

KEYWORD: Alcohol; Criminal Conduct; Personal Conduct

DIGEST: Applicant has a history of alcohol-related incidents, most of which involved arrests for driving while under the influence. He is not alcohol dependent, has attended alcohol education and treatment programs, and has made positive changes in behavior supportive of sobriety. Applicant mitigated the alcohol consumption, criminal conduct, and personal conduct security concerns. Clearance is granted.

CASENO: 03-04247.h1

DATE: 07/22/2004

DATE: July 22, 2004

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-04247

**DECISION OF ADMINISTRATIVE JUDGE**

**JAMES A. YOUNG**

**APPEARANCES**

**FOR GOVERNMENT**

Francisco J. Mendez, Esq., Department Counsel

## **FOR APPLICANT**

Chester H. Morgan II, Esq.

### **SYNOPSIS**

Applicant has a history of alcohol-related incidents, most of which involved arrests for driving while under the influence. He is not alcohol dependent, has attended alcohol education and treatment programs, and has made positive changes in behavior supportive of sobriety. Applicant mitigated the alcohol consumption, criminal conduct, and personal conduct security concerns. Clearance is granted.

### **STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 26 November 2003, DOHA issued a Statement of Reasons<sup>(1)</sup> (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 an unknown day (apparently 10) March 2004 and elected to have a hearing before an administrative judge. The case was assigned to me on 13 April 2004. On 12 May 2004, 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 21 May 2004.

### **FINDINGS OF FACT**

Applicant is a 33-year-old software engineer for a defense contractor. He has been married seven years and has two children. He is respected by his peers and supervisors for his integrity, professionalism, dedication, and work ethic. He has had a security clearance since 1998.

In May 1991, when he was 20 years old, Applicant was arrested for driving under the influence (DUI) of alcohol. His

blood-alcohol content (BAC) was .15. He was convicted of DUI, given a two-year deferred sentence, <sup>(2)</sup> and ordered to perform public service and attend a level I alcohol education program. In June 1991, Applicant was arrested for drinking in public and failing to appear-A bench warrant for failure to appear had been issued because the check he used to pay the fine and court costs was returned for insufficient funds. He made the check good.

In February 2001, Applicant was arrested and charged with DUI, driving a vehicle with a BAC greater than .10, and failing to obey a traffic control signal. In February 2002, the charges were dismissed, apparently as a result of a decision that the BAC violated his Fifth Amendment rights under the Constitution. Applicant admits he was drunk on that occasion.

In May 2001, Applicant was arrested and charged with DUI and driving while ability impaired (DWAI). In April 2002, he pled guilty to DWAI and was sentenced to 14 days in jail, suspended, unsupervised probation for eight months, and ordered to attend a level II alcohol education program and 68 hours of alcohol therapy/treatment, with 90 days of electronic surveillance. From July 2001 through October 2002, Applicant received weekly alcohol-related treatment/counseling as an outpatient.

In a statement he gave to a Defense Security Service agent on 15 October 2002, Applicant claimed he did not intend to consume alcoholic beverages in the future. Ex. 2 at 3. From testimony at the hearing, it is clear Applicant continues to consume alcoholic beverages, but only one or two beers on social occasions. He does not drive after drinking.

## 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 restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

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.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).*

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see Directive ¶ E3.1.15*. 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.

## CONCLUSIONS

### **Guideline G-Alcohol Consumption**

In the SOR, DOHA alleged Applicant was arrested in May 2001 and convicted in April 2002 of DWAI (¶ 1.a); received alcohol-related treatment from July 2001 until October 2002 (¶ 1.b); was arrested in February 2001 for DUI (¶ 1.c); arrested in June 1991 for failing to appear and drinking in public (¶ 1.d); and was arrested in May 1991 and convicted of DUI (¶ 1.e). 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 by substantial evidence and Applicant's admissions each of the SOR's allegations. Applicant was involved in alcohol-related incidents away from work-the DUIs. DC E2.A7.1.2.1. Applicant must have known of the security concern raised by excessive alcohol consumption because he had reported his earlier alcohol-related offenses on his 1997 security clearance application. Despite that knowledge, Applicant was arrested twice for DUI within a 90-day period in 2001 when he was no longer young and immature. He was 30 years old, married, and had two children. As there is no evidence Applicant is alcohol dependent, these incidents are evidence of his questionable judgment. Nevertheless, the alcohol-related incidents occurred a number of years ago and there is no indication of a recent problem (MC E2.A7.1.3.2.)-the last incident was over three years ago. More importantly, Applicant has made positive changes in his behavior supportive of sobriety (MC E2.A7.1.3.3.)-he attended both education and therapy that has turned his life around. He is more cautious of how much he drinks and does not drink and drive at all. He was never diagnosed with alcohol dependence, so there is no reason he cannot successfully avoid future incidents of intoxication.

Applicant now understands why excessive alcohol consumption, even without a resulting DUI, can raise a security concern, and realizes that if he drinks to the point of intoxication in the future, he will lose his clearance. After considering all of the circumstances of this case, I conclude Applicant is serious about his sobriety. Therefore, I find for Applicant on ¶ 1.

### **Guideline J-Criminal Conduct**

In the SOR, DOHA alleged Applicant had been charged and arrested as indicated in ¶¶ 1.a, 1.c, and 1.d (¶ 2.a); arrested in June 1997 for failing to appear (¶ 2.b); arrested in September 1996 for damaging business property and public peace (¶ 2.c); arrested in May 1994 for contempt of court (¶ 2.d); and arrested in August 1993 for third degree assault and theft (¶ 2.e). 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 by substantial evidence and Applicant's admissions each of the allegations in ¶ 2. Applicant has a history of criminal conduct (DC E2.A10.1.2.1.) involving minor offenses (DC E2.A10.1.2.2.) Except for the recent DUIs, most of the offenses occurred more than 10 years ago and several involved alcohol. The crimes were not recent (MC E2.A10.1.3.1.) and there is clear evidence of successful rehabilitation (MC E2.A10.1.3.6.). I find for Applicant on ¶ 2.

### **Guideline E-Personal Conduct**

In the SOR, DOHA claimed the facts alleged in ¶¶ 1.a, 1.c, 1.d, 1.e, 2.b, 2.c, 2.d, and 2.e, amount to conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that could indicate Applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

The Government established by substantial evidence each of the allegations in ¶ 3. Reliable, unfavorable information (DC E2.A5.1.2.1.) raises issues about Applicant's judgment and reliability. But Applicant has taken positive steps to eliminate his vulnerability to exploitation (MC E2.A5.1.3.5) by changing his drinking habits. Applicant now exercises good judgment and is reliable. The evidence supports a predictive conclusion that he will remain so in the future. I find for Applicant on ¶ 3.

## **FORMAL FINDINGS**

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

Paragraph 1. Guideline G: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: For Applicant

Subparagraph 1.e: For Applicant

Paragraph 2. Guideline J: FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: For Applicant

Subparagraph 2.d: For Applicant

Subparagraph 2.e: For Applicant

Paragraph 3. Guideline E: FOR APPLICANT

Subparagraph 3.a: For Applicant

## **DECISION**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

**James A. Young**

**Administrative Judge**

1. Pursuant to 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 imposition of confinement was deferred, so 10 U.S.C. § 986 does not apply.