

KEYWORD: Criminal Conduct; Alcohol Consumption; Personal Conduct

DIGEST: Over a period of 23 years, Applicant's consumption of alcohol resulted in his arrest on three occasions for alcohol-related driving offenses. His first alcohol-related driving offense occurred when he was 18 and resulted in the death of his friend. The last two alcohol-related driving offenses occurred within the past five years. He has shown a disrespect for authority by violating the terms of his probation on three occasions. Since 1982, he has been arrested and/or charged with criminal offenses on six occasions, four of the arrests occurred within the past ten years. He has not provided sufficient information to mitigate the criminal conduct, alcohol consumption, and personal conduct concerns. Clearance is denied.

CASE NO: 03-11536.h1

DATE: 05/31/2006

DATE: May 31, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No.03-11536

**DECISION OF ADMINISTRATIVE JUDGE**

**ERIN C. HOGAN**

**APPEARANCES**

**FOR GOVERNMENT**

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Over a period of 23 years, Applicant's consumption of alcohol resulted in his arrest on three occasions for alcohol-related driving offenses. His first alcohol-related driving offense occurred when he was 18 and resulted in the death of his friend. The last two alcohol-related driving offenses occurred within the past five years. He has shown a disrespect for authority by violating the terms of his probation on three occasions. Since 1982, he has been arrested and/or charged with criminal offenses on six occasions, four of the arrests occurred within the past ten years. He has not provided sufficient information to mitigate the criminal conduct, alcohol consumption, and personal conduct concerns. Clearance is denied.

**STATEMENT OF CASE**

On September 30, 2005, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance.<sup>(1)</sup> The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline J, Criminal Conduct; Guideline G, Alcohol Consumption; and Guideline E, Personal Conduct.

On October 18, 2005, Applicant responded to the SOR allegations. Applicant elected to have his case decided on the written record. Department Counsel submitted the government's file of relevant material (FORM) on December 19, 2005. The FORM was mailed to Applicant on January 17, 2006, and received on January 30, 2006. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not respond. The case was assigned to me on March 28, 2006.

**FINDINGS OF FACT**

Applicant is a 41 year old product manager for a defense contractor. He submitted a security clearance application on November 14, 2003.<sup>(2)</sup> He denies SOR allegation ¶ 3.d but admits to all the remaining allegations in the SOR.<sup>(3)</sup>

Applicant started drinking alcohol in 1980 when he was in high school. Between 1980 to July 1982, he would drink approximately four to six beers per day.<sup>(4)</sup> On July 22, 1982, Applicant was partying with friends in the mountains. He was drinking alcohol. While driving home, he got in a car wreck. He observed a car coming up the mountain in his lane. He attempted to avoid the other car, lost control of his truck, and ended up in a creek. One of his passengers drowned in the creek. another passenger was seriously injured. On December 13, 1983, he pled guilty to Vehicular Homicide. He was sentenced to 90 days in jail; two years probation with a requirement to provide urine samples for drug screens, and to attend counseling and alcohol therapy programs.<sup>(5)</sup>

In 1984, Applicant broke his probation and moved to Florida.<sup>(6)</sup> Prior to moving to Florida, he provided urine samples on July 31, 1984, and August 16, 1984, which tested positive for marijuana use. He subsequently failed to report to his parole officer and failed to participate in court-ordered alcohol therapy. On November 8, 1984, a warrant was issued for Applicant's arrest.<sup>(7)</sup>

In 1987, Applicant was stopped for speeding. The police officer discovered he had an outstanding warrant and he was extradited to his home state.<sup>(8)</sup> On August 31, 1987, he was convicted of probation violation. He was sentenced to two years probation, ordered to complete 60 hours of community service and pay extradition costs of \$325.35. He completed probation on January 11, 1989.<sup>(9)</sup>

On January 3, 1997, Applicant and his fiance (now wife) got into an argument while shopping at a mall. He had drank three to four mixed drinks prior to the argument.<sup>(10)</sup> His fiance attempted to call a taxi. An eyewitness reported the argument to mall security.<sup>(11)</sup> Applicant was arrested for Harrassment. He admitted to the arresting police officer that he grabbed his fiance by the throat in order to stop her from calling a taxi. He pled "no contest" to the charge and his sentence was deferred for 24 months with the condition of supervised probation. He completed probation on June 23, 1999 and the charge was dismissed.<sup>(12)</sup>

On October 11, 2001, Applicant joined a couple of co-workers for a few drinks after work. He had three mixed drinks. He thought he was drinking singles but unbeknownst to him was actually drinking doubles. During the drive home, he rear ended a trailer. He was subsequently arrested for Driving Under the Influence of Alcohol and Drugs. On December 1, 2001, he pled guilty and was sentenced to a 90 day license suspension, 180 days in jail, suspended for five years, subject to several conditions. The conditions included that he not drive with any alcohol on his breath and that he not drive while under the influence of alcohol or drugs.<sup>(13)</sup>

On April 23, 2002, Applicant was arrested for Driving Under the Influence of Alcohol and Drugs after spending a day at the beach. He claims he had one mixed drink and four to six beers. He pulled into the front gate of a military installation

to turn around. The gate guards smelled alcohol on his breath and called the local Sheriff. He failed a breathalyzer test. His BAC was .16.<sup>(14)</sup> On August 7, 2002, Applicant pled guilty to Driving Under the Influence of Alcohol and was sentenced to five years non-supervised probation subject to the following conditions: a \$1,700 fine; 39 days in the custody of the Sheriff; attend and complete the First Conviction Program; and his driver's license was restricted for 18 months.<sup>(15)</sup> At the time of his arrest, he was still on probation for his October 11, 2001 arrest.

In January 2003, Applicant sought treatment for his alcohol use through an employer sponsored treatment program. He also attends Alcoholics Anonymous approximately 3-5 times per week.<sup>(16)</sup> No information was provided as to what progress he was making by attending these programs. Currently, Applicant drinks approximately one to two glasses of beer monthly.<sup>(17)</sup>

On March 3, 2003, Applicant was arrested for Driving While License Suspended/Revoked and a seat belt violation. On June 2, 2003, he pled guilty to Driving While License Suspended and the seat belt violation was dismissed. In February 2004, he was sentenced to three years summary probation, suspended.<sup>(18)</sup> He claims that he was driving a truck load of home improvement articles to his home. No one else in his household could drive a stick shift truck so he decided to drive it even though he was aware his driver's license was under suspension.<sup>(19)</sup>

Applicant was counseled by his current supervisor for charging eight hours leave for a six hour training class. He states he worked the extra two hours during the week and that it was a time reporting error. He had no intention to cheat on his time card.<sup>(20)</sup> On June 3, 2000, Applicant was terminated from his position with a previous employer for inability to meet the qualifications of the position, poor performance and work ethic, time and attendance errors, inadequate coordination with staff, and falsely using sick leave.<sup>(21)</sup> He does not agree with the basis for the termination and claims he was terminated due to a personality conflict with his supervisor.<sup>(22)</sup>

When Applicant submitted his November 14, 2003, security clearance application, he answered "No" in response to question 23, which reads:

Your Police Record - Pending Charges. Are there any charges pending against you for any criminal offense? 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.<sup>(23)</sup>

He did not list his March 3, 2003, arrest for Driving While License Suspended/Revoked. In his response to the SOR, Applicant states that his failure to list the pending charge was an oversight on his part. He had no intention to deceive.<sup>(24)</sup>

## **POLICIES**

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."<sup>(25)</sup> In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch.

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. The adjudicative guidelines at issue in this case are:

Guideline J - Criminal Conduct: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.<sup>(26)</sup>

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.<sup>(27)</sup>

Guideline E - Personal Conduct: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that a person may not properly safeguard classified information.<sup>(28)</sup>

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to these adjudicative guidelines, are set forth and discussed in the conclusions below.

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance."<sup>(29)</sup> An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person.<sup>(30)</sup> An administrative judge should consider the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (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 pertinent 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. [\(31\)](#)

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. [\(32\)](#) Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts admitted by the applicant or proven by Department Counsel. The applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision. [\(33\)](#) Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. [\(34\)](#)

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

## CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a prima facie case for disqualification under Guidelines J, G, and E.

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

Between 1982 to March 2003, Applicant was arrested and charged with a criminal offense on six occasions. The last three arrests occurred within the past five years. 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 in this case based on his criminal history.

The Criminal Conduct concern can be mitigated. I find none of the mitigating conditions apply. Of the Criminal Conduct Mitigating Conditions (CC MC) that have the potential to apply, I cannot apply CC MC E2.A10.1.3.1: (*The criminal behavior was not recent*) since three of his six arrests occurred within the past five years. His last two arrests occurred while he was still under probation for prior offenses. Charges were still pending for his last arrest when he submitted his security clearance application. CC MC E2.A10.1.3.2: (*The crime was an isolated incident*) is not applicable due to the numerous times he has been arrested.

Finally, I cannot apply CC MC E2.A10.1.3.6: (*There is clear evidence of successful rehabilitation*) due to the recency of Applicant's offenses and his repeated and deliberate violations of the terms of past probation periods. He is still under probation for his last offense. I find against Applicant under Guideline J.

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

Between July 22, 1982, and April 23, 2002, Applicant was arrested on three occasions after he chose to drive after consuming alcohol. The first arrest resulted in the death of his friend. His most recent alcohol related arrests occurred in October 2001 and April 2002. His April 2002 arrest occurred while he was still serving probation for the October 2001 arrest. Alcohol Consumption Disqualifying Conditions (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 with respect to his three alcohol-related arrests. There is also record evidence which indicates he was drinking alcohol prior to his January 31, 1997, arrest for Harrassment.

I find none of the Alcohol Consumption Mitigating Conditions (AC MC) apply. AC MC E2.A7.1.3.1: (*The alcohol related incidents do not indicate a pattern*) cannot be applied since his recent drunk driving offenses occurred within less than a year of each other.

AC MC E2.A7.1.3.2: (*The problem occurred a number of years ago and there is no indication of a recent problem*) cannot be applied. Although Applicant has been attending an employer sponsored alcohol rehabilitation program and attends Alcoholics Anonymous meetings, he still drinks alcohol. He indicates that he drinks on average of no more than two beers per month. Given his past history of alcohol incidents, his casual drinking remains a concern. He has provided no information about the progress made in his treatment program. Choosing to drink alcohol while attending an alcohol counseling program raises a concern. Based on these reasons, I cannot apply E2.A7.1.3.3: (*Positive changes in behavior supportive of sobriety*).

Considering Applicant's history of alcohol abuse, his repeated acts of poor judgment by choosing to drive while intoxicated, and his continued consumption of alcohol while attending alcohol treatment, a security concern remains under Guideline G. He has not mitigated the Alcohol Consumption concern.

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

Under Guideline E, Personal Conduct Disqualifying Conditions (PC DC) E2.A5.1.2.1: (*Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances*) applies with respect to Applicant being counseled by his current employer for inaccurate time card reporting and his termination from his previous employer for poor performance. PC DC E2.A5.1.2.5: (*A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency*) applies with respect to these two incidents as well as his arrest history. His past misconduct can be considered rule violations.

Three of Applicant's six arrests occurred while he was serving probation which shows a lack of respect for authority. He was prosecuted on August 31, 1987, for probation violation related to his first conviction for Vehicular Homicide. On December 7, 2001, he was placed on two years probation for his October 11, 2001, Driving Under the Influence of Alcohol offense. About four and half months later, he was arrested for another Driving Under the Influence of Alcohol offense on April 23, 2002. His driver's license was restricted for 18 months as part of his sentence. He chose to drive while his driver's license was restricted and was arrested on March 3, 2003, for driving on a suspended license. Applicant's pattern of disregarding the orders of the court during probation indicates a disrespect for the law and an inability to follow rules. It raises questions about Applicant's judgment and his ability to follow the procedures for safeguarding classified information.

The government has not proven a prima facie case with respect to SOR ¶ 3d. It is alleged that Applicant deliberately falsified his November 14, 2003, security clearance application in response to Question 23 by not listing his pending charges for Driving While License Revoked. Applicant states he did not list the pending charges due to oversight. He did not intentionally omit this offense. I find Applicant did not deliberately intend to falsify his response to question 23. I find credible his explanation that he overlooked this offense since he listed all of his other offenses on his security clearance application.

With respect to the remaining Guideline E concerns, I find none of the Personal Conduct Mitigating Conditions apply. Applicant has demonstrated a pattern of conduct involving questionable judgment and unreliability over the past 23 years. He has not provided sufficient information to mitigate the personal conduct security concern. I find against Applicant under Guideline E.

In all adjudications, the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I considered all the evidence provided and also considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. I find Applicant has failed to mitigate the security concerns raised by the criminal conduct, alcohol consumption, and personal conduct concerns. Therefore, I am persuaded by the totality of the evidence in this case, that it is not clearly consistent with the national interest to grant Applicant a security clearance.

## **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: 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

### **Paragraph 2 Guideline G: 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 E: AGAINST APPLICANT**

Subparagraph 3.a. Against Applicant

Subparagraph 3.b. Against Applicant

Subparagraph 3.c. Against Applicant

Subparagraph 3.d. For 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 Applicant. Clearance is denied.

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Erin C. Hogan

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

2. Item 4.

3. Item 3.
4. Item 6 at 3.
5. Items 10, 12 and 13.
6. Item 6 at 1.
7. Items 10, 12, 13 at 14-16.
8. Item 6 at 2.
9. Items 10, 12, and 13.
10. Item 14 at 20.
11. Item 14 at 18-27.
12. Item 6 at 2, Items 10, 11, and 14.
13. Item 3 at 1; Item 4, question 24; Item 6 at 2-3; and Item 9.
14. Item 6 at 3.
15. Item 3 at 1; Item 4, question #24; and Item 6 at 3.
16. Item 7.
17. Item 4 at 2.
18. Item 7 at 5; Item 8.
19. Item 3 at 1.
20. Item 3 at 3.
21. Item 3; Item 4, question #20.
22. Item 3 at 3.
23. Item 4.
24. Item 3 at 3.
25. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).
26. Directive, ¶ E2.A10.1.1.
27. Directive, ¶ E2.A7.1.1.
28. Directive, ¶ E2.A5.1.1.
29. Directive, ¶ E2.2.1.
30. *Id.*
31. *Id.*

32. Directive, ¶ E3.1.14.

33. Directive, ¶ E3.1.15.

34. Directive, ¶ E.2.2.2.