

KEYWORD: Alcohol; Criminal Conduct

DIGEST: Applicant's two alcohol-related incidents do not establish he has an alcohol problem. Clearance is granted.

CASENO: 03-12681.h1

DATE: 06/30/2005

DATE: June 30, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-12681

DECISION OF ADMINISTRATIVE JUDGE

JOSEPH TESTAN

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's two alcohol-related incidents do not establish he has an alcohol problem. Clearance is granted.

STATEMENT OF THE CASE

On July 22, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to applicant which 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 and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

Applicant responded to the SOR in writing on August 18, 2004. The case was assigned to the undersigned on September 14, 2004. A Notice of Hearing was issued on January 12, 2005, setting the Hearing for February 17, 2005. Following the hearing, applicant submitted a one page letter for admission into evidence. This letter, and Department Counsel's February 17, 2005 letter indicating she has no objection to applicant's post-hearing submission, were marked as Exhibit R and admitted into evidence. The transcript was received on February 28, 2005.

FINDINGS OF FACT

Applicant is a 31 year old employee of a defense contractor.

In 1992, while applicant was working as a waiter, a customer left a credit card at the restaurant. Applicant found the card, and rather than returning it to the owner, he decided to use it "as [he] heard that other persons did the same thing and got away with it" (Exhibit 8). He successfully used it at one store, but was caught trying to use it at a second store. He was arrested and charged with two counts of Burglary, Theft, and Forgery. He pleaded nolo contendere to the Burglary charges (misdemeanors), and the other two charges were dismissed. He was sentenced to 45 days in jail, and placed on probation for two years.

In December 2000, applicant and two friends went to a club to celebrate applicant's upcoming wedding. While at the club, applicant consumed three or four beers. As they were leaving the club and walking to their car, applicant became involved in an altercation with another individual. Passing firemen tried unsuccessfully to break up the fight, and one of them sustained injuries. Applicant and the other combatant were arrested. Applicant was charged with Battery Against an Officer, Unlawful Obstruction of a Peace officer, and Disturbing the Peace, all misdemeanors. In February 2001, he pleaded nolo contendere to Disturbing the Peace, and the other two charges were dismissed. He was fined \$400.00 and ordered to pay a \$680.00 state penalty fund assessment. Applicant testified that he "was to the point almost to intoxication" at the time of the incident (TR at 128).

In October 2002, applicant was involved in a traffic accident. When one of the responding police officers arrived on the scene to investigate, he "detected an odor of alcohol emitting from [applicant's] breath and person and [he] noticed that [applicant's] eyes were red and watery and [applicant's] speech was thick." Based on applicant's "objective signs of alcohol intoxication and poor performance on [field sobriety tests]," this officer formed the opinion that applicant was under the influence of alcohol and was unable to safely operate a motor vehicle. He then placed applicant under arrest for Driving Under the Influence of Alcohol or Drugs (DUI). Applicant ended up pleading no contest to a misdemeanor Wet Reckless charge, and the DUI charge was dismissed. He was fined \$1,060.00, and ordered to enroll in and complete an alcohol and drug education program. He was also placed on probation for three years. Applicant completed the program (Exhibit R).

In a signed, sworn statement that he gave to the Defense Security Service (DSS) in February 2003, applicant stated that he "was not intoxicated" on the evening in question. He reiterated this at the DOHA hearing, but admitted that he was "a little bit" under the influence of alcohol (TR at 116). Applicant further testified that he learned a lot from the alcohol education program, including the fact that "it's not in anybody's benefit to get behind the wheel if you have any alcohol whatsoever." Although applicant still consumes alcohol, he does not drive after doing so. He intends to continue abstaining from driving after he has consumed any amount of alcohol. In his words, "I do not intend to do that ever again. I just won't do it. I've learned my lesson" (TR at 21-22, 125-127).

Applicant's former manager at his current place of employment testified that in his opinion, applicant is qualified to hold a security clearance. Another manager at applicant's place of employment testified that applicant is reliable, and that in his opinion, applicant is qualified to hold a security clearance. Applicant's current supervisor, who has known applicant about three years, testified that he has never had to question applicant's judgment, reliability or trustworthiness, and that applicant is qualified to hold a security clearance. A fourth witness, the individual to whom applicant's supervisor reports, testified that applicant is honest and that he has never had to question applicant's judgment, reliability or trustworthiness. He further testified that he supports applicant's request for a security clearance. All four witnesses testified that alcohol has never been an issue with applicant's work performance.

CONCLUSIONS

The evidence establishes that applicant has been convicted of three crimes, two of which occurred after applicant had consumed alcohol. This conduct reflects adversely on his judgment, reliability and trustworthiness. It also requires application of Disqualifying Condition E2.A10.1.2.2 (*a single serious crime or multiple lesser offenses*) of the Criminal Conduct Adjudication Policy and Disqualifying Condition E2.A7.1.2.1 (*alcohol-related incidents away from work*) of the Alcohol Consumption Adjudication Policy.

With respect to the 1992 incident, applicant's use of the stolen credit card is very serious. Had this occurred recently, applicant would not be granted a security clearance. However, given the isolated nature of this type of conduct, the fact that it occurred over 12 years ago when applicant was still a teenager, and the fact that four of his current and/or former managers testified, in essence, that applicant is now an honest and trustworthy individual, I conclude that it is mitigated.

With respect to the December 2000 incident, applicant was under the influence of alcohol when he became involved in the altercation. Whether alcohol affected applicant's decision to engage the other individual is not clear. Therefore, I cannot conclude that this was truly an alcohol-related incident. It also is not clear if applicant was responsible for the fireman's injuries. He denies that he was, and there is no credible evidence that he was the one who caused the injury. Without minimizing the seriousness of the incident, it is fair to assume that if the fireman did not get hurt, applicant and the other individual would not have been arrested.

The October 2002 incident, on the other hand, was clearly alcohol-related. Although the accident that resulted in applicant's arrest may have been caused by the hit-and-run driver of the other car, the fact remains applicant was under the influence of alcohol when he was driving, and it is this fact alone that made applicant's conduct criminal. The fact he was convicted of a "Wet Reckless" charge instead of DUI does not minimize the seriousness of this alcohol-related criminal conduct.

To applicant's credit, he learned from the alcohol education program he was ordered to attend following his "Wet Reckless" conviction, and no longer drives after consuming alcohol. This fact, together with the lack of any other evidence that suggests applicant has consumed alcohol to excess since this incident occurred over two years ago, leads me to conclude he is unlikely to be involved in alcohol-related misconduct in the future.

Turning to the Directive's Adjudication Policy, applicant qualifies for Mitigating Conditions E2.A71.3.1 (*the alcohol-*

related incidents do not indicate a pattern), E2.A7.1.3.2 (the problem occurred a number of years ago and there is no indication of a recent problem) and E2.A7.1.3.3 (positive changes in behavior supportive of sobriety) of the Alcohol Consumption Adjudication Policy, and Mitigating Conditions E2.A10.1.3.1 (the criminal behavior was not recent) and E2.A10.1.3.6 (there is clear evidence of successful rehabilitation) of the Criminal Conduct Adjudication Policy.

FORMAL FINDINGS

GUIDELINE J: FOR THE APPLICANT

GUIDELINE G: FOR THE APPLICANT

DECISION

In light of all 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.

Joseph Testan

Administrative Judge