applicant.

Under Guideline H, illegal drug involvement raises questions about an individual's willingness or ability to protect classified information. Involvement with or use of an illegal drug indicates unwillingness or inability to abide by the law. Cleared employees must respect regulations whether they agree with them or not. If they do not respect the rules on illegal substances, they may not respect the rules designed to protect classified information.

Applicant used marijuana on a frequent and regular basis from 1982 until at least March 2003. He abused a prescription drug for several months in 2001. During almost the entire time period when Applicant abused marijuana and the prescription drug he possessed a secret security clearance. DC 1: *Any drug abuse* applies in this case. Considering the duration of the drug abuse, which for the most part coincided with Applicant's alcohol abuse, and that he is still actively involved in programs seeking to overcome the alcohol problem, I find there is insufficient evidence to establish the existence of either MC 1: *The drug involvement was not recent*; or MC 3: *A demonstrated intent not to abuse any drugs in the future*. The remaining mitigating conditions have no applicability to the facts of this case. Guideline H is decided against Applicant.

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.

The government has established its case against Applicant under Guideline J based upon the public intoxication, spouse abuse, DUI, and probation violation charges. DC 1: *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*; and DC 2: *A single serious crime or multiple lesser offenses* apply. Applicant's criminal conduct is inextricably entwined with his alcohol abuse. While he is on the road to recovery from his alcohol problems, there is an inadequate basis at present for making anything other than a very guarded prognosis that he will not relapse. Should he relapse, it is very likely that further criminal conduct will occur. Accordingly, no mitigating condition applies and Guideline J is decided against Applicant.

Personal conduct under Guideline E is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Applicant submitted a security clearance application (SF 86) in November 2000, and in response to question 24 stated he had never been charged with an offense related to alcohol or drugs. The SOR alleges he deliberately failed to list several of the offenses alleged elsewhere in the SOR. However, all those offenses occurred after he submitted the SF 86. There is no evidence Applicant answered the question incorrectly. Thus, Guideline E is decided for Applicant.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find Applicant has failed to mitigate the security concerns that arise from his alcohol consumption, drug involvement, and criminal conduct. He has failed to overcome the case against him or satisfy his ultimate burden of persuasion.

FORMAL FINDINGS

SOR ¶ 1-Guideline G: Against the Applicant

Subparagraphs a-m: Against the Applicant

SOR ¶ 2-Guideline H: Against the Applicant

Subparagraphs a-c: Against the Applicant

SOR ¶ 3-Guideline J: Against the Applicant

Subparagraph a: Against the Applicant

SOR ¶ 4-Guideline E: For the Applicant

Subparagraph a: For 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.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 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, Item 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, Item E3.1.15.
8. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
9. *Egan*, 484 U.S. at 528, 531.
10. *Id* at 531.
11. *Egan*, Executive Order 10865, and the Directive.