

KEYWORD: Alcohol; Criminal Conduct; Personal Conduct

DIGEST: Applicant was cited for marijuana possession in April 1997, arrested for retail fraud and for multiple alcohol-related crimes while a minor between April 1997 and December 1998, and diagnosed as alcohol dependent in July 1999. He participated in the Alcoholics Anonymous (AA) program from June until August 2000, but he now consumes alcohol occasionally. He did not disclose the arrest for retail fraud and three alcohol-related crimes on his security clearance application. Security concerns based on alcohol consumption and criminal conduct are mitigated, but concerns based on falsification of the security clearance application are not mitigated. Clearance is denied.

CASENO: 03-18079.h1

DATE: 01/26/2005

DATE: January 26, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-18079

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Kathryn Antigone Trowbridge, Esq., Department Counsel

FOR APPLICANT

William F. Savarino, Esq.

SYNOPSIS

Applicant was cited for marijuana possession in April 1997, arrested for retail fraud and for multiple alcohol-related crimes while a minor between April 1997 and December 1998, and diagnosed as alcohol dependent in July 1999. He participated in the Alcoholics Anonymous (AA) program from June until August 2000, but he now consumes alcohol occasionally. He did not disclose the arrest for retail fraud and three alcohol-related crimes on his security clearance application. Security concerns based on alcohol consumption and criminal conduct are mitigated, but concerns based on falsification of the security clearance application are not mitigated. Clearance is denied.

STATEMENT OF THE CASE

On January 27, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to deny Applicant a security clearance. This action was taken under Executive Order 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). The SOR alleges security concerns under Guidelines G (Alcohol Consumption), J (Criminal Conduct), and E (Personal Conduct). Under Guideline G it alleges nearly six years of alcohol consumption, sometimes to excess and the point of intoxication (¶ 1.a.); a series of alcohol-related arrests and convictions (¶¶ 1.b. through 1.h.); a diagnosis of alcohol dependence (¶ 1.i.); and continued consumption of alcohol after the diagnosis of alcohol dependence (¶ 1.j.). Under Guideline J, it alleges an arrest and conviction for possession of marijuana (¶ 2.a.), an arrest for retail fraud (¶ 2.b.), and the alcohol-related conduct alleged under ¶¶ 1.b. through 1.h. (¶ 2.c.). Under Guideline E, it alleges Applicant gave false answers to questions 24 and 26 on his security clearance application (¶¶ 3.a. and 3.b.)

Applicant answered the SOR in writing on February 17, 2004. He admitted the allegations under Guideline G except for the duration of his alcohol consumption in ¶ 1.a., and he admitted all the allegations under Guideline J. He denied the allegations under Guideline E, and he requested a hearing. The case was assigned to me on September 23, 2004, and DOHA issued a notice of hearing on the same day, setting the case for October 19, 2004. The case was heard as scheduled. DOHA received the transcript (Tr.) on October 27, 2004.

At the hearing, I ordered the parties to brief the question whether Applicant's diagnosis of alcohol dependence was made by a credentialed medical professional as contemplated by the Directive under Guideline G. I received the briefs on November 5, 2004, December 1, 2004, December 2, 2004, and December 13, 2004. They are included in the record as Appellate Exhibits I, II, III, and IV.

PROCEDURAL RULING

Applicant's response to Department Counsel's brief included a written medical diagnosis of Applicant (Appellate Exhibit II). Department Counsel objected to Applicant's tender of new evidence after the hearing was closed (Appellate Exhibit III). I conclude that Department Counsel's objection is meritorious. Accordingly, I have not considered the new evidence tendered by Applicant.

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I also make the following findings:

Applicant is a 26-year-old manufacturing technician for a defense contractor. He has worked for his current employer since September 2000. He has never held a security clearance.

On April 5, 1997, Applicant, then 18 years old, was charged with possession of marijuana. He was convicted and fined.

On April 26, Applicant was arrested for driving away from a gas station without paying. According to the police report (Government Exhibit 7) Applicant was stopped for driving 69 miles per hour (mph) on a road where the speed limit was 35 mph. After stopping Applicant, the police received the report of a theft of gas, and they noticed gasoline splashed on Applicant's rear bumper. They asked Applicant if he had been at the gas station, and he responded that he had not. The

police transported him to the gas station, where he was positively identified by the cashier. Applicant then apologized and promised to pay for the gas. Applicant's vehicle was impounded, and he was charged with retail fraud, photographed, and fingerprinted. He was advised of his rights and declined to make a written statement. He was then released. He called his father, who came to the police station and took him home.

At the hearing, Applicant contradicted parts of the police report. He testified he did not remember telling the police he had not been at the gas station. He testified he told the police he did not steal gas. When he realized he had not paid for the gas, he contacted the station owner, apologized, and paid for it. The station owner promised to drop the charges.

In May 1997, Applicant was arrested for possessing alcoholic beverages as a minor (MIP). He pleaded no contest and was fined. In June 1997, he was arrested for the same offense, pleaded guilty, and was fined. On July 24, 1997, he was arrested for having a blood alcohol content as a minor. He pleaded guilty, and his driver's license was restricted. On July 30, 1997, he was arrested for MIP, but the charge was dismissed.

In August 1997, he was arrested for having a blood alcohol content of .03%. He was fined and his driver's license was suspended.

In October 1997, he was arrested for operating a motor vehicle with a blood alcohol content over the legal limit. He was found guilty, fined, his driver's license was suspended, and he was ordered to attend a victim-impact panel. He was ordered to attend a substance abuse assessment scheduled for December 16, 1997, but he did not appear. In February 1998, he was ordered to provide proof of enlistment in the U.S. Navy or enter an alcohol outpatient treatment program within 60 days. He did not comply, and in March 1999 a bench warrant was issued for his arrest.

In July 1998, Applicant was arrested for MIP. He pleaded guilty, paid a fine, and his driver's license was suspended.

In August 1998, Applicant was arrested for failure to stop, MIP, and driving while his license was suspended. He was incarcerated for five days. (Government Exhibit 1, p. 8; Government Exhibit 2, p. 3)

In December 1998, Applicant was again charged with MIP. (Government Exhibit 3, p. 1) In May 1999, he pleaded guilty and was sentenced to a fine and probation, and his driver's license was suspended. He was ordered to abstain from alcohol, perform community service, and undergo substance abuse screening and treatment. (Government Exhibit 3, p. 3) He failed to complete his community service. (Government Exhibit 3, p. 4)

In July 1999, Applicant was diagnosed as alcohol dependent by a "licensed limited psychologist" working at the substance abuse treatment facility used by the court. Applicant began a program for treatment of chemical dependency in October, but he attended only two or three sessions because they were too expensive and he had transportation difficulties because of his suspended driver's license. When Applicant learned a bench warrant had been issued for his arrest, he explained to the court why he did not complete the program. The judge ordered him to attend Alcoholics Anonymous (AA) in lieu of the chemical dependency program. Applicant attended AA meetings from June to August 2000 and went through the 12-step program.

Applicant was 20 years old when he attended AA. He testified AA caused him to realize he had a problem with alcohol abuse. (Tr. 54) His experience with AA was "a big epiphany and eye-opener" that convinced him he "needed to get a handle on [his] using alcohol as a crutch." (Tr. 55)

In March 2001, Applicant executed a security clearance application (SF 86). In response to question 24, asking whether he had ever been charged with or convicted of any offenses related to alcohol or drugs, he disclosed his MIP offenses in May, June, July, and December 1997, and driving with a suspended license in August 1998. He did not disclose his citation for marijuana possession in April 1997, or his convictions for driving with a blood alcohol content in August 1997, MIP in July 1998, and MIP in December 1998. He admitted all the omitted offenses at the hearing and testified he forgot some of them when he executed his SF 86. (Tr. 26, 36, 37-39, 70)

On the same SF 86, Applicant answered "no" in response to question 26, asking whether in the last seven years he had been arrested for, charged with, or convicted of any offenses not encompassed by other questions. He did not disclose his arrest in April 1997 for retail fraud at the gas station. He testified he thought the arrest was not within the scope of the question because the charges were dropped.

Applicant disclosed considerable derogatory information in his SF 86. He disclosed he left a job under unfavorable circumstances (question 20), used marijuana 15-20 times (question 27), attended AA (question 30), and had a debt for federal income taxes that was more than 180 days delinquent (question 38).

In late 2002, Applicant joined a worldwide fraternal organization known to "make good men better," install moral values, and perform extensive charity work. He became very active in the organization and progressed upward through the ranks.

On March 5, 2003, Applicant was interviewed by a Defense Security Service (DSS) investigator. In a signed, sworn statement, Applicant disclosed the same offenses as he listed on his SF 86. In addition, he disclosed the retail fraud at the gas station and an arrest for shoplifting that were not listed on his SF 86.

Regarding his alcohol abuse, Applicant told the DSS investigator his court-ordered attendance at AA meetings "was the first and only time [he] was required to attend any type counseling as a result of [his] consumption of alcoholic beverages." He did not mention he was ordered in December 1997 and February 1998 to undergo substance abuse assessment and failed to comply with both court orders. At the hearing, he testified he did not disclose the chemical dependency treatment program in October 1999 because he did not complete it. (Tr. 92)

In his DSS statement, he told the investigator, "I presently consume beer occasionally." At the hearing, Applicant testified his last drink was at his wedding anniversary celebration on June 12, 2004, when he had one beer with dinner. He further testified his last drink before the anniversary celebration was at his wedding in June 2003, when he had a glass of champagne and "maybe a beer right after it." (Tr. 31-32)

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.

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through ¶ 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (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 applicant'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. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

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, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[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. 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 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

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. Directive ¶ E2.A7.1.1. A disqualifying condition (DC 1) may arise from alcohol-related criminal incidents away from work. Directive ¶ E2.A7.1.2.1. Applicant's multiple arrests and convictions of alcohol-related offenses establish DC 1.

A disqualifying condition (DC 3) can arise from a diagnosis by a "credentialed medical professional" of alcohol abuse or alcohol dependence. Applicant was diagnosed as alcohol dependent by a licensed limited psychologist to whom he was referred by a local court. Briefs were submitted by the parties at my request on the question whether a licensed limited psychologist is a "credentialed medical professional."

The Directive does not define "credentialed medical professional," but it lists examples, "e.g., physician, clinical

psychologist, or psychiatrist." A credential is "evidence . . . concerning one's right to credit, confidence, or authority." *The American Heritage Dictionary of the English Language* (4th ed. 2000) (www.bartleby.com/61/50/CO735000.html). Applicant's diagnosis is signed by a person who listed the following credentials after her name: "MA, LLP, CAC-I." Under the law of the jurisdiction where Applicant was diagnosed, a person with a master's degree (MA) may be licensed as an "LLP" (licensed limited psychologist) for the purpose of practicing psychology under the supervision of a licensed physician or psychologist. The practice of psychology is defined as "the rendering . . . of services involving the application of principles, methods, and procedures of understanding, predicting, and influencing behavior for the purposes of the diagnosis, assessment related to diagnosis, or behavioral adjustment problems. . . ." (Appellate Exhibit I, Attachments 3 and 4) In short, an "LLP" is authorized by law ("credentialed") to practice psychology, including diagnosis, under the supervision of a physician or psychologist. I conclude the LLP who diagnosed Applicant as alcohol dependent was a credentialed medical professional within the meaning of the Directive. Thus, DC 3 is established.

A disqualifying condition (DC 6) may exist if an applicant consumes alcohol after a diagnosis of alcoholism by a credentialed medical professional and following completion of an alcohol rehabilitation program. "Alcoholism" is "chronic alcohol abuse, dependence, or addiction." *Stedman's Medical Dictionary* at 44 (26th ed. 1995). In his DSS interview in March 2003, Applicant admitted he consumed beer "occasionally" after his diagnosis of alcohol dependence in July 1999 and his completion of the court-ordered AA program in August 2000. (Government Exhibit 2 at p. 4) I conclude DC 6 is established.

Security concerns under Guideline G can be mitigated by evidence that "[t]he problem occurred a number of years ago and there is no indication of a recent problem," or "[p]ositive changes in behavior supportive of sobriety." Directive ¶¶ E2.A7.1.3.2, E2.A7.1.3.3. Applicant's last alcohol-related incident was in December 1998, more than six years ago. Since that time, he has completed the AA 12-step program, become very active in a fraternal organization that promotes civic responsibility and moral values, and was recently married. According to his DSS statement, he remains an occasional drinker, but at the hearing he described himself having had only two drinks in two years. Any inconsistency between Applicant's description of himself as an occasional drinker versus a once-a-year drinker need not be resolved, because I am satisfied he is no longer a problem drinker. I conclude Applicant has mitigated the security concerns based on alcohol consumption.

Guideline J (Criminal Conduct)

A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1. Two disqualifying conditions are relevant. DC 1 applies when an applicant has admitted criminal conduct. Directive ¶ E2.A10.1.2.1. DC 2 applies when there is evidence of a serious crime or multiple lesser offenses. Directive ¶ E2.A10.1.2.2. Applicant's admissions in his answer to the SOR and at the hearing establish both DC 1 and DC 2.

Security concerns based on criminal activity can be mitigated by showing the criminal activity was not recent. Directive ¶ E2.A10.1.3.1. Based on the evidence set out under Guideline G above, I conclude Applicant's criminal activity has

been mitigated by the passage of time without recurrence.

Guideline E (Personal Conduct)

Under Guideline E, conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

A deliberate omission or falsification of relevant and material facts from any personal security questionnaire is a disqualifying condition (DC 2) that can raise a security concern. Directive ¶ E2.A5.1.2.2. Although Applicant disclosed six alcohol-related offenses in his response to question 24 of SF 86, he did not disclose his citation for marijuana possession in April 1997, or his convictions of driving with a blood-alcohol content in August 1997, MIP in July 1998, and IP in December 1998. He disclosed his marijuana use in response to question 27, and he explained at the hearing he thought the marijuana citation was not within the scope of the question because it was akin to a traffic ticket and not an arrest. I am satisfied Applicant did not intentionally omit the marijuana offense, in light of his disclosure under question 27.

I am not persuaded by Applicant's explanation that he simply forgot about the three alcohol-related offenses he did not disclose. Even after he knew his criminal record was a matter of concern, he disclosed the same offenses and omitted the same offenses in his DSS interview in March 2003. Of the three omitted offenses, the August 1997 offense was his first alcohol-related driving offense, and the December 1998 MIP offense set in motion the diagnosis of alcohol dependence that led to his participation in AA and his "moral epiphany." While he may not have recalled the specific dates of the offenses, I am satisfied he knew he had committed more alcohol-related offenses than he listed. I conclude Applicant intentionally omitted material facts in his response to question 24.

In his answer to question 26, Applicant did not disclose his arrest for failing to pay for gas. His explanation at the hearing was that he did not think the incident was within the scope of the question because the owner agreed to drop the charges. I find this explanation not credible. The record reflects Applicant has tried repeatedly to minimize his culpability in this incident, which involves outright dishonesty. In his DSS interview and at the hearing, he maintained he absent-mindedly drove away without paying for the gas. This explanation is contradicted by the police report, which reflects Applicant denied having been at the gas station until he was positively identified by the station cashier. Applicant has not explained why he was driving 69 mph in a 35-mph zone, suggesting flight instead of forgetfulness. He has not explained why gasoline was splashed on the rear of his car, suggesting haste.

The gas station incident caused Applicant's vehicle to be impounded. He was taken into custody, photographed,

fingerprinted, questioned, and held at the police station until he was released in his father's custody. I am satisfied Applicant knew he had been arrested, knew his arrest was within the scope of the security clearance questionnaire, and chose to omit it. Accordingly, I find Applicant intentionally omitted relevant and material facts from his answer to question 26. Based on this record, DC 2 is established.

A disqualifying condition (DC 5) applies when an applicant has a pattern of dishonesty or rule violations. Directive ¶E2.A5.1.2.5. Applicant committed an act of dishonesty by stealing gas in April 1997, falsely denied his guilt when questioned by the police, intentionally failed to disclose it on his SF 86 in March 2001, gave the DSS investigator a false explanation for it in March 2003, and repeated his false explanation at the hearing. These facts, coupled with Applicant's incomplete disclosure of his alcohol-related offenses, show a pattern of deliberately understating the extent of his criminal conduct. I conclude DC 5 is established. No mitigating conditions are established.

FORMAL FINDINGS

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

Paragraph 1. Guideline G (Alcohol Consumption): 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

Subparagraph 1.f.: For Applicant

Subparagraph 1.g.: For Applicant

Subparagraph 1.h.: For Applicant

Subparagraph 1.i.: For Applicant

Subparagraph 1.j.: For Applicant

Paragraph 2. Guideline J (Criminal Conduct): FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: For Applicant

Paragraph 3. Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

Subparagraph 3.b.: Against 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 a security clearance for Applicant. Clearance is denied.

LeRoy F. Foreman

Administrative Judge