

KEYWORD: Alcohol; Criminal Conduct; Personal Conduct

DIGEST: Applicant drove while under the influence of alcohol on at least three occasions and kicked out the window of a police patrol car on another. He deliberately omitted from his security clearance application information concerning his 1997 DUI and 1998 and 2002 liens placed against him for failing to pay his state income taxes. Applicant failed to mitigate alcohol consumption, criminal conduct, and personal conduct security concerns. Clearance is denied.

CASENO: 03-22843.h1

DATE: 03/02/2005

DATE: March 2, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-22637

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

David A. Aguilar, Esq.

SYNOPSIS

Applicant drove while under the influence of alcohol on at least three occasions and kicked out the window of a police patrol car on another. He deliberately omitted from his security clearance application information concerning his 1997 DUI and 1998 and 2002 liens placed against him for failing to pay his state income taxes. Applicant failed to mitigate alcohol consumption, criminal conduct, and personal conduct security concerns. 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 10 June 2004, DOHA issued a Statement of Reasons [\(1\)](#) (SOR) detailing the basis for its decision-security concerns raised under Guideline G (Alcohol Consumption), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on 10 July 2004 and elected to have a hearing before an administrative judge. The case was assigned to me on 19 January 2005. On 9 February 2005, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on 18 February 2005. I kept the record open until 24 February 2005 to permit Applicant to get an affidavit from his security officer concerning his Questionnaire for National Security Positions (QNSP). In an affidavit (Ex. K), signed on 21 February 2005, Applicant asserted he had been unable to get such an affidavit because the security officer has been ordered not to cooperate with him.

FINDINGS OF FACT

Applicant is a 48-year-old composites technician for a defense contractor. Ex. 1 at 1, 2. His father is a retired military veteran. Applicant served from 1975-80 in the U.S. Air Force. Tr. 15. Applicant is over six feet tall and weighed over 200 pounds. Ex. 1 at 1.

From approximately 1990 until 2001, Applicant "typically consumed an average of eight or nine beers, three or four times each week." Ex. 9 at 3. In September 1997, Applicant was involved in a motor vehicle accident. Applicant was driving erratically, as if he was not in full control of his truck, and struck the vehicle in front of him that was making a right turn. Police gave him a breath test that showed he had blood-alcohol content of .12. Applicant was convicted of driving under the influence (DUI) and sentenced to a fine, 120 days in jail (suspended), and DUI school. Tr. 36; Ex. 7.

In August 1998, Applicant drove his vehicle off the road into a ditch. Fire medics eventually responded and helped Applicant out of his vehicle. Although shaken up, he appeared to be uninjured. A wrecker was called to extract the vehicle. A police officer arrived and had Applicant sit in the back of the vehicle while he filled out the accident report so Applicant could submit it to his insurance company. Applicant was cooperative in answering questions. At Applicant's request, the police officer contacted one of Applicant's friends to give him a ride home. Applicant began to cry and asked if the officer had been in the Gulf War. When the police officer answered "no," Applicant said, "You wouldn't understand. They treated me like shit in the military." Ex. 6 at 3. Applicant's friend arrived, and the police officer got out of his vehicle to tell him he could take Applicant home. Applicant kicked out a side window in the back of the police vehicle, causing damage to the frame. When the police officer asked why, Applicant said he couldn't breathe and he was being treated like he had been treated in the war. *Id.* The officer removed Applicant from the vehicle, arrested him, and put him in cuffs and leg irons. The officer smelled alcohol on Applicant's breath, but apparently no sobriety tests were performed. Charges of malicious mischief were dismissed when Applicant agreed to pay for the damages to the vehicle.

In June 1999, Applicant was arrested for DUI. He was stopped by police after crossing the fog lines and nearly running off the road. Applicant smelled of alcohol and had difficulty exiting the vehicle. Applicant was unsteady and demonstrated positive cues of impairment. When the officer checked, he discovered Applicant's vehicle registration had expired. The sticker on the plate had been altered. Applicant pled guilty to DUI. Tr. 50-51; Ex. 8.

In August 2001, Applicant was stopped by police after he swerved his vehicle across several lanes of traffic and straddled the median lane/curb lane divider. His BAC was .105 and .092. He pled guilty to endangering the lives of other due to his intoxication and impaired ability to drive and DUI. Ex. 4; Ex. 9 at 2.

On 3 January 2003, Applicant signed his security clearance application (SCA) certifying that his statements therein were "true, correct, and complete" to the best of his knowledge and belief. Question 24 asked if Applicant had ever been charged with or convicted of any offenses related to alcohol or drugs. Ex. 1 at 6. Applicant answered "yes" and listed his DUI offenses in 1999 and 2001. Question 26 asked if, in the previous seven years, Applicant had been arrested for, charged with, or convicted of any offenses not listed in other modules of the SCA. Applicant answered "no." Question 36 asked if, in the previous seven years, Applicant had a lien placed against his property for failing to pay taxes or other debts. Applicant answered "no."

There is insufficient evidence of record to find Applicant had liens placed against him for failing to pay his state income taxes.

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 with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within 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.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. 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. 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.

CONCLUSIONS

Guideline G--Alcohol Consumption

In the SOR, DOHA alleged Applicant consumed alcohol to excess from 1974 until at least August 2001 (¶ 1.a); pled guilty in September 2002 for an arrest in August 2001 for DUI (¶ 1.b); was convicted in June 1999 for a DUI offense (¶ 1.c); was arrested in Sept 1997 and charged with DUI (¶ 1.d). Applicant admitted each allegation, except that found in ¶ 1.a. 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. Directive ¶ E2.A7.1.1.

The Government established potentially disqualifying conditions under Guideline G through its evidence and Applicant's admissions. Applicant has had alcohol-related incidents away from work-his three DUIs and kicking out the window of a police vehicle. DC E2.A7.1.2.1. His admission to consuming six to eight beers a night, three of four nights a week, from 1990 through 2001 amounts to habitual and binge⁽²⁾ consumption of alcohol. DC E2.A7.1.2.5.

Applicant claims he quit drinking and has been sober since 28 August 2001. Tr. 24. An Applicant may mitigate alcohol consumption security concerns by demonstrating the problem occurred a number of years ago and there is no indication of a recent problem (MC E2.A7.1.3.2) or that he has made positive changes in behavior supportive of sobriety (MC E2.A7.1.3.3). As the last incident was over three years ago, I will apply MC E2.A7.1.3.2. I am not able to apply MC E2.A7.1.3.3 because Applicant's testimony was not credible. He insists he only had two or two and one-half beers before each of his arrests. Yet he is over six feet tall and weighed over 200 pounds. Two drinks in such a person will not raise a person's blood-alcohol level to .12. At the hearing, Applicant testified he had had six drinks before one of his DUI arrests, but later reverted to his two drink story. He also claims the police were out to get him, whether it was trying to suffocate him in the police vehicle by leaving him in the back of the vehicle without air conditioning or tampering with the Breathalyzer so he would appear to be intoxicated. His testimony does not pass the common sense test. After observing his demeanor and considering his testimony as a whole, I am not convinced he has abstained from alcohol since August 2001.

Guideline J--Criminal Conduct

In the SOR, DOHA alleged Applicant was arrested three times for DUI, as described in ¶¶ 1.b-1.d (¶ 2.a) and was arrested in August 1998 and charged with criminal mischievous (¶ 2.b). Applicant admitted each of the allegations. A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1.

The Government established each of the allegations. Applicant drove drunk on three occasions and committed criminal mischievous on another. Applicant committed criminal conduct (DC E2.A10.1.2.1) consisting of, at the very least, multiple lesser offenses (DC E2.A10.1.2.2). It is a criminal offense to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of the executive branch of the Government of the United States. 18 U.S.C. § 1001. Security clearances are within the jurisdiction of the executive branch of the Government of the United States. *See Egan*, 484 U.S. at 527. Applicant deliberately falsified answers in his SCA by deliberately failing to note his September 1997 DUI arrest and the liens that had been placed against him in 1998 and 2002 for failing to pay his state income taxes. Although not charged in the SOR under Guideline J, it is evidence of criminal conduct that convinces me Applicant is not entitled to mitigation under MC E2.A10.1.3.1-the criminal behavior was not recent. I find against Applicant on ¶ 2.

Guideline E--Personal Conduct

In the SOR, DOHA alleged Applicant falsified material facts on his SCA by failing to disclose his 1997 DUI arrest (§ 3.a), his August 1998 arrest for criminal mischievous (§ 3.b), and liens placed against him for unpaid state income taxes for 1998 and 2002 (§ 3.c). Applicant denied all three allegations. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate the applicant may not properly safeguard classified information. Directive § E2.A5.1.1.

The Government established Applicant failed to disclose in his SCA the 1997 DUI arrest and his 1998 malicious mischief arrest. After carefully listening to his testimony and observing his demeanor, I am not convinced by his protestations that the omission from his SCA were unintentional. None of the mitigating conditions apply. The Government failed to establish liens were placed against Applicant in 1998 and 2002 for unpaid state income taxes. I find against Applicant on § 3.a and 3.b, but for him on § 3.c.

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

Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Paragraph 3. Guideline E: AGAINST APPLICANT

Subparagraph 3.a: Against Applicant

Subparagraph 3.b: Against Applicant

Subparagraph 3.c: For Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

James A. Young

Administrative Judge

1. As required by 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).

2. The United States Department of Health and Human Services Substance Abuse and Mental Health Services Administration (SAMHSA), in its National Survey on Drug Use and Health (NSDUH), defined binge drinking as "[f]ive or more drinks on the same occasion at least once in the past 30 days (includes heavy use)."

<http://oas.samhsa.gov/NHSDA/2k3NSDUH/2k3results.htm#ch3>. The Appeal Board has not defined the term nor adopted SAMHSA's definition. In fact, it decided there was insufficient evidence to find an individual was a binge drinker who was arrested for DUI once after having five drinks and a second time after having ten drinks. *See* ISCR Case No. 02-15358 at 7 (App. Bd. Jul. 22, 2003).