

KEYWORD: Criminal Conduct; Alcohol; Drugs

DIGEST: Applicant was twice diagnosed by physicians as being alcohol dependent. Yet he continues to consume alcohol to such an extent that he has a lengthy history of arrests for public intoxication and driving while intoxicated. Applicant has smoked marijuana for more than 20 years during which time he held a security clearance. Applicant failed to mitigate security concerns raised by his criminal conduct, alcohol consumption, and drug involvement. Clearance is denied.

CASENO: 03-22963.h1

DATE: 01/26/2006

DATE: January 26, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-22963

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Stephanie K. Gonzalez, Esq.

Duy T. Ly, Esq.

SYNOPSIS

Applicant was twice diagnosed by physicians as being alcohol dependent. Yet he continues to consume alcohol to such an extent that he has a lengthy history of arrests for public intoxication and driving while intoxicated. Applicant has smoked marijuana for more than 20 years during which time he held a security clearance. Applicant failed to mitigate security concerns raised by his criminal conduct, alcohol consumption, and drug involvement. 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 12 May 2005, DOHA issued a Statement of Reasons⁽¹⁾ (SOR) detailing the basis for its decision-security concerns raised under Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption), and Guideline H (Drug Involvement) of the Directive. Applicant answered the SOR in writing on 7 June 2005 and elected to have a hearing before an administrative judge. The case was assigned to me on 6 October 2005. On 15 November 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 28 November 2005.

Applicant objected to exhibits 4 and 5 on the ground that the documents were covered by the doctor-patient privilege under the Federal Rules of Evidence. I admitted the documents subject to Department Counsel producing Applicant's release granting the Government the right to obtain the documents. The Government produced a form Applicant signed, authorizing the release of information to persons investigating his suitability for a security clearance. I admitted this document, without objection, as Ex. 6. The Government did not produce a specific release for medical records. The federal exclusionary rule is not applicable in DOHA proceedings. *See* DISCR Case No. 90-2069 at 5 (App. Bd. Mar. 25, 1992). As the documents were created in the regular course of business and were furnished by an investigative service (the Defense Security Service) pursuant to its responsibilities in connection with assisting the Secretary of Defense to safeguard classified information within industry, I admitted Exs. 4 and 5. Directive ¶ E3.1.20.

I left the record open for Applicant to submit a character statement from one of Applicant's coworkers. Without objection from the Government, I admitted the statement as Ex. A.

FINDINGS OF FACT

Applicant is a 53-year-old avionics technician for a defense contractor. He served as an avionics technician in the U.S. Navy from 1973-79. Applicant received a confidential security clearance in 1973 and, with a short break between the time he left the service and obtained a job with a defense contractor, has held a clearance ever since. He currently holds a secret clearance.

Applicant has consumed alcohol since he was 16 years old. He began by drinking gin, beer, and bourbon whisky. As a teenager, he drank once a week and became intoxicated twice a year. When he was in the Navy, Applicant consumed at a half-gallon of whisky every other day from the mid 1970s until 1997 or 1998.

In 1994, Applicant attempted suicide. He was distraught over the failure of his attempts to reunite with his third wife. He was diagnosed by a physician as being alcohol dependent. He was admitted to the hospital for detoxification. After detoxification, Applicant agreed to continue in Alcoholics Anonymous (AA). In August 1996, Applicant was referred by his employer for treatment of alcohol dependence because of his excessive absenteeism. He was admitted as an in-patient for five days of detoxification. The treating physician diagnosed Applicant as being alcohol dependent. After his detoxification, he was entered into a two week alcohol rehabilitation program and was to attend AA meetings in the evening.

In June 2003, Applicant reported that he rarely drank to the point of intoxication anymore. Applicant has had difficulty with absenteeism from work since the time he started working for his present employer in 1980. He blames this absenteeism on binge consumption of alcohol. After his wife died in 1989, Applicant was counseled on two occasions by his supervisors for sleeping in equipment carts. Although he does not recall the circumstances of his sleeping on duty, he admits he may have been drinking on both of those occasions.

Applicant used marijuana one to two times a year from the early 1970s until December 2002. He usually obtained the marijuana from friends, but has, at times, purchased it.

In December 1975, Applicant was arrested for possession of marijuana. He admits being arrested in January 1976 and then convicted of an unknown offense. He was arrested in November 1995 for public intoxication. He paid a small fine. Applicant was arrested in February 1997 for domestic violence. The case was dismissed. In May 1997, Applicant and his wife were arrested for public intoxication. Applicant paid a \$150 fine.

Applicant was arrested again in December 1997 for public intoxication. Police observed Applicant's wife stumble as she left the grocery store. Applicant followed soon thereafter. He was carrying two grocery bags and was very unsteady on his feet. He was stopped by police. After he failed a horizontal gaze nystagmus field sobriety test, he was arrested for public intoxication. He was arrested again for public intoxication in June 1998. He paid a small fine to settle both offenses.

Applicant was arrested in November 2001 for possession of marijuana, less than two ounces. In March 2003, Applicant was stopped by police on suspicion of DWI. Police found marijuana in the car and three marijuana cigarettes in a small brass container in one of Applicant's pockets. Applicant failed the field sobriety tests and samples of his breath tested .217 and .203 on the intoxilyzer. Applicant was arrested for DWI and possession of marijuana less than two ounces. Applicant pled guilty to both offenses. He was fined and put on probation.

There is a history of alcoholism in Applicant's family. He realizes he has an alcohol problem, but asserts it doesn't affect his ability to put out a good product. He claims he doesn't drink anywhere but at home. His friend testified Applicant drinks when they are fishing. Applicant does not believe that having a couple of drinks makes him a threat to national security. Applicant is not participating in any alcohol-related treatment or aftercare programs.

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 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 the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

Guideline J-Criminal Conduct

In the SOR, DOHA alleged Applicant was arrested in March 2003 for DWI and possession of marijuana (¶ 1.a); was arrested in November 2001 for possession of marijuana (¶ 1.b); was arrested for domestic violence in February 1997 (¶ 1.c); was arrested for public intoxication in May 1997 (¶ 1.d), December 1997, (¶ 1.e), June 1998 (¶ 1.f), and November 1995 (¶ 1.g); was arrested in January 1976 (¶ 1.h); and was arrested for possession of marijuana in December 1975 (¶ 1.i). 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's evidence established potentially disqualifying conditions under Guideline J. It is a security concern and possibly disqualifying for an Applicant to engage in criminal conduct regardless of whether the person was formally charged. DC E2.A10.1.2.1. Applicant engaged in criminal conduct, consisting mostly of lesser offenses (DC E2.A10.1.2.2), such as public intoxication, that were resolved by citations. But Applicant also engaged in driving while intoxicated and possession of marijuana offenses. None of the listed mitigating conditions apply. Although he has not been arrested since March 2003, his lengthy history of criminal conduct, even after he reached the age of 50, creates doubt about his judgment, reliability, and trustworthiness. After carefully reviewing all of the evidence, the disqualifying and mitigating conditions, and the adjudicative process factors. I find against Applicant on ¶ 1.

Guideline G-Alcohol Consumption

In the SOR, DOHA alleged Applicant consumed alcohol to the point of intoxication at times from 1970-99 (¶ 2.a); was diagnosed with alcohol dependence in 1996 (¶ 2.b); and was treated for alcohol dependence in 1994 (¶ 2.c). Applicant admitted each of the allegations. 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's evidence established potentially disqualifying conditions under Guideline H. Applicant was involved

in alcohol-related incidents away from work (DC E2.A7.1.2.1), such as the DWI and public intoxication offenses. He also had alcohol-related incidents that were work related (DC E2.A7.1.2.2), such as his absenteeism from work and sleeping while on duty. He admits being a binge drinker (DC E2.A7.1.2.5), was diagnosed by credentialed medical professionals in 1994 and 1996 as being alcohol dependent (DC E2.A7.1.2.3), and consumed alcohol subsequent to those diagnoses and after completing alcohol rehabilitation programs (DC E2.A7.1.2.6).

None of the mitigating conditions listed under the guideline apply. Applicant's contention that, despite his alcohol dependence, he still produces a good product is misplaced. The concern is that his continued use of alcohol leads to the exercise of questionable judgment, thus increasing the risk of the unauthorized disclosure of classified information. Despite his alcohol dependence, Applicant still does not recognize the seriousness of the problem and continues to consume alcohol. Under all the circumstances, I find against Applicant on ¶ 2.

Guideline H-Drug Involvement

In the SOR, DOHA alleged Applicant purchased and used marijuana at various times from 1970-99 (¶ 3.a). Applicant admitted the allegation. The improper or illegal involvement with drugs raises questions regarding an applicant's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information. Directive ¶ E2.A8.1.1.

The Government's evidence established potentially disqualifying conditions under Guideline H. Applicant abused a controlled substance (DC E2.A8.1.2.1) by using marijuana. He also admitted purchasing and possessing marijuana. DC E2.A8.1.2.2. None of the mitigating conditions apply. Applicant stated he does not intend to use marijuana in the future. See MC E2.A8.1.3.3. In light of Applicant's history of using marijuana for more than 20 years, his use of marijuana while he held a security clearance and knew of the Government's concerns about illegal drug use, and his apparent lack of judgment when he consumes alcohol, Applicant has not established a record of abstinence that warrants a favorable finding on that mitigating condition. After considering all of the evidence, as well as the disqualifying and mitigating conditions, and the adjudicative process factors, I find against Applicant on ¶ 3.

FORMAL FINDINGS

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

Paragraph 1. Guideline J: 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

Subparagraph 1.g: Against Applicant

Subparagraph 1.h: Against Applicant

Subparagraph 1.i: Against Applicant

Paragraph 2. Guideline G: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: Against Applicant

Paragraph 3. Guideline H: AGAINST APPLICANT

Subparagraph 3.a: Against 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 (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended and modified (Directive).