KEYWORD: Alcohol; Personal Conduct; Criminal Conduct

DIGEST: Applicant was arrested for public intoxication in 1983 but not charged. He was convicted of driving while intoxicated (DWI) in 1998. He was terminated from his job in January 2005 because he consumed a decongestant containing alcohol before coming to work. He did not disclose his alcohol-related termination on his security clearance application (SF 86) or when initially interviewed by a security investigator. Applicant refuted the allegations regarding personal conduct and criminal conduct. He mitigated the security concern based on alcohol consumption. Clearance is granted.

CASENO: 05-06750.h1

DATE: 05/23/2006

DATE: May 23, 2006

In re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 05-06750

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Francisco Mendez, Esq., Department Counsel

FOR APPLICANT

Javier N. Maldonado, Esq.

SYNOPSIS

Applicant was arrested for public intoxication in 1983 but not charged. He was convicted of driving while intoxicated (DWI) in 1998. He was terminated from his job in January 2005 because he consumed a decongestant containing alcohol before coming to work. He did not disclose his alcohol-related termination on his security clearance application (SF 86) or when initially interviewed by a security investigator. Applicant refuted the allegations regarding personal conduct and criminal conduct. He mitigated the security concern based on alcohol consumption. Clearance is granted.

STATEMENT OF THE CASE

On November 4, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. The SOR alleges security concerns under Guidelines G (Alcohol Consumption), E (Personal Conduct), and J (Criminal Conduct). Under Guideline G, it alleges excessive consumption of alcohol from 1983 to January 2005 (¶ 1.a), an arrest in May 1983 for public intoxication (¶ 1.b), an arrest and conviction for drunk driving in April 1998 (¶ 1.c), and a termination from employment for reporting to work under the influence of alcohol (¶ 1.d). Under Guidelines E and J, it alleges Applicant committed a felony (¶ 3.a) when he intentionally failed to disclose his alcohol-related termination on his SF 86 (¶ 2.a) and during an interview with a security investigator (¶ 2.b).

Applicant answered the SOR in writing on November 17, 2005, admitted the allegation in ¶ 1.a in part, admitted ¶ 1.c, denied the remaining allegations, offered explanations, and requested a hearing. The case was assigned to an administrative judge on January 23, 2006, and reassigned to me on February 6, 2006, based on workload considerations. On February 13, 2006, DOHA issued a notice of hearing setting the case for March 28, 2006. The case was heard as scheduled. DOHA received the transcript (Tr.) on April 7, 2006.

PROCEDURAL RULING

At the hearing, I granted Department Counsel's motion to amend SOR ¶ 1.d by deleting the last sentence, which alleged Applicant's blood-alcohol level on which his termination of employment was based exceeded the state's permissible level for operating a motor vehicle.[(1)]

FINDINGS OF FACT

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

Applicant is a 44-year-old electrician. He has been selected for employment as a site electrician for a State Department contractor, contingent upon having or obtaining a security clearance. He has never held a clearance.

Applicant is highly regard by members of his community and his current employer. A retired Air Force colonel who has known Applicant and his family for eight years regards him as "a dedicated family man, hard worker and patriot," who is "extremely trustworthy, loyal to his family and friends and to his country."[(2)] A local business owner regards Applicant as honest and hard working, and was impressed by "his upbeat attitude, his obvious pride in our country, and his genuine compassion for his family and friends."[(3)] A local property manager who has employed Applicant as an electrician and known him for about 12 years respects him for his workmanship and timeliness.[(4)] A member of Applicant's church considers him "a loyal citizen, a strong family man, church volunteer worker," and states he has a reputation as "a fine electrician."[(5)] Another member of his church considers him "a conscientious and patriotic person with very high morals and character traits."[(6)] Applicant's current supervisor regards him as a knowledgeable electrician and a dedicated, conscientious, and hard-working employee.[(7)]

On April 25, 2005, Applicant executed a SF 86 in preparation for his new job. He answered "yes" to question 20, asking if he had quit a job in lieu of being fired, left a job by mutual agreement following allegations of misconduct, left a job by mutual agreement following allegations of unsatisfactory performance, or left a job for some other reason under unfavorable circumstances. He disclosed he left a job in December 2002 by mutual agreement following allegations he was disrespectful to a client.[(8)] He also answered "yes" to question 24, asking if he had ever been charged with or convicted of any offenses related to alcohol or drugs, and he disclosed a conviction of driving while intoxicated (DWI)

in March 1998.[9]

In his answer to the SOR and at the hearing, Applicant admitted consuming alcohol on a regular basis but he denied abusing it. He specifically denied the allegation in SOR ¶ 1.a that he "consumed alcohol, at times to excess and to the point of intoxication, from at least 1983 to at least January 2005." He testified: "I don't do that. That's just not my nature."[10]

In an interview with a security investigator on May 22, 2005, Applicant stated he had not been involved in any alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition.[11] On May 25, 2005, an investigator interviewed one of Applicant's previous employers and was informed he was fired in January 2005 for coming to work intoxicated. The employer stated two managers noticed that Applicant smelled of alcohol, and they took him to a laboratory where he was given a blood-alcohol test that showed a level higher than the state allows for operating a motor vehicle.[12] The employer would not permit the investigator to examine the file, nor would he disclose the identity of the two managers.[13] The employer refused to permit interviews of Applicant's co-workers due to possible "ramifications of a termination."[14] The investigator believed the employer's representative, but found him guarded and uncomfortable. He suspected the employer was concerned about a lawsuit.[15]

Applicant had not disclosed this incident on his SF 86, nor had he mentioned it during the interview with the security investigator on May 22, 2005.[16] The investigator testified he did not interview Applicant again after discovering the information about his undisclosed job termination.[17] The investigator's report is dated May 26, 2006.[18]

At Applicant's request, his former employer provided a letter and a copy of the blood-alcohol test, which showed that his blood-alcohol level on January 14, 2005, was determined to be .016, well below the legal limit for operating a motor vehicle. The company's letter stated the allegation in the SOR regarding his blood-alcohol level was incorrect.[19]

Applicant testified he had been suffering from the flu and took a non-prescription decongestant on the morning of January 14, 2005. It contained alcohol. He went to work at 7:00 a.m., was summoned to a meeting at 10:00 a.m., and informed he was suspected of consuming alcohol on the job. He drove himself to the laboratory and submitted to a breathalyzer, which reflected a blood-alcohol level of .016. He returned to work, met with his supervisors, and was informed his alcohol level was twice the legal limit for driving in the state. He pointed his alcohol level was "seven times under the legal limit." His supervisor responded that the company has a "zero-tolerance policy."

Applicant then met with the human resources (HR) director and told him he did not want his work record to reflect an alcohol-related termination. Applicant offered to submit an unqualified resignation, and the HR director agreed his records would not reflect an alcohol-related termination if he resigned. He told the HR director, "You can put they

suspected it, and I took the blood test, and then people can draw their own conclusion from that test."[(20)]

Applicant submitted his letter of resignation and accepted another offer of employment he had received a couple of weeks previously. The record contains no documents from the company reflecting his termination or its characterization.[(21)] Applicant provided a copy of his letter of resignation dated January 14, 2005, reciting that his resignation "is in order to pursue other opportunities," and stating, "The terms of my departure are amicable."[(22)]

Applicant testified the investigator called him a couple of times during the week following the formal interview to verify information.[(23)] Near the end of the week, the investigator came to his house and told him that his previous employer said there was a problem with alcohol. Applicant testified he told the investigator there was no alcohol problem, but someone said they smelled alcohol, he took a breathalyzer test, and he passed it.[(24)] He told the investigator he did not list his termination of employment on his SF 86 because it was not an alcohol-related termination and he was assured by the HR director that his records would not reflect an alcohol-related termination.[(25)] He testified the conversation was short, outside his house, and lasted only for a few minutes.[(26)]

At the hearing, Applicant testified he had consulted with several medical doctors in preparation for a lawsuit against his former employer.[(27)] He was adamant that he resigned from his job, did not leave under unfavorable conditions, and was not terminated for alcohol-related reasons. During cross-examination by department counsel, he would not budge from that position. He admitted he was told he would be fired for violating the zero-tolerance policy, and he admitted he responded by saying he would resign, but he insisted those circumstances did not constitute "leaving a job by mutual agreement following allegations of misconduct."[(28)]

During the interview on May 22, 2005, Applicant disclosed an arrest for public intoxication in 1983. The investigator was unaware of that arrest until Applicant disclosed it.[(29)] The arrest was corroborated by a search of public records, which reflect that he was arrested and then "released outright."[(30)] In his answer to the SOR, Applicant admitted he was arrested but denied he was intoxicated. He explained that he and several others were arrested after a fight occurred at a dance. He was released shortly after his arrest. No breath or sobriety tests were administered, and he was not charged.[(31)]

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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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).

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 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, conditions 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; *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 incidents away from work, such as driving under the influence. Directive ¶ E2.A7.1.2.1.

SOR ¶ 1.a, alleging excessive alcohol consumption between 1983 and January 2005, duplicates ¶¶ 1.b, 1.c, and 1.d. When the same conduct is alleged twice under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. *See* ISCR Case No. 03-04704 (App. Bd. Sep. 21, 2005) at 3 (same debt alleged twice). Accordingly, I resolve SOR ¶ 1.a in Applicant's favor.

The information regarding Applicant's arrest for public intoxication in March 1983 is sparse. Applicant denied he was intoxicated on that occasion. There is no evidence of a sobriety test or blood-alcohol test. The official records reflect he was "released outright." The sparse records and Applicant's testimony indicate he was swept up with a number of individuals as a result of a disturbance at a dance and then released shortly thereafter without being charged. I conclude Applicant has refuted the allegation in SOR ¶ 1.b., and I resolve it in his favor.

Applicant admitted his conviction of DWI in April 1998. This conviction, alleged in SOR ¶ 1.c is sufficient to establish DC 1.

A disqualifying condition (DC 2) also may arise if there are "[a]lcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job." Directive ¶ E2.A7.1.2.2. Applicant admitted consuming a non-prescription medication containing alcohol. There is no evidence of his employer's policy, if any, regarding consumption of medications containing alcohol while on the job. Applicant denied being impaired, and there is no evidence he was impaired. The only evidence was that two unidentified "managers" smelled alcohol and a breathalyzer showed a blood-alcohol level of .016. His employer mistakenly believed his blood-alcohol level exceeded the level permitted for operating a motor vehicle, until Applicant pointed out the mistake.

There is no evidence of the minimum permissible level of blood-alcohol concentration under the employer's "zero tolerance" policy. The government presented no evidence of the physiological implications of a blood-alcohol level of

.016, nor did it present any evidence of safety standards for electricians with respect to alcohol consumption or blood-alcohol levels. However, Applicant produced evidence of the standard employed by the U.S. Department of Transportation (DOT), Federal Motor Carrier Safety Administration, which does not allow drivers to perform "safety-sensitive functions" if their blood-alcohol concentration is 0.02 or higher.[(32)] Under the DOT standard, Applicant would not have been considered impaired. Nevertheless, I conclude Applicant's termination of employment was "alcohol-related," notwithstanding the fumbling manner in which it appears to have been accomplished. Thus, I conclude DC 2 is established.

Security concerns based on alcohol consumption can be mitigated (MC 1) by showing that "[t]he alcohol-related incidents do not indicate a pattern." Directive ¶ E2.A7.1.3.1. Applicant refuted the allegation of an alcohol-related incident in 1983, but the DWI in 1998 and the alcohol-related termination in January 2005 were established by substantial evidence. However, these two incidents do not indicate a "pattern." They were almost seven years apart and factually dissimilar. The former involved intentional consumption of alcoholic beverages that resulted in impairment. The latter involved an unwise consumption of an alcoholic medication that produced a low blood-alcohol level. I conclude MC 1 is established.

Security concerns under this guideline also can be mitigated (MC 2) by showing "[t]he problem occurred a number of years ago and there is no indication of a recent problem." Directive ¶ E2.A7.1.3.2. Applicant's DWI was eight years ago and there is no evidence of recurrence. I conclude MC 2 is established for the 1998 offense but not for the job termination in 2005.

Several of the general adjudicative guidelines are relevant to Applicant's conduct in January 2005. The conduct alleged, on-the-job alcohol consumption by an electrician, is serious. Directive ¶ E.2.2.1.1. However, what actually occurred is less serious because of the low blood-alcohol level and absence of evidence of impairment.

The circumstances surrounding Applicant's conduct are somewhat mitigating. Directive ¶ E2.2.1.2. Applicant's blood-alcohol level was not the product of social drinking, but a result of his unwise effort to obtain relief from flu symptoms. His testimony indicates he knew the decongestant contained alcohol, but it is unclear whether he knew how much, if any, he could safely consume before going to work.

Applicant's conduct was recent, but not frequent. Directive ¶ E2.2.1.3. His consumption of alcoholic medication before going to work appears to have been a one-time occurrence. He was a mature adult and experienced electrician when the conduct occurred. Directive ¶ E2.2.1.4. He voluntarily consumed the alcoholic medication, although it is not clear whether he was aware of its effects. Directive ¶ E2.2.1.5. His motivation was relief from flu symptoms, not personal enjoyment, stress relief, or other motivations usually associated with alcohol consumption. Directive ¶ E2.2.1.7. His conduct did not expose him to potential pressure, coercion, exploitation, or duress, because it was documented in his personnel file and he readily disclosed it when questioned. Directive ¶ E2.2.1.8.

Finally, the likelihood of recurrence is very low. Directive ¶ E2.2.1.9. Notwithstanding one employer's effort to terminate him, Applicant enjoys a reputation as a capable, conscientious, and hard-working electrician. It was clear from his testimony and demeanor at the hearing that he understands the adverse consequences of alcohol-related misconduct on the job and has no desire to repeat his January 2005 experience.

After considering the disqualifying and mitigating conditions and evaluating the evidence in the context of the whole person, I conclude Applicant has mitigated the security concern based on alcohol consumption.

Guideline E (Personal Conduct)

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1. A disqualifying condition (DC 2) under this guideline may be established by "deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities." Directive ¶ E2.A5.1.2.2. A disqualifying condition (DC 3) also applies when an applicant deliberately provides false or misleading information concerning relevant and material matters to an investigator or security official in connection with a personnel security or trustworthiness determination. Directive ¶E2.A5.11.2.3.

When a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time the omission occurred. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

Applicant disclosed an employment termination under unfavorable circumstances on his SF 86, disclosing his resignation after being accused of discourteous conduct. He also disclosed his 1998 DWI conviction. During the security interview, he voluntarily disclosed his 1983 arrest for public intoxication. These disclosures suggest candor and lack of intent to conceal derogatory information.

There is a facial conflict in the evidence, in that the security investigator testified he did not interview Applicant again after learning of the alcohol-related job termination, but Applicant described several subsequent conversations with the investigator regarding what the employer had told the investigator. The investigator was available as a rebuttal witness after Applicant testified, but he was not recalled to contradict Applicant's testimony.

I have concluded that Applicant's testimony is consistent with the investigator's. The initial interview was on May 22, 2005, a Sunday. Applicant testified there were several telephone conversations and a brief personal interview outside Applicant's house "at the end of the week." The investigator learned of the alcohol-related job termination on May 25, 2005. The investigator's report is dated May 26, 2005, a Thursday. What appears to have occurred are several brief follow-up inquiries between May 22 and May 26, concluding with a brief conversation on May 26 about the alcohol-related termination, after which the investigator completed his report. It appears that none of these follow-up inquiries rose to the level of what the investigator would have considered a second formal interview.

I have considered the possibility that Applicant chose to disclose the earlier, less serious events but intentionally omitted the more recent and serious alcohol-related termination, hoping the HR director for his former employer would adhere to their oral agreement to not characterize the event as alcohol-related. However, after considering all the evidence, I have reached a contrary conclusion.

I am satisfied Applicant should have disclosed his termination by a previous employer on his SF 86 and during his interview with the security investigator. The evidence regarding this incident is sparse because of the employer's refusal to cooperate with the security investigator, but it establishes Applicant was suspected of alcohol-related misconduct on the job. It is not clear whether he was suspected of being impaired, drinking on the job, or both. The evidence also establishes that he and his employer agreed that he would resign, and that the evidence of his 0.016 alcohol concentration would remain in his file so that future employers could make their own judgments about the evidence. Applicant was well aware of the potential adverse consequences of being terminated for an alcohol-related incident on the job, and he believed he had negotiated a solution to avoid those adverse consequences.

However, based on his testimony, his responses and demeanor during vigorous cross-examination, and all the evidence in the record, I am also satisfied Applicant does not understand that a baseless or unfounded allegation of misconduct followed by a mutually agreeable termination of employment must be disclosed in response to question 20 on the SF 86. In his mind, if there was no misconduct, there is no duty to disclose. He believed he had resigned under "amicable" conditions. He did not believe his separation from employment was included in the scope of question 20 on the SF 86. I conclude Applicant did not intentionally omit relevant and material facts from his SF 86 or during his interview with the security investigator. Accordingly, I conclude DC 2 and DC 3 are not established, and I resolve SOR ¶¶ 2.a and 2.b. in his favor.

Guideline J (Criminal Conduct)

The criminal conduct alleged in SOR ¶ 3.a is the same conduct alleged under ¶¶ 2.a and 2.b, which are resolved in his favor. Applicant refuted the allegations of intentional falsification. Accordingly, SOR ¶ 3.a is resolved in Applicant's favor.

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

Paragraph 2. Guideline E (Personal Conduct): FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

Paragraph 3. Guideline J (Criminal Conduct): FOR APPLICANT

Subparagraph 3.a: For 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 Applicant a security clearance. Clearance is granted.

LeRoy F. Foreman

Administrative Judge

1. Hearing Exhibit (HX) I; Tr. 15-16.

2. Applicant's Exhibit (AX) A.

3. AX B.

4. AX C.

5. AX D.

6. AX E.

7. AX F.

8. Government Exhibit (GX) 1 at 8.

9. *Id.* at 9.

10. *Id.*

11. GX 2 at 12.

12. GX 2 at 3.

13. Tr. 29, 34.

14. GX 2 at 4.

15. Tr. 42, 47-48.

16. Tr. 26.

17. Tr. 30-31.

18. *Id.* at 1.

19. Answer to SOR at 1, 5.

20. Tr. 58.

21. Tr. 55-58.

22. Answer to SOR at 6.

23. Tr. 59.

24. *Id.*

25. Tr. 60, 79.

26. Tr. 76-77.

27. Tr. 69.

28. Tr. 72-75.

29. Tr. 46.

30. GX 2 at 8.

31. *Id.*; Answer to SOR at 2.

32. 49 CFR Ch. III, § 382.307(e)(2), attached to the record as HX II.