

KEYWORD: Criminal Conduct; Alcohol

DIGEST: Applicant is forty-four years old and has been employed by a federal contractor since 1998. From 1983 through 2001, Applicant was arrested eight times for driving under the influence (DUI) of alcohol. He pled guilty to DUI five times, two times he pled guilty to reckless driving that was alcohol related and one DUI was nolle prossed. Applicant was also convicted of felony possession of marijuana. Applicant continues to consume alcohol. Applicant has failed to mitigate the security concerns raised by his criminal conduct and his alcohol consumption. Clearance is denied.

CASENO: 03-18347.h1

DATE: 09/15/2005

DATE: September 15, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-18347

DECISION OF ADMINISTRATIVE JUDGE

CAROL G. RICCIARDELLO

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is forty-four years old and has been employed by a federal contractor since 1998. From 1983 through 2001, Applicant was arrested eight times for driving under the influence (DUI) of alcohol. He pled guilty to DUI five times, two times he pled guilty to reckless driving that was alcohol related and one DUI was nolle prossed. Applicant was also convicted of felony possession of marijuana. Applicant continues to consume alcohol. Applicant has failed to mitigate the security concerns raised by his criminal conduct and his alcohol consumption. Clearance is denied.

STATEMENT OF CASE

On March 29, 2004, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) stating they were unable to find it is clearly consistent with the national interest to grant or continue a security clearance for applicant.⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guidelines J, criminal conduct and Guideline G, alcohol consumption.

In an undated sworn answer, Applicant responded to the SOR and admitted the allegations under Guideline J, with explanations. He also admitted the allegations under Guideline G and provided a qualified denial of 2.c. with an explanation. Applicant elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the file of relevant material (FORM) on November 8, 2004. A complete copy of the FORM was received by Applicant on November 15, 2004. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not object to the FORM and did not provide additional material. The case was assigned to me on December 29, 2004. The decision in this case was delayed due to a moratorium on cases where Title 10 U.S.C. 986 (the Smith Amendment) applied. The case was held in abeyance until the moratorium was lifted. Department Counsel conceded that the Smith Amendment does not apply, because although Applicant was

sentenced to more than a year in jail, he did not serve more than a year. However, Department Counsel did not withdraw the allegation in subparagraph 1.j. alleging the Smith Amendment. Therefore my findings are reflective of that fact.

FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and statements I make the following findings of fact.

Applicant is a 44-year-old electrical engineer who has worked for the same federal contractor since 1998. He is not married and has no children. Applicant has been arrested, charged, and/or convicted of eight driving under the influence (DUI) charges from 1983 to 2001. He pled guilty to five DUI offenses, one DUI charge was nolle prossed, and the two remaining DUI charges he pled to the reduced charge of reckless driving, alcohol related.

On April 15, 1985 Applicant was charged with sale of marijuana.(two counts) and possession of marijuana (one count). Applicant pled guilty to possession of marijuana (a felony) and was sentenced to 9 years incarceration. Applicant spent only eleven days in jail and was on probation for five years.⁽²⁾ Six of Applicant's DUI arrests took place after his conviction for possession of marijuana.

Between June 1985 and July 1985 Applicant consulted an outpatient coordinator of a mental health facility to seek help with alcohol and substance abuse issues. He was required to do so as part of a court order stemming from his possession of marijuana conviction, and was also advised by his attorney.⁽³⁾ Applicant was not interested in attending therapy to address his problems with drugs and alcohol, but did so only because it was required by the court and his attorney's recommendation to assist in his criminal case.⁽⁴⁾ Applicant did not want to formulate a therapeutic contact with the assigned counselor. Applicant's progress during his required attendance was described as "none."⁽⁵⁾

Applicant completed a DUI level program in State A in 1998.⁽⁶⁾ He completed a DUI course in State A in 1994 and a Safety Council course in the same state in 1992.⁽⁷⁾ Applicant completed DUI courses in State B in 1991 and 1987.⁽⁸⁾ He also attended voluntary treatment in 1985, and Applicant believes he may have been required by the court to attend classes in 1983 and 1985.⁽⁹⁾

In Applicant's sworn statement dated August 22, 2001,he stated:

After deep reflection of my experiences with alcohol and the problems it has cost me in my life, I do not drink anymore, as it has cost me more trouble than it is worth in any lifetime. I would give anything not to have had the problems that have occurred to me using alcohol. I have not had a drink for over two months now, nor do I ever wish to have any alcohol again. I have always tried to do what is honest and fair in my life and do not want to complicate my life or be a burden for anyone else. When I had the prior DUIs, the law dismissed them after a period of five years, so it did not bother me that much and seemed to be part of the possible consequences of going out and drinking, in areas where there were no taxis or public transportation available. But, now after fully realizing the damaging effect it has had on my life it is simply not an option in my life anymore. All I can say is I truly believe that I can never drink alcohol again and do not ever want to [.] No amount of counseling [sic] can make this decision for me, I have had no treatments other than the court ordered alcohol school referrals and my quitting drinking is a personal decision.⁽¹⁰⁾

Applicant also stated, "I no longer use marijuana or any other substance, [I] do not want to be around it and will leave anywhere I see them in use. This too has caused me more trouble that it is worth in my life. I was exposed to the infrequent use of marijuana until about 1993. That is when I decided it was not for me and quit. Other than alcohol, I have been drug free. Now I am totally substance free."⁽¹¹⁾

In sworn interrogatories dated October 28, 2003, Applicant was asked, "Do you currently drink alcoholic beverages (e.g. beer, wine, liquor)? His reply was "yes."⁽¹²⁾ Applicant also replied that he drank "beer only,"⁽¹³⁾ and "only once or twice a week, no more than three at any one time."⁽¹⁴⁾ In Applicant's follow-up statement he stated "These mistakes have forced m[e] to reflect on my life and have vowed to myself to never repeat them. These problems occurred from drinking hard liquor, which I have abstained from and will remain away from now that I have recognized that I have a problem with it."⁽¹⁵⁾

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Considering the evidence as a whole, Guideline J, pertaining to criminal conduct, and Guideline G, pertaining to alcohol consumption, with their respective DC and MC, apply in this case. Additionally, each security clearance decision must be a fair and impartial commonsense decision 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 and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. 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.⁽¹⁶⁾ The government has the burden of proving controverted facts.⁽¹⁷⁾ The burden of proof is something less than a preponderance of evidence.⁽¹⁸⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against

him.⁽¹⁹⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽²⁰⁾

No one has a right to a security clearance⁽²¹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽²²⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽²³⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽²⁴⁾ 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 consideration of the evidence, I find the following adjudicative guidelines most pertinent to the evaluation of the facts in this case:

Guideline J - Criminal Conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

Guideline G-Alcohol Consumption-a security risk may exist because 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.

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

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 Guideline J and Guideline G.

Based on all the evidence Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*Allegations or admissions 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 charges*) apply. Applicant was arrested and convicted of five DUIs from 1983 through 2001. During the same period, two other DUI charges were reduced and he pled guilty to reckless driving alcohol related, and one DUI was nolle prossed. Applicant was also convicted of a felony for possession of marijuana.

I have considered all the mitigating conditions and specifically considered Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.2.1 (*The criminal behavior was not recent*), and CC MC E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation.*). I conclude none apply. Applicant repeatedly committed alcohol-related offenses and stated "When I had the prior DUIs, the law dismissed them after a period of five years , so it did not bother me that much and seemed to be part of the consequences of going out and drinking ..." ⁽²⁵⁾ Applicant's comments reflects a disregard for the fact that his actions were illegal. He is not deterred from committing other offenses because he does not seem to understand the severity of his offenses or his responsibility to obey the law. Applicant's first offense was when he was 18 years old and his last offense was when he was forty years old. He attended the court ordered DUI courses, but they did not deter him from committing more alcohol-related offenses. In 1985 Applicant was convicted of marijuana possession, a felony, and was sentenced to nine years confinement. He served only 11 days. Even this serious felony conviction was not a wake-up call to Applicant. He was arrested again in 1987, 1991, 1992, 1993, 1998 and 2001. Despite lapses in time between offenses the fact that Applicant continues to consume alcohol, despite the negative impact it has had on his life, reflects a serious lack of judgment.

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*) AC DC E2.A7.1.2.5. (*Habitual or binge consumption of alcohol to the point of impaired judgment*) applies in this case. Applicant has eight DUI offenses and continues to drink alcohol.

I have considered all the mitigating conditions and specifically considered Alcohol Consumption Mitigating Condition (AC MC) E2.A7.1.3.1 (*The alcohol related incidents do not indicate a pattern*), AC MC E2.A7.1.3.2 (*The problem occurred a number of years ago and there is no indication of a recent problem*), and AC MC E2.A7.1.3.3 (*Positive changes in behavior supportive of sobriety*), and conclude none apply.

It is a serious concern that Applicant had eight opportunities to gain an awareness of the serious consequences that his drinking had on his life and continues to have on his life, and yet he continues to drink. Applicant stated in 2001 that he

was no longer going to drink any alcohol because of all the trouble it had caused in his life. He vowed that he fully understood the damaging effects alcohol had on his life. He vowed that he would never drink alcohol again, and he did not want to drink again. Two years later, Applicant renegeed on that vow and now believes it was only hard liquor that was causing his problems. Applicant has rationalize that it was the type of liquor he was

consuming that was the problem, rather that grasping that alcohol is the problem. Applicant continues to drink 1-2 times a week.

Applicant continues to show a lack of appreciation for the negative effects alcohol has on his life, a lack of understanding that his criminal conduct, except for his drug offense, is all alcohol related, and a rationalization that it was hard liquor that was the problem. Applicant has a long and continuous pattern of drinking alcohol. He made a vow to stop drinking and has not. Applicant's past behavior and the fact he continues to drink, raises serious questions about his ability to comply with rules and regulations. The alcohol consumption concern is not just that Applicant may drink and drive, but that becoming intoxicated makes him less reliable and increases the risk of disclosure of classified information due to carelessness. All of the above factors raise serious doubts as to Applicant's judgment and ability to make good choices. Applicant has failed to mitigate the security concerns regarding his criminal conduct and his alcohol consumption.

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 various 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 have considered all the evidence in this case. I have also considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. 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. Applicant has failed to mitigate the security concerns caused by his criminal conduct and alcohol consumption. Accordingly, Guideline J, criminal conduct, and Guideline G, pertaining to alcohol consumption are decided against 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 Criminal Conduct (Guideline J) AGAINST THE APPLICANT

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. Against the Applicant

Subparagraph 1.e. Against the Applicant

Subparagraph 1.f. Against the Applicant

Subparagraph 1.g. Against the Applicant

Subparagraph 1.g. Against the Applicant

Subparagraph 1.h. Against the Applicant

Subparagraph 1.i. Against the Applicant

Subparagraph 1.j. For the Applicant

Paragraph 2 Alcohol Consumption (Guideline G) AGAINST THE APPLICANT

Subparagraph 2.a. Against the Applicant

Subparagraph 2.b. Against the Applicant

Subparagraph 2.c. 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. Clearance is denied.

Carol. G. Ricciardello

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. GE 12.
3. GE 3 and 7.
4. GE 15.
5. *Id.* at 66.
6. GE 8.
7. *Id.*
8. *Id.*
9. *Id.*
10. GE 13 at 3-4.
11. *Id.*
12. GE 7.
13. *Id.*
14. *Id.*
15. GE 8.
16. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
17. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, ¶ E3.1.14.
18. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
19. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, ¶ E3.1.15.
20. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, ¶ E3.1.15.
21. *Egan*, 484 U.S. at 531.
22. *Id.*

23. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.

24. Executive Order 10865 § 7.

25. GE 13.