

KEYWORD: Alcohol; Drugs; Criminal Conduct

DIGEST: For more than 35 years, Applicant has used illegal drugs and routinely consumed alcohol to the point of impairment. His alcohol consumption has led to two arrests for Driving Under the Influence (DUI), and arrests for assault and criminal property damage. He continues to drink. He recently experimented with crystal methamphetamines and smoked cocaine while holding a security clearance. He has not mitigated the government's concerns about his alcohol consumption, drug use and criminal conduct. Clearance is denied.

CASENO: 03-05302.h1

DATE: 02/28/2006

DATE: February 28, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-05302

**DECISION OF ADMINISTRATIVE JUDGE**

**MARY E. HENRY**

**APPEARANCES**

**FOR GOVERNMENT**

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

For more than 35 years, Applicant has used illegal drugs and routinely consumed alcohol to the point of impairment. His alcohol consumption has led to two arrests for Driving Under the Influence (DUI), and arrests for assault and criminal property damage. He continues to drink. He recently experimented with crystal methamphetamines and smoked cocaine while holding a security clearance. He has not mitigated the government's concerns about his alcohol consumption, drug use and criminal conduct. Clearance is denied.

**STATEMENT OF THE CASE**

On July 29, 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 J (Criminal Conduct), Guideline G (Alcohol Consumption), and Guideline H (Drug Involvement) 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 September 23, 2005, Applicant submitted a notarized response to the allegations. He 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 23, 2005. Applicant had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. He did not submit a response or additional evidence. This case was assigned to me on January 6, 2006.

Department Counsel filed a Motion to Amend the Statement of Reasons, Paragraph 3, on November 16, 2005, by adding of the following allegation:

3.f. You used cocaine, as recently as about 2002, after you had been granted a Secret Department of Defense Industrial Security Clearance on August 2, 1996.

Applicant has not responded to this motion. The government's motion is granted and the SOR is amended as requested.

### **FINDINGS OF FACT**

Applicant admitted, with explanation, the allegations in subparagraphs 1.a. through 1.g., 2.a. through 2.d., 3.a., and 3.c. through 3.e. of the SOR. (1) Those admissions are incorporated here as findings of fact. He denied the remaining allegations. (2) 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 53-year-old electronic technician for a defense contractor. (3) He has worked for this contractor for 24 years. (4) He served three years in the United States Army. (5) He first received a security clearance in 1972, and continues to have a clearance. (6)

Applicant first experimented with drugs in high school when he used marijuana and lysergic acid diethylamide (LSD). (7) He used LSD approximately four times in the late 1960s. (8) From 1968 to 1975, he purchased and smoked marijuana with friends at the beach, his home, their home, other social settings, and while in the Army. (9) In 1974, the Army charged him with a violation of the Uniform Code of Military Justice (UCMJ) for wrongful possession of marijuana, and imposed a forfeiture of \$75.00 and reduction in rank as a non-judicial punishment. (10) In 1974, while a soldier in the Army, he used barbiturates for several months in social settings with his buddies. (11) Following his discharge from the Army, he purchased, then smoked or snorted cocaine or crack cocaine with friends. (12) He used this drug up to a couple of times a month, from the mid 1970s until the mid 1980s. He last used cocaine in 2002, after providing another individual with information on how to purchase this drug for her use. (13) Between 2000 and 2001, he used crystal methamphetamine on two or three occasions. (14) He has expressed an intent not to use drugs in the future. (15) He

admits that he used illegal drugs while in possession of a security clearance.<sup>(16)</sup>

Applicant began drinking alcohol at age 16.<sup>(17)</sup> From this age until 2002, he regularly consumed three to eight beers a week, and shots of hard liquor five times a week, sometimes to the point of intoxication.<sup>(18)</sup> As a result of his drinking, the police arrested and charged him with DUI in April 1986,<sup>(19)</sup> and with a second DUI in September 2002.<sup>(20)</sup> In September 2002, the police also charged him with inattention to driving, no motor vehicle driver's license, and being involved in an accident with an unattended vehicle.<sup>(21)</sup> The court found him guilty of DUI and driving without a motor vehicle license.<sup>(22)</sup> The court ordered alcohol treatment, fined him, and suspended his driver's license.<sup>(23)</sup> The other charges were dismissed.<sup>(24)</sup>

By 2002, Applicant was involved in a close personal relationship with a woman. Both routinely drank.<sup>(25)</sup> They often fought when under the influence of alcohol.<sup>(26)</sup> In July 2002, he and his girlfriend argued.<sup>(27)</sup> She then took the spark plugs to his car twice.<sup>(28)</sup> After the second time, he broke a window to get into her house.<sup>(29)</sup> She called the police, who arrested and charged him with criminal property damage.<sup>(30)</sup> Following an argument in October 2002, his girlfriend called the police, who arrested and charged him with assault.<sup>(31)</sup> In October 2003, the police arrested and charged him with third degree assault following an argument with his girlfriend.<sup>(32)</sup> He had not been drinking, but she had.<sup>(33)</sup> He pled no contest to the charge.<sup>(34)</sup> The court fined him, required him to attend anger management classes, and placed him on one year of probation.<sup>(35)</sup>

In October 2002, Applicant sought alcohol counseling and treatment as a result of a court education program referral.<sup>(36)</sup> In the intake form, he indicated that he liked to drink for fun.<sup>(37)</sup> Following evaluation, a certified substance abuse counselor diagnosed him with alcohol abuse and recommended treatment.<sup>(38)</sup> Although the counselor recommended a higher level of treatment, Applicant agreed to a treatment program that involved ten group sessions and three individual sessions.<sup>(39)</sup> The counselor noted Applicant did not see his alcohol consumption as a problem. He began this program in October 2002 and completed it in January 2003.<sup>(40)</sup> He continues to drink.<sup>(41)</sup>

In April 2004, Applicant enrolled in an anger management class as required by the court.<sup>(42)</sup> He attended and participated in 30 sessions.<sup>(43)</sup> He completed this class in October 2004.<sup>(44)</sup> He no longer has a close personal relationship with the woman with whom he drank and argued.<sup>(45)</sup>

## **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.<sup>(46)</sup> The government has the burden of proving controverted facts.<sup>(47)</sup> The burden of proof is something less than a preponderance of the evidence.<sup>(48)</sup> 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.<sup>(49)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(50)</sup>

No one has a right to a security clearance<sup>(51)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(52)</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.<sup>(53)</sup> 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.<sup>(54)</sup> 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:

**Criminal Conduct - Guideline J: A history or pattern of criminal activity creates doubt about a person's**

**judgment, reliability and trustworthiness.**

**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.**

**Drug Involvement - Guideline H: Improper or illegal involvement with drugs, raises questions regarding an individual'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.**

### 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 J as to allegations 1.a. through 1.e. and 1.g. 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*) apply. Applicant has been arrested for a variety of misdemeanor offenses, including assault, possession of marijuana, DUI, and criminal property damage.

While Applicant has admitted allegation 1.f., a citation in May 2003 for no motor vehicle driver's license, his admission is not enough to establish criminal conduct under Guideline J. Under the relevant state law, operating a motor vehicle without a driver's license is a violation of the motor vehicle statutes. Such a violation is not criminal conduct, but rather a violation of the civil laws of the state. The government has not established this allegation.

I have considered the Criminal Conduct Mitigating Conditions (CC MC) and conclude that none apply. While the 1974 punishment for wrongful possession of marijuana is over 30 years old, Applicant has used drugs many times since then. His 1986 DUI arrest occurred almost 20 years ago; however, his continued drinking has resulted in another DUI and other criminal arrests. In more recent years, his problems with law enforcement have increased because of his alcohol consumption. In light of his legal problems, his decision to continue drinking raises questions about his judgment and reliability. He has not mitigated the government's concerns under Guideline J.

The government has established its case under Guideline G. Based on all the evidence, 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*), applies. Applicant's DUI arrests in 1986 and 2002 qualify as alcohol-related incidents away from work. Likewise, AC DC E2.A7.1.2.5. (*Habitual or binge consumption of alcohol to the point of impaired judgment*) applies. Applicant has been drinking for more than 35 years. He often drinks to excess and intoxication, causing his judgment to be impaired. His drinking caused significant arguments with a girlfriend. These arguments led to arrests by the police.

I considered all the Alcohol Consumption Mitigating Conditions (AC MC), and conclude that none apply. Although Applicant participated in an alcohol treatment program, he declined to undergo a more advanced recommended level of treatment as he does not consider his drinking problematic. He continues to drink because drinking is fun. In the past, his drinking led to arguments, criminal arrests, and suspension of his driving privileges. By continuing to drink, he places himself in jeopardy for new problems caused by alcohol abuse. The Applicant has not mitigated the government's security concern under Guideline G.

The government has established its case under Guideline H. Drug Involvement Disqualifying Conditions (DI DC) E2.A8.1.2.1. (*Any drug abuse...*), <sup>(55)</sup> DI DC E2.A8.1.2.2. (*Illegal drug possession, including cultivation, processing, manufacture, purchase sale, or distribution*), and DI DC E2.A8.1.2.2. (*...Recent drug involvement, especially following the granting of a security clearance...*) apply. During high school and while in the Army, Applicant used LSD, barbiturates and marijuana. Subsequent to his discharge from the Army, he smoked and snorted cocaine or crack cocaine for at least ten years. He last used this drug in 2002. He also used crystal methamphetamine several times between 2000 and 2001. All these drugs are illegal under the Control Substances Act of 1970. To use these drugs, he had to possess them. He also purchased some of the drugs he used. While holding a security clearance as a soldier in the Army, he used marijuana and barbiturates. He currently has a security clearance and has again used illegal drugs, specifically cocaine and crystal methamphetamine.

I considered all the Drug Involvement Mitigating Conditions (DI MC) and conclude that none apply. Applicant has admitted using illegal drugs since obtaining a security clearance in 1972. In so doing, he has breached a special trust given to him. While much of his drug use is in the past, his recent decision to resume use of illegal drugs while holding a security clearance raises concerns about his security worthiness. Although he has asserted that he will not use drugs in the future, his seventeen years of illegal drug use, combined with his decision at age 48 to again try illegal drugs raises serious questions about his judgment and reliability. Accordingly, allegations 3.a. through 3.f. of Guideline H are found in against Applicant.

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 drug abuse. Although he did not use drugs for many years, his decision to experiment with crystal methamphetamines at age 48 raises serious questions about his judgment. He continues to drink because he enjoys it. He does not acknowledge any problems with his drinking, despite his recent alcohol related arrests. He has not changed is behavior in the last 35 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 J (Criminal Conduct): 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: For Applicant

Subparagraph 1.g: Against Applicant

Paragraph 2, Guideline G (Alcohol Consumption): AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: Against Applicant

Subparagraph 2.d: Against Applicant



Paragraph 3, Guideline H (Drug Involvement): AGAINST APPLICANT

Subparagraph 3.a: Against Applicant

Subparagraph 3.b: Against Applicant

Subparagraph 3.c: Against Applicant

Subparagraph 3.d: Against Applicant

Subparagraph 3.e: Against Applicant

Subparagraph 3.f: 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 3 (Response to SOR, dated September 23, 2005) at 1-4.
2. Since Applicant has not responded to the government's motion to amend the SOR, I will treat his non-response a denial of allegation 3.f.
3. Item 10 (Outpatient treatment records, dated October 9, 2002) at 5; Item 7 (Applicant's statement, October 19, 2004) at 1.

4. Item 10, *supra* note 3, at 7.
5. Item 7, *supra* note 3, at 2.
6. Item 3, *supra* note 1, at 4.
7. Item 7, *supra* note 3, at 2, 3.
8. *Id.* at 3.
9. *Id.* at 2.
10. Item 8 (Commander's report of disciplinary action, dated September 24, 1974) at 1.
11. Item 7, *supra* note 3, at 2.
12. *Id.* at 2-3; Item 10, *supra* note 3, at 8.
13. Item 7, *supra* note 3, at 3.
14. *Id.* at 3.
15. *Id.* at 2-4.
16. *Id.* at 3-4.
17. Item 10, *supra* note 3, at 3.
18. *Id.* at 8; Item 6 (Applicant's signed statement, dated January 16, 2003) at 1; Item 3, *supra* note 1, at 2.
19. Item 3, *supra* note 1, at 2.
20. Item 9 (Court records on 2002 criminal charges, dated February 26, 2004) at 3.
21. *Id.* at 1-3.
22. *Id.*
23. *Id.*
24. *Id.*
25. Item 6, *supra* note 18, at 1.
26. *Id.*
27. *Id.* at 2-3.
28. *Id.* at 3.
29. *Id.*
30. *Id.*
31. *Id.* at 2.
32. Item 7, *supra* note 3, at 1.

33. *Id.*
34. *Id.*
35. *Id.*
36. Item 10, *supra* note 3, at 2.
37. *Id.* at 7.
38. *Id.* at 1.
39. *Id.*
40. *Id.* at 2; Item 3, *supra* note 1, at 5.
41. Item 6, *supra* note 18, at 1.
42. Item 3, *supra* note 1, at 6.
43. *Id.*
44. *Id.*
45. Item 7, *supra* note 3, at 2.
46. ISCR Case No. 96-0277 (July 11, 1997) at 2.
47. ISCR Case No. 97-0016 (App. Bd., December 31, 1997) at 3; Directive, Enclosure 3, ¶ E3.1.14.
48. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).
49. ISCR Case No. 94-1075 (App. Bd., August 10, 1995) at 3-4; Directive, Enclosure 3, ¶ E3.1.15.
50. ISCR Case No. 93-1390 (App. Bd. Decision and Reversal Order, January 27, 1995) at 7-8; Directive, Enclosure 3, ¶ E3.1.15.
51. *Egan*, 484 U.S. at 531.
52. *Id.*
53. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
54. Executive Order No. 10865 § 7.
55. Drug abuse is defined in E2.A8.1.1.2.1. to include drugs materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970)