

KEYWORD: Alcohol

DIGEST: Applicant's history of alcohol-related incidents between 1997 and 2002 has not been mitigated by his favorable character evidence. Although Applicant's most recent alcohol-related offense occurred in March 2002, Applicant's internally ambiguous and independently discredited testimony, coupled with the lack of strong independent evidence, undermine his current claim his alcohol consumption is under control. Clearance is denied.

CASENO: 03-15858.h1

DATE: 11/25/2005

DATE: November 25, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-15858

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Gary L. Rigney, Esq.

SYNOPSIS

Applicant's history of alcohol-related incidents between 1997 and 2002 has not been mitigated by his favorable character evidence. Although Applicant's most recent alcohol-related offense occurred in March 2002, Applicant's internally ambiguous and independently discredited testimony, coupled with the lack of strong independent evidence, undermine his current claim his alcohol consumption is under control. Clearance is denied.

STATEMENT OF CASE

On October 21, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6, dated January 2, 1992, as reissued through Change 4 thereto, dated April 20, 1999, issued a Statement of Reasons (SOR) to the 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. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. On November 5, 2004, Applicant responded to the SOR and requested a hearing before an Administrative Judge.

The case was assigned to me on January 3, 2005. On February 28, 2005, this case was set for hearing on March 18, 2005. The Government submitted five exhibits, and Applicant submitted two exhibits. Testimony was taken from Applicant and four witnesses. The transcript (Tr.) was received on March 24, 2005.

FINDINGS OF FACT

The SOR alleges excessive alcohol consumption based on four allegations. Applicant admitted the factual allegations and requested a hearing. Applicant is 34 years old and is employed as a network cable installer for a defense contractor. He seeks a secret security clearance.

In his sworn statement (GE 2) dated October 3, 2002,⁽¹⁾ Applicant discussed his alcohol consumption patterns, alcohol-related incidents and steps taken to reduce his drinking. Applicant began drinking when he was 18 years old. While Applicant never provided a clear picture of his drinking pattern either in the sworn statement or at the hearing, he did say he was drinking mainly on the weekends at the time of his first arrest. (Tr. 10) Applicant was 26 years old when he was arrested on December 13, 1997 (subparagraph 1.b.), for (1) Running a Stop Sign, (2) Driving Under the Influence of Liquor (DUI), (3) Reckless Driving, and (4) No Seat Belt. He pled guilty to DUI and was fined \$600.00, placed on 12 months probation, and ordered to attend the Court Referral Program. Before the arrest, Applicant had been playing cards with friends, and drinking about 12 cans of beer in a 4 ½ hour period. Though he stated in his sworn statement he thought he felt fine when he entered his car, he testified he really did not think, he just got into his car. (Tr. 23)

After his December 1997 DUI, Applicant attended eight court-ordered alcohol education classes in eight weeks. He also attended Alcoholics Anonymous (AA) classes but was unsure whether the number of classes was 12 or 14. Applicant successfully completed the referral and AA requirements with no further action recommended. (GE 4) Though he did not actively participate in the AA meetings, the conversation from participants made him realize that alcohol abuse can be destructive to the driver (Tr. 25) and also to other people. (Tr. 26) When asked whether he changed his drinking habits, Applicant said he stopped hanging around the places he used to hang around (Tr. 11-12), but he did not describe how his consumption pattern had changed. No additional explanation was provided.

On February 25, 2000, Applicant was 29 years old and charged with his second DUI, first offense (subparagraph 1.c.), even though he had already been convicted once for the same offense. Before his arrest, Applicant had consumed eight or nine beers in a four hour period while helping a friend clean out a shed. When he was ready to get into his car and leave, he recalled feeling unimpaired and able to drive. At the time of his arrest, Applicant registered right at the minimal alcohol level to be considered under the influence, and surmised he was arrested because he failed the field sobriety test. He was fined \$600.00, given a 30-day suspended sentence and placed on probation for three months. He was again ordered to attend the court referral program and AA, which he completed successfully in February 2001. (GE 5) When asked to describe the benefit of AA a second time, Applicant stated, "I'd say [I messed up] even more than I did the first [DUI]. Alcohol can mess you up and I proved it this time. I messed up [the] first time and I did it again." (Tr. 14)

After the second DUI, Applicant said he learned more about the problems alcohol can cause. He promised himself he would not drink and drive in the future. He indicated he wanted to reduce his alcohol intake following the DUI in February 2000. (Tr. 14) In response to the question of how frequently he drank, he replied he would drink with friends at a party or an athletic contest. (Tr. 14) Applicant's former roommate in 2001 and 2002 described Applicant's pattern of drinking during the period as three or four times a week, consuming six to eight beers a piece each time they drank (Tr. 62), and getting drunk about four or five times a month. (Tr. 69) Though Applicant also said at page 14 he never drank by himself, at a later point in his testimony he indicated he did consume alcohol while sitting in the house and while mowing the lawn. (Tr. 37)

On March 3, 2002, Applicant was arrested for (1) Public Intoxication and (2) open container. He pled guilty to both charges and was fined. A visitor to town joined Applicant and a few others at a bar where Applicant recalled drinking a few beers. He "got to feeling pretty good" (Tr. 15) after his group joined a birthday party where the participants were drinking shots.

Applicant admitted consuming alcohol to excess between 1989 and October 2002. (Subparagraph 1.a.) He also estimated that he drank to excess less than five times since October 2002 but could not be more certain.

After the alcohol-related incident in March 2002, Applicant testified that he has made changes in his life. He has moved away from the group he used to hang around. He plans to marry his fiancée. (Tr. 18) He also likes his job and is taking courses to obtain certifications to handle the technical field. (Tr. 19)

When asked how much he currently drinks, he responded, "not a lot." (Tr. 18) The question was repeated and his response was, "couldn't really say." (Tr. 19) When asked how much he had to drink in the week before the hearing, Applicant said he had a few beers on one occasion with a friend. (Tr. 19). Later in his testimony he replied less than five (Tr. 42), but still later in his testimony he could not remember. (Tr. 43)

The team leader of Applicant's cable installing group testified he supervised Applicant from 2002 to January 2005. Applicant's good work performance is based on the letters of appreciation the team leader has received from customers. The team leader surmised Applicant's fiancée has instilled stability in his life "as far as having somebody to see all the time rather than maybe going out with the guys or something like that." (Tr. 52)

Applicant's friend has known him for 29 years. They shared an apartment between in 2001 and 2002. According to the friend, they consumed about six to eight beers, three to four times a week (Tr. 62) and got drunk about four or five times a month. (Tr. 68) When Applicant moved in with his fiancée a year ago, his friend believes Applicant's drinking habits changed. The only time they have consumed alcohol together was during the friend's birthday party in November 2004 when Applicant had two beers.

A coworker who has worked with Applicant for four years testified he has consumed alcohol with Applicant during lunch or after work. About twice a month after work, according to the coworker, they might consume between two and six beers. The coworker recalled he and Applicant stopped after work the week before the hearing. (2) Even though he could not fully remember how many beers he had consumed, he estimated two; he estimated Applicant may have had four beers. (Tr. 80) Applicant's fiancée called the bar where the coworker and Applicant were, and drove Applicant home.

Applicant's fiancée has known Applicant since 2001 when she began dating him. (Tr. 85) At some time early in the relationship, he came to her apartment where she supplied the beer although she could not recall how much. The only time she saw Applicant drunk was shortly before the Public Intoxication offense in 2002. (Tr. 88) They began living together in the Spring of 2003. She noticed a change in Applicant's attitude that she did not attribute to her presence in the relationship; rather, she concluded Applicant had matured because he talked about matters he never talked about before, such as his desire to wed and have children. (Tr. 91) Applicant's fiancée does not know how frequently Applicant consumes alcohol. She recalled that in November 2004 she drove Applicant and his former roommate around town to celebrate the former roommate's birthday. (GE 95) She called the bar where he was drinking the week before the hearing, and testified, "if I talk to him and I think there's a question, then I'll just, you know, just come up." (Tr. 93) Applicant's fiancée maintained however, she is not concerned about his drinking. (Tr. 96; 97)

The Court Magistrate of the town where Applicant lived with his friend in 2001 has known Applicant for 15 years. She believes Applicant is kind and trustworthy. A computer specialist and a team leader consider Applicant to be very qualified in performing his duties.

POLICIES

Enclosure 2 of the Directive sets forth guidelines containing disqualifying conditions (DC) and mitigating conditions (MC) that should be given binding consideration in making security clearance determinations. These conditions must be considered in every case along with the general factors of the whole person concept. However, the conditions are not automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense.

Burden of Proof

Initially, the government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualifies, or may disqualify, the applicant from being eligible for access to classified information. *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988) "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *See Egan*, 481 U.S. at 531; *see* Directive E2.2.2.

Alcohol Consumption (Guideline G)

Excessive alcohol consumption can lead to poor judgment and increase the risk of unauthorized disclosure of classified information.

CONCLUSIONS

The security concerns raised by the alcohol consumption (AC) guideline is drinking an excessive amount of alcohol which can lead to the exercise of poor judgment, unreliability and untrustworthiness. Drinking too much alcohol can also increase the risk of unauthorized disclosure of classified information due to carelessness. The Government has established a case of excessive alcohol consumption under AC disqualifying condition (DC) E2.A7.1.2.1 (*alcohol-related incidents away from work*). Between December 1997 and October 2002, Applicant committed a pattern of alcohol-related incidents. In December 1997, at the age of 26, Applicant consumed 12 cans of beer in a 4 ½ hour period while playing cards. Although Applicant claimed he stopped hanging around his old drinking locations, there is no evidence he modified his drinking.

At age 29, Applicant committed his second DUI less than three years later in February 2000. He was helping a friend clean out a shed. He consumed eight or nine beers in a four hour period. Even though the amount of alcohol in his bloodstream was at the threshold level to be considered under the influence of alcohol, Applicant was still impaired as observed by the arresting officer during the field sobriety test. While Applicant intended (1) to reduce his alcohol intake after the February 2000 DUI, (2) not drive after he had been drinking, and (3) drink only at sports events, the testimony of his former roommate in 2001 and 2002 indicates that Applicant was drinking three or four times a week and reaching intoxication about four or five times a month, leading me to conclude Applicant was drinking more not less alcohol during the period. In addition to his alcohol-related incident in March 2002 when he was 31 years old, Applicant

admitted he drank to intoxication until October 2002.

Applicant's equivocal testimony and testimony indicating he could not remember or was unsure about his drinking at different times in his consumption history, e.g., especially how much alcohol he had consumed at a bar with his coworker in the week before the hearing, and about the frequency of his alcohol use since 2003, raises serious concerns about whether Applicant has been completely truthful about his alcohol use over the years. His discredited testimony also undermines his claim he has reduced and currently has control over his consumption. The inconsistencies in his own testimony about when he drinks also diminish his credibility. For example, early in his testimony he claimed he did not drink alone. Yet, later he testified he did drink around the house or when mowing the lawn.

The three alcohol-related incidents in five years eliminate AC mitigating condition (MC) E2.A7.1.3.1. (*the alcohol-related incidents do not indicate a pattern*) from favorable consideration. AC MC E2.A7.1.3.2. (*the problem occurred a number of years ago and there is no indication of a recent problem*) does not apply either because of the absence of credible evidence demonstrating tangible steps taken to promote control over his alcohol consumption. While moving in with his fiancée appears to be a step in the right direction, simply talking about subjects requiring increased responsibility is not enough to show Applicant has his alcohol use under control. Applicant's favorable evidence from the three character statements, and the positive testimony from Applicant's coworkers, supervisor, friend, and fiancée have been closely examined, but I find it insufficient to overcome the adverse evidence under the AC guideline. There is also insufficient evidence under E2.2.6 (*the presence or absence of rehabilitation and other pertinent behavioral changes*) and E2.2.1.9. (*the likelihood of continuation or recurrence*) to find in Applicant's favor under the whole person concept. Given (1) the alcohol-related incidents, (2) the intervals of heavy alcohol consumption, (3) the lack of probative evidence from Applicant's two referral and AA encounters, and (4) Applicant's inconsistent and ambiguous testimony, a finding for Applicant cannot be made at this time.

FORMAL FINDINGS

Formal Findings required by Paragraph 25 of Enclosure 3 are:

Paragraph 1 (Criminal Conduct, Guideline J): AGAINST THE APPLICANT.

subparagraph a. Against the Applicant.

subparagraph b. Against the Applicant.

subparagraph c. Against the Applicant.

subparagraph d. Against 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 Applicant.

Paul J. Mason

Administrative Judge

1. The Special Agent who took the statement placed the date "3rd day of October 2001," above her signature in the subscription portion of the statement on page two. The year is incorrect and should read "3rd day of October 2002," because the offense described in subparagraph 1.d. did not occur until March 2002. (SOR; GE 6)
2. This person drank with Applicant on the one occasion in the week before the hearing.