

DATE: February 2, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-04129

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Juan Rivera, Esquire, Department Counsel

FOR APPLICANT

J. Brady Hair, Esquire

SYNOPSIS

Applicant consumes alcohol at times to excess and to the point of intoxication. He has also been arrested three times for driving under the influence of alcohol (DUI). When he submitted a security questionnaire in May 2002, he disclosed the two more recent arrests but omitted the oldest of the three. He has mitigated the security concerns about his alleged falsification. However, because his drinking habits are unchanged, he has not mitigated the security concerns about his use of alcohol and his criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

On November 6, 2003 the Defense Office of Hearings and Appeals (SOR) issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns under Guideline E (personal conduct), Guideline G (alcohol consumption), and Guideline J (criminal conduct). The SOR informed Applicant that, based on information available to the government, DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to continue Applicant's security clearance. [\(1\)](#)

On December 11, 2003, Applicant answered the SOR (Answer), admitted (with explanation) all of the allegations except for the allegation in subparagraph 3.a, and requested a hearing. The case was assigned to me on August 5, 2004. On September 16, 2004, I convened a hearing at which the government presented five exhibits to support the SOR. In response, Applicant presented one exhibit as well as the testimony of four witnesses, including the Applicant. DOHA received the transcript (Tr.) on September 28, 2004.

FINDINGS OF FACT

Applicant's admissions in his Answer are entered as facts. After a thorough review of the pleadings, transcript, and exhibits, I also find the following:

Applicant is 41 years old and works for a defense contractor. He requires a security clearance for his work, which

involves installation of communications systems at various government installations worldwide. He has held his current position for nearly six years. Before that, he was employed as a warehouse manager for about five years, a job he acquired after moving to his current residence from his home state in late 1993.

Applicant has an associates' degree in Applied Science and has excelled in his current position as an installer. His company's president and his two immediate supervisors regard Applicant as a valued asset and feel he is trustworthy, honest, and reliable. Applicant has been in a stable, caring relationship with his girlfriend for three and a half years. He has also grown close to and has been a positive part in the life of his girlfriend's teenage son.

In 1983 or 1984, Applicant, then age 23, was driving home at night after drinking at a bar in his home town. He was pulled over by the police after he failed to dim his headlights for oncoming traffic. He was still drinking while driving as he had an open can of beer in the car when he was stopped. Applicant pled guilty to charges of DUI and having an open container while driving. He was fined, his driver's license was suspended, and he was ordered to attend an alcohol awareness and counseling program.

In February 1999, Applicant was working as a warehouse manager and was given a company vehicle for work and personal use. After attending a cookout where he drank at least seven or eight beers, Applicant drove home in the company vehicle and continued drinking while he drove. On the way, he was involved in an accident when he rear-ended another car as he was changing lanes. Applicant admitted to police that he had been drinking; he was arrested and charged with DUI and having an open container. Through a negotiated plea, the DUI charge was dismissed and Applicant pled guilty to the open container charge.

Applicant was suspended from his warehouse job pending resolution of the charges because he had misused a company vehicle. While on suspension, he obtained his current job, which paid better.

In December 2001, Applicant was again arrested and charged with DUI and having an open container. He had been deer hunting with friends and drank anywhere from four to eight beers. On the way home, he again drank while he drove and was involved in an accident. While making a left turn, Applicant misjudged the speed of oncoming traffic and collided with another car. The responding police officer observed Applicant had a strong odor of alcohol about him and was unsteady on his feet. Applicant told the officer at the scene he had only consumed two beers. Found in Applicant's vehicle was a cold, half-consumed, open bottle of beer. Applicant refused to take a breathalyser test, and was arrested on charges of DUI and having an open container. The charges were eventually entered as *nolle prosequi*.

Applicant submitted a security clearance application (SF 86) on May 17, 2002. In response to question 24, which asked Applicant in relevant part if he had ever been charged with an alcohol-related offense, Applicant disclosed his 2001 and 1999 arrests, but omitted his first arrest in 1984. When filling out the SF 86, Applicant asked his company's assistant facility security officer (FSO) a general question about how far back one was required to go in answering. She told him to go back 10 years. He first disclosed the 1983/4 arrest when he was interviewed by a Defense Security Service (DSS) agent on September 24, 2004; however, he was not confronted with his omission during the interview. Rather, Applicant disclosed it in the normal line of questioning.

Applicant gave a signed, sworn statement to Defense Security Service (DSS) agent on September 24, 2004. In that statement, Applicant claimed he drank about four or five beers before his most recent DUI arrest. At hearing, he testified⁽²⁾ he did not feel intoxicated despite the reporting officer's observation that he smelled of alcohol and was unsteady on his feet. In his statement to DSS, Applicant said, "I have never driven while drunk but I was under the influence of alcohol each time I was arrested for DUI."⁽³⁾

Applicant also claims to be "a moderate recreational and social drinker of beer."⁽⁴⁾ When he was 23 years old, the age when he was first charged with DUI, he drank between two and ten beers three to five times weekly. Around the time of his second arrest, Applicant was drinking six or seven beers three to four times weekly. He currently drinks only two or three times weekly, but may consume up to seven or eight beers on any single day. Three weeks before his hearing, he drank seven or eight beers on the occasion of a celebration for his girlfriend's tennis team. He claims not to have felt intoxicated after the celebration but did not drive home. The most he has ever had to drink in one sitting was 12 beers, sometime in 2001 or 2002.⁽⁵⁾

Applicant works about 20 miles south of his home. He periodically goes to a local bar after work to socialize with friends. The bar is about six or seven miles north of his home, and he only drinks "a couple of beers if [he] is going to drive."⁽⁶⁾

POLICIES

The Directive sets forth adjudicative guidelines⁽⁷⁾ to be considered in evaluating an Applicant's suitability for access to classified information. The Administrative Judge must take into account both disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having considered the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are Guideline E (Personal Conduct), Guideline G (Alcohol Consumption), and Guideline J (Criminal Conduct).

BURDEN OF PROOF

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁽⁸⁾ for an Applicant to either receive or continue to have access to classified information. The Government bears the initial burden of proving, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If the government meets its burden it establishes a *prima facie* case that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden then shifts to the Applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, the Applicant bears a heavy burden of persuasion.⁽⁹⁾ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. The Government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the Government.⁽¹⁰⁾

CONCLUSIONS

Guideline E (Personal Conduct). An applicant's conduct is a security concern if it involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Such behavior could indicate that the person may not properly safeguard classified information.⁽¹¹⁾ Here, the government's concern stems from Applicant's conduct related to his alleged falsification of his SF 86 wherein he omitted the fact of his first DUI arrest. (SOR 3.a).

These facts and pleadings require consideration of Guideline E disqualifying condition (DC) 2.⁽¹²⁾ However, to be disqualifying under DC 2, Applicant must be shown to have deliberately omitted the information in an effort to mislead the government about information relevant to an assessment of his suitability to hold a clearance. While the fact he was arrested is certainly relevant to the government's investigation, I conclude Applicant did not have the requisite intent to mislead. Applicant disclosed his two most recent arrests for the same offenses for which he was charged in the early 1980's. It makes no apparent sense for him to withhold an earlier arrest. Further, the assistant FSO testified she told Applicant he only had to cover the preceding 10 years in completing his questionnaire. With these two factors in mind, it was reasonable for Applicant to omit the arrest despite the plain wording of the question.

Even were I to conclude Applicant intentionally falsified his SF 86, Guideline E mitigating condition (MC) 4⁽¹³⁾ would apply in his favor. On balance, I conclude for Applicant as to SOR paragraph 2.

Guideline G (Alcohol Consumption). 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. [\(14\)](#)

The government established its case under Guideline G by showing that Applicant has been arrested for alcohol-related crimes three times. (SOR paragraph 1) One of his arrests for DUI was work-related in that he was driving a company vehicle yet still engaged in risky, alcohol-related conduct. Available information also shows his drinking patterns have remained consistent since his first arrest at age 23. He is now 31 years old and claims to have matured and to benefit from his relationship of the past three and a half years. Yet he has consumed alcohol to the point of excess since his last arrest in 2001 and still drives after consuming alcohol. Guideline G DC 1, [\(15\)](#) DC 2, [\(16\)](#) and DC 5-[\(17\)](#) apply here.

Against the government's *prima facie* case for disqualification, Applicant has not established he is entitled to any of the Guideline G mitigating conditions. Aside from the fact Applicant's alcohol-related behavior is essentially unchanged since his first DUI arrest, I am concerned by Applicant's statements that he does not feel intoxicated after drinking as many as six or seven beers. In assessing his demeanor at hearing and weighing his answers to questions about his drinking from his own counsel as well as government counsel and myself, I conclude Applicant still does not appreciate the ramifications of his alcohol-related conduct. Even after experiencing three serious incidents, one conviction for DUI, court-ordered alcohol counseling, and the current proceeding with its potential impacts on his livelihood, Applicant has failed to show how, if at all, his past alcohol problems may not repeat in the future. I conclude Guideline G against the Applicant.

Guideline J (Criminal Conduct). Criminal conduct is a security concern because it may indicate an unwillingness to abide by rules and regulations, and may show the applicant to be lacking in reliability and trustworthiness. [\(18\)](#) The government established a *prima facie* case for disqualification under this guideline. Here, there is a single allegation (SOR paragraph 2.a) of criminal conduct based on Applicant's alcohol-related violations of the law. Applicant was charged with the same criminal conduct three times between 1983 and 2001. While two of the three arrests resulted in dismissal, Applicant admits he was intoxicated on each occasion. Guideline J DC 1 [\(19\)](#) and DC 2-[\(20\)](#) apply here.

By contrast, for the same reasons his alcohol consumption remains a security concern, I conclude Applicant has failed to mitigate the security concerns engendered by his three arrests for DUI. The same factors and patterns of behavior that resulted in Applicant's arrests are still present. Applicant's drinking is largely the same now as it was when last arrested and he has admitted he continues to drive after drinking. I conclude Guideline J against the Applicant.

I have carefully weighed all of the evidence, and I have applied the disqualifying and mitigating conditions as listed under each applicable adjudicative guideline. A fair and commonsense assessment [\(21\)](#) of the record before me, which reflects a person who does not appreciate the seriousness of his past problems enough to change his present behavior, supports the government's doubts about Applicant's ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. I conclude it is not clearly consistent with the national interest to grant Applicant's request for a security clearance.

FORMAL FINDINGS

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1, Alcohol Consumption (Guideline G): AGAINST THE APPLICANT

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

Subparagraph 1.c: Against the Applicant

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

Subparagraph 2.a: Against the Applicant

Paragraph 3, Personal Conduct (Guideline E): FOR THE APPLICANT

Subparagraph 3.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 the Applicant.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. Tr., at 76.
3. GE 3.
4. Id.
5. Tr., p. 71 - 82.
6. Tr., p. 82 - 83.
7. Directive, Enclosure 2.
8. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
9. *See Egan*, 484 U.S. at 528, 531.
10. *See Egan*; Directive E2.2.2.
11. Directive, E2.A5.1.1.
12. Directive, E2.A5.1.2.2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;
13. Directive, E2.A5.1.3.4. Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided;
14. Directive, E2.A7.1.1.
15. Directive, 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;
16. Directive, E2.A7.1.2.2. Alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job;
17. Directive, E2.A7.1.2.5. Habitual or binge consumption of alcohol to the point of impaired judgment;
18. Directive, E2.A10.1.1.
19. Directive, E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was

formally charged;

20. Directive, E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

21. Directive, E2.2.3.