

KEYWORD: Alcohol, Criminal Conduct, Personal Conduct

DIGEST: Between 1978 and 1999, Applicant has been arrested and charged with Driving Under the Influence (DUI) seven times. He was also arrested in 1996 for domestic violence, which was dismissed by the court. He continues to consume significant quantities of alcohol on a daily basis. He has not mitigated the government's security concerns regarding his alcohol consumption, criminal conduct, and personal conduct. Clearance is denied.

CASENO: 03-22956.h1

DATE: 03/09/2006

DATE: March 9, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-22956

DECISION OF ADMINISTRATIVE JUDGE

MARY E. HENRY

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Between 1978 and 1999, Applicant has been arrested and charged with Driving Under the Influence (DUI) seven times. He was also arrested in 1996 for domestic violence, which was dismissed by the court. He continues to consume significant quantities of alcohol on a daily basis. He has not mitigated the government's security concerns regarding his alcohol consumption, criminal conduct, and personal conduct. Clearance is denied.

STATEMENT OF THE CASE

On July 15, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Specifically, the SOR set forth security concerns arising under Guideline G (Alcohol Consumption), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct), of the Directive. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. On August 2, 2005, Applicant submitted a notarized response to the allegations, and elected to have his case decided on the written record in lieu of a hearing.

Department Counsel prepared a File of Relevant Material (FORM) and provided Applicant with a complete copy on November 22, 2005. On December 27, 2005, Applicant responded to the FORM, and submitted additional evidence. The case was assigned to me on January 23, 2006.

In the brief dated November 18, 2005, the government alleges that Applicant was arrested for public intoxication in 2004, which he has denied. Since the government has not filed a motion to amend the SOR to include an allegation for this conduct, this issue is not before me and will not be considered.

FINDINGS OF FACT

Applicant admitted, with explanation, the allegations in subparagraphs 1.a. through 1.g. and 2.a. and 2.b. of the SOR.⁽¹⁾ Those admissions are incorporated here as findings of fact. He denied the remaining allegations. After a complete review of the evidence in the record and upon due consideration, I make the following additional findings of fact:

Applicant is a 45-year-old lead shipping/receiving inspector for a defense contractor.⁽²⁾ He has worked for this contractor or its predecessor for twenty years.⁽³⁾ He completed a security clearance application (SF 86) in April 2002.⁽⁴⁾

Applicant has a stellar employment record. He is recognized by his employer for his leadership qualities and contributions.⁽⁵⁾ He has never been disciplined at work.⁽⁶⁾ He has no work attendance issues or financial problems.⁽⁷⁾ His supervisors highly praise his work ethics and skills.⁽⁸⁾

The police arrested and charged Applicant in January 1978, February 1979 and January 1982 for DUI.⁽⁹⁾ The disposition of these arrests is unknown. He was arrested and charged with public intoxication in 1984.⁽¹⁰⁾ This charged was nolle prossed the next day.⁽¹¹⁾

In May 1985, the police again arrested and charged Applicant with DUI.⁽¹²⁾ The court convicted him and sentenced him to 10 days of hard labor, which was suspended.⁽¹³⁾ The court also fined him \$250 and placed him on six months probation.⁽¹⁴⁾ In September 1992, the police arrested and charged him with DUI.⁽¹⁵⁾ The court sentenced him to 30 days in jail, suspended 28 days, and fined him \$150.⁽¹⁶⁾ On appeal, the State nolle prossed this case.⁽¹⁷⁾

Applicant was arrested and charged with third degree domestic violence assault in 1996, a charge which was dismissed. (18) Finally, the police arrested and charged Applicant with DUI and an improper lane change in July 1999. (19) The court dismissed the DUI and convicted him on the improper lane change. (20) The court sentenced him to 30 days in jail, which was suspended, fined him \$500, and placed him on probation for one year. (21)

Applicant currently drinks alcohol and intends to do so in the future. (22) He consumes a case of beer a week, 1 to 4 ounces of liquor a week, and 1 to 4 glasses of wine a month. (23) Applicant denies drinking to intoxication. (24) He does not drink prior to going to work or while at work. (25) He is not a member of alcohol anonymous or similar organization nor does he take medication to abstain from drinking. (26) He has not been treated for substance abuse. (27)

On April 15, 2002, Applicant completed his security clearance application. He answered "yes" to the following question in the SOR:

Question 24. Your Police Record - Alcohol/Drug Offenses

Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs? For this item report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607.

He then listed his DUI arrest in 1999. (28) Applicant, however, did not list his DUI arrests in 1978, 1979, 1982, 1985, 1992, and his 1984 arrest for public intoxication. (29) Although he discusses his 1999 DUI arrest in his signed statement dated September 15, 2003, he does not mention his prior arrests nor does he deny any previous DUI arrests. (30) He states that he failed to disclose his previous DUI arrests because he thought he only had to list those arrests which occurred in the previous seven years. (31)

On an unspecified dated, the Defense Office of Hearings and Appeals sent Applicant Interrogatories. Interrogatory Number 5 asks: "Have you been arrested, charged or held by any law enforcement authorities for any reason?" (32) In his response dated April 21, 2004, Applicant listed his 1999 DUI arrest, his 1996 arrests for domestic violence, speeding, and a boating violation, and his 1993 arrest for speeding. (33) He failed to list his arrests in 1978, 1979, 1982, 1985, and 1992 for DUI, and his arrest in 1984 for public intoxication. (34) In his response, he states that when he filed out his clearance seven years stuck in his mind as the time frame for listing prior alcohol offenses. (35) In his second response, he indicates that in the last 20 years he has been charged with and convicted for only one alcohol related offense, which (36)

he did not identify in his answers.

POLICIES

Enclosure 2 of the Directive sets forth adjudication guidelines which must be considered in the evaluation of security suitability. An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the adjudicative process provision in Paragraph E2.2., Enclosure 2 of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Included in the guidelines are disqualifying conditions and mitigating conditions applicable to each specific guideline. In addition, each security clearance decision must be 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, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (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 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. 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.⁽³⁷⁾ The government has the burden of proving controverted facts.⁽³⁸⁾ The burden of proof is something less than a preponderance of the evidence.⁽³⁹⁾ Once the government has met its burden, the burden shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽⁴⁰⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁴¹⁾

No one has a right to a security clearance⁽⁴²⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽⁴³⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽⁴⁴⁾ Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." The decision to deny an individual a security clearance is not necessarily a determination as to the allegiance, loyalty, and patriotism of an applicant.⁽⁴⁵⁾ 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.

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:

Alcohol Consumption - Guideline G: 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.

Criminal Conduct - Guideline J: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Personal Conduct - Guideline E: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulation could indicate that the person may not properly safeguard classified information.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate adjudicative factors, I conclude the following with respect to the allegations set forth in the SOR:

The government has established its case under Guideline G. Applicant's DUI arrests in 1978, 1979, 1982, 1985, 1992, and 1999 as well as his 1984 arrest for public intoxication are alcohol-related incidents away from work. Applicant has been drinking for more than 25 years, and continues to drink regularly. He often drinks to excess and to intoxication, causing his judgment to be impaired. Although Applicant denies that he drinks to impairment, his DUI arrests reflect that his alcohol consumption has been excessive on numerous occasions. He currently drinks a case of beer and 1 to 4 ounces of hard liquor a week. A few times a month, he will also drink a glass of wine. His level of alcohol consumption indicates that he drinks a significant quantity of alcohol on a daily basis. By continuing to drink on a daily basis, he places himself in jeopardy for future DUIs and other alcohol related problems. Applicant's conduct clearly falls within Alcohol Consumption Disqualifying Condition (AC DC) E2.A7.1.2.1. (*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*), and AC DC E2.A7.1.2.5. (*Habitual or binge consumption of alcohol to the point of impaired judgment*).

I have considered all the Alcohol Consumption Mitigating Conditions and conclude that none apply. Applicant has not mitigated the government's security concerns under Guideline G.

The government has established its case under Guideline J. Over a period of 21 years, Applicant has been arrested seven times for DUI, and once for domestic assault. His criminal conduct raises Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1. (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged*) and CC DC E2.A10.1.2.2. (*A single serious crime or multiple lesser offenses*).

Although he has not been arrested for DUI since 1999, he continues to drink a significant amount of alcohol on a daily basis, which increases his risk for additional arrests for DUI. In light of this risk, his decision to continue excessive drinking raises questions about his judgment and reliability, and negates the application of E2.A9.1.3.1. (*There is no indication of a current problem*) of Criminal Conduct Mitigating Conditions. Applicant has not mitigated the government's security concerns under Guideline J.

The government has established its case under Guideline E. Applicant's answers omitted material fact from his SF-86 and interrogatory answers. He denies, however, that he deliberately falsified his answer to these questions, arguing that he thought he needed to list all DUIs in the last seven years. When a falsification allegation is denied, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. [\(46\)](#)

Throughout the security clearance application, numerous questions reference a seven year period of time. Question 24, on the other hand, clearly asks if he had ever been arrested for any offense(s) related to alcohol. Applicant truthfully answered "yes" and listed the 1999 DUI arrest, which had occurred within seven years of April 15, 2002, the date he completed his security clearance application. In his statement to the investigator, Applicant again discussed only his 1999 arrest. His prior arrests are not mentioned, nor is the existence of these arrests denied. While he should have read the questions more carefully, it is not unreasonable for him to have thought that he need only list his DUI arrests for the last seven years as questions before and after this question reference seven years. I find that Applicant did not deliberately falsify his answer to Question 24. I find in favor of him as to allegation 3.a. of the SOR.

Applicant answered "yes" to Interrogatory Number 5. He listed all his arrests between 1993 and 1999, including the 1999 DUI, the 1996 domestic violence arrest, and speeding tickets. Applicant's assertion that he thought he only had to list his offenses for the last seven years in responding to this question is not credible. None of the questions in the interrogatories contain a time limitation. In addition, he listed speeding violations as far back as 1993, more than seven years prior to April 15, 2002, the date he completed his security clearance application. Although he could remember speeding tickets as far back as 1993, he claims he could not remember a DUI arrest one year earlier, when he spent two days in jail. He deliberately ended his arrests before his answer would show a pattern of alcohol arrests. He has not mitigated the governments concerns as to allegation 3.b. of the SOR.

Finally, I have considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. He has a long history of drinking and alcohol related arrests. He continues to drink and intends to do so in the future, with the knowledge that he could be arrested again. He does not acknowledge any problems with his drinking, despite his many alcohol related arrests. He has not changed his behavior in the last 25 years, and it is unlikely that he will now do so. He has not mitigated the government's security concerns. Accordingly, for the reasons stated, I find that it is not clearly consistent with the national interest to grant a security clearance to 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 (Alcohol Consumption): 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

Paragraph 2, Guideline J (Criminal Conduct): AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Paragraph 3, Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraph 3.a: For Applicant

Subparagraph 3.b: 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 a security clearance for Applicant. Clearance is denied.

Mary E. Henry

Administrative Judge

1. Item 2 (Response to SOR, dated August 2, 2005) at 1-3.
2. *Id.* at 3-5.
3. *Id.*
4. Item 4 (Security Clearance Application, dated April 15, 2002).
5. Item 2, *supra* note 1, at 3-5, 7; Applicant's supplemental documentation at 5-6.
6. Applicant's supplemental documentation at 3-4.
7. Item 5 (Applicant's signed statement, dated September 15, 2003) at 1.
8. Item 2, *supra* note 1, at 3; Applicant's supplemental documentation at 5-6.

9. Item 2, *supra* note 1, at 1; Applicant's supplemental documentation at 3.

10. Item 2, *supra* note 1, at 1.

11. *Id.*

12. *Id.* at 2; Item 7 (United States Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, criminal record report, dated May 16, 2005) at 2; Applicant's supplemental documentation at 3.

13. Item 2, *supra* note 1, at 2; Item 7, *supra* note 12, at 2.

14. *Id.*

15. Item 2, *supra* note 1, at 2; Applicant's supplemental documentation at 3.

16. Item 2, *supra* note 1, at 2.

17. *Id.*

18. *Id.*; Applicant's supplemental documentation at 3.

19. *Id.*

20. Item 2, *supra* note 1, at 2.

21. *Id.*

22. Item 6 (Interrogatories and Applicant's answers to interrogatories, signed April 21, 2004) at 1-2.

23. *Id.* at 2.

24. *Id.*

25. *Id.*

26. *Id.* at 3.

27. *Id.*

28. Item 4, *supra* note 4, at 5.

29. *Id.*

30. Item 5, *supra* note 7, at 1.

31. Item 2, *supra* note 1, at 3.

32. Item 6, *supra* note 22, at 3.

33. *Id.* at 5.

34. *Id.*

35. Item 2, *supra* note 1, at 3.

36. Applicant's supplemental documentation at 1.

37. ISCR Case No. 96-0277 (July 11, 1997) at 2.
38. ISCR Case No. 97-0016 (App. Bd., December 31, 1997) at 3; Directive, Enclosure 3, ¶ E3.1.14.
39. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).
40. ISCR Case No. 94-1075 (App. Bd., August 10, 1995) at 3-4; Directive, Enclosure 3, ¶ E3.1.15.
41. ISCR Case No. 93-1390 (App. Bd. Decision and Reversal Order, January 27, 1995) at 7-8; Directive, Enclosure 3, ¶ E3.1.15.
42. *Egan*, 484 U.S. at 531.
43. *Id.*
44. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
45. Executive Order No. 10865 § 7.
46. ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004)(explaining holding in ISCR Case No. 02-23133 at 5(App. Bd. Jun. 9, 2004)).