

KEYWORD: Alcohol; Criminal Conduct

DIGEST: Applicant has a lengthy history of alcohol abuse and related criminal conduct, including a 1999 conviction for accosting a minor for immoral purposes, and a 2002 conviction for driving under the influence. He has been court-ordered to obtain alcohol evaluations on at least three occasions, and had his driving privileges restricted following his 2002 conviction. He has failed to mitigate the security concerns that arise from his alcohol consumption and criminal conduct. Clearance is denied.

CASENO: 03-18482.h1

DATE: 01/06/2005

DATE: January 6, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-18482

**DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

**APPEARANCES**

**FOR GOVERNMENT**

Eric H. Borgstrom, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant has a lengthy history of alcohol abuse and related criminal conduct, including a 1999 conviction for accosting a minor for immoral purposes, and a 2002 conviction for driving under the influence. He has been court-ordered to obtain alcohol evaluations on at least three occasions, and had his driving privileges restricted following his 2002 conviction. He has failed to mitigate the security concerns that arise from his alcohol consumption and criminal conduct. Clearance is denied.

**STATEMENT OF THE CASE**

On January 28, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant 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 Guideline G, concerning alcohol consumption, and Guideline J, concerning criminal conduct. Applicant submitted an answer to the SOR that was received by DOHA on March 22, 2004, requested a hearing, and admitted all SOR allegations.

The case was assigned to me on September 10, 2004. A notice of hearing was issued on October 29, 2004, scheduling the hearing for November 16, 2004. The hearing was conducted as scheduled. The government submitted five documentary exhibits that were marked as Government Exhibits (GE) 1-5, and admitted into the record without objection. Applicant testified, and called two witnesses to testify on his behalf. The transcript was received on November 24, 2004.

## FINDINGS OF FACT

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

Applicant is a 24-year-old single man who has been employed by a defense contractor as an engineering technician since September 2000. He graduated from high school in 1998 and thereafter attended about two years of college. The testimony of his two character witnesses, both of whom supervise Applicant, establish he is considered to be an excellent employee. Neither witness has ever seen any indication Applicant has an alcohol problem, and both of them observed him drinking alcohol at the company's 2003 Christmas party.

Applicant began drinking alcohol when he was a high school freshman. By his junior year he was consuming a 12 pack of beer two to four times a month. In 1993, when Applicant was about 13 years old, he possessed alcohol in school and was referred for alcohol counseling at the insistence of either the school, his parents, or both.

Applicant's first arrest for an alcohol-related offense occurred in July 1996, when he was about 16 years old. He was charged with being a Minor in Possession of Alcohol (MIP) after he had consumed approximately a 12 pack of beer. He was convicted of that offense and a fine was imposed. He was convicted of MIP again in March 1998, and was sentenced to 12 months good behavior, and ordered to obtain alcohol counseling. He attended counseling sessions for approximately four weeks following this conviction. In addition to his alcohol-related offenses, Applicant was convicted of shoplifting/vandalism/theft sometime while still a minor.

Applicant was charged with Accosting a Child for Immoral Purposes and Contributing to the Delinquency of a Minor in October 1999, for an incident that occurred in December 1998. Applicant's version of the incident is that he was 18 years old at the time and the charges were based upon him kissing and fondling a 14-year-old girl. The police reports indicate he and several other individuals picked the girl up from her house, took her to another house where Applicant supplied her with alcohol and marijuana, and then engaged in sexual intercourse with her on three occasions. Applicant was convicted of the Accosting a Child for Immoral Purposes charge, and was sentenced to two years probation, 60 days in jail, and fined.

Applicant was again ordered to obtain alcohol counseling as a result of the 1999 conviction. He was diagnosed as alcohol and cannabis dependent by a therapist and a physician when he was discharged from the counseling program in November 2000. The discharge summary indicated that while Applicant attended and participated in the scheduled sessions, it did not appear he could relate the signs and symptoms of alcohol abuse to himself and that he was overconfident of his ability to stay clean.

Applicant's last alcohol related arrest occurred in October 2002, when he was charged with driving under the influence (DUI). His blood alcohol concentration was .12 when he was arrested. He was convicted on November 18, 2002, fined \$750.00, and had his driving privileges restricted for

one year. He was again ordered to attend an alcohol counseling program, which he completed.

Applicant has never participated in alcoholics anonymous (AA) because he doesn't believe he is alcohol dependent and does not think he has a problem handling alcohol. As of December 2002, he estimates his use of alcohol consists of drinking two to three beers on weekends when he is out bowling with friends.

### **POLICIES**

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. 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. Considering the evidence as a whole, Guideline G, pertaining to alcohol consumption, and Guideline J, pertaining to criminal conduct, with their respective DC and MC, are most relevant in this case.

### **BURDEN OF PROOF**

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>(2)</sup> The government has the burden of proving controverted facts.<sup>(3)</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence<sup>(4)</sup>, although the government is required to present substantial evidence to meet its burden of proof.<sup>(5)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(6)</sup> 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.<sup>(7)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(8)</sup>

No one has a right to a security clearance<sup>(9)</sup> and "the clearly consistent standard indicates that

security clearance determinations should err, if they must, on the side of denials." <sup>(10)</sup> Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security. <sup>(11)</sup>

## CONCLUSIONS

Under Guideline G, alcohol consumption is a security concern 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. Those who abuse alcohol are more likely than others to engage in high risk, thoughtless, and sometimes violent behavior. Recurrent use of alcohol to the point of intoxication

may affect an individual's ability to exercise the care, judgment, and discretion necessary to protect classified information.

Applicant was convicted of at least four alcohol-related offenses between July 1996 and November 2002. He has been referred for alcohol counseling on at least four occasions, the last time following his DUI conviction in 2002. He was diagnosed as alcohol dependent in November 2000 by a therapist and a physician. DC 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*; and DC 3: *Diagnosis by a credentialed medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence* apply. I have considered all Guideline G Mitigating Conditions and none apply. Guideline G is decided against Applicant.

Under 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.

As alleged in the SOR, Applicant was convicted of a shoplifting offense while a minor and of Accosting a Child for Immoral Purposes in 1999. DC 1: *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*; and DC 2: *A single serious crime or multiple lesser offenses* apply in this case.

Although not alleged in the SOR, Applicant's other criminal conduct, at least two MIP charges in the 1990s, and a DUI in 2002, must be considered in determining whether any mitigating condition applies. Accordingly, while five years has passed since the last alleged offense, a mere two years has passed since Applicant's last criminal conviction. Further, his criminal conduct spanned at least the six years between 1996 and 2002. Additionally, the contents of his sworn SOR answer and his testimony dealing with the Accosting a Child for Immoral Purposes are both subject to the criminal prohibition imposed by 18 U.S.C. § 1001, and both are blatantly false. Lastly, virtually all of Applicant's criminal conduct is alcohol-related, and, despite four counseling referrals and a diagnosis of alcohol dependence, he continues to drink and denies he has a problem with

alcohol. Accordingly, I have considered all Mitigating Conditions under Guideline J and none apply. I specifically find MC 1: *The criminal behavior was not recent*; MC 4: *The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*; and MC 6: *There is clear evidence of successful rehabilitation* do not apply in this case. The remaining itigating Conditions have no applicability to the facts herein. Guideline J is decided against Applicant.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find Applicant has failed to overcome the case against him and satisfy his ultimate burden of persuasion. It is not clearly consistent with the national interest to grant Applicant a security clearance.

### **FORMAL FINDINGS**

SOR ¶ 1-Guideline G: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Subparagraph d: Against the Applicant

Subparagraph e: Against the Applicant

Subparagraph f: Against the Applicant

Subparagraph g: Against the Applicant

Subparagraph h: Against the Applicant

Subparagraph i: Against the Applicant

SOR ¶ 1-Guideline J: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: 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.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
4. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
5. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
6. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
7. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
8. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
9. *Egan*, 484 U.S. at 528, 531.
10. *Id* at 531.
11. *Egan*, Executive Order 10865, and the Directive.