

KEYWORD: Personal Conduct; Alcohol; Criminal Conduct

DIGEST: Applicant has been charged with numerous criminal offenses, many of them alcohol related, and is currently serving a sentence of probation following his October 2005 conviction for driving while intoxicated. He deliberately omitted required information from a security clearance application he submitted in November 2002. Applicant has failed to mitigate the security concerns that exist in this case. Clearance is denied.

CASENO: 03-26243.h1

DATE: 02/27/2006

DATE: February 27, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-26243

**DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant has been charged with numerous criminal offenses, many of them alcohol related, and is currently serving a sentence of probation following his October 2005 conviction for driving while intoxicated. He deliberately omitted required information from a security clearance application he submitted in November 2002. Applicant has failed to mitigate the security concerns that exist in this case. Clearance is denied.

**STATEMENT OF THE CASE**

On February 22, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was 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 J (criminal conduct), Guideline E (personal conduct), and Guideline G (alcohol consumption). Applicant submitted an answer to the SOR that was received by DOHA on March 21, 2005, admitted all SOR allegations except subparagraphs 2.a, 2.c, 2.d, and 2.e, and requested a hearing.

The case was assigned to me on August 26, 2005. A notice of hearing was issued on October 3, 2005, scheduling the hearing for October 25, 2005. The hearing was conducted as scheduled. The government submitted 14 documentary exhibits that were marked as Government Exhibits (GE) 1-14, and admitted into the record without objection. Applicant testified but did not submit any other evidence. The transcript was received on November 9, 2005.

## FINDINGS OF FACT

Applicant's admissions to the SOR allegations 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 33-year-old man who has been employed by defense contractors as a mechanic since September 2002. He was previously employed as a loom technician from December 1995 until September 2001, and was unemployed from September 2001 until September 2002. He has never been married.

Applicant graduated from high school in 1992. He was charged with passing two fraudulent checks in July 1993, and was required to make restitution and pay court costs. He entered on active duty in the U. S. Air Force in November 1993, and received a General Discharge (under honorable conditions) in September 1995. The basis for his early discharge was misconduct due to his having received a letter of reprimand and multiple punishments pursuant to Article 15, Uniform Code of Military Justice.

Applicant's first Article 15 was for the offense of Drunk and Disorderly toward Law Enforcement Personnel committed on March 23, 1995. He received a letter of reprimand, forfeited \$400.00 pay per month for two months, was required to perform extra duties for 45 days, and was reduced one rank (suspended). Applicant was again charged with being Drunk and Disorderly on April 16, 1995, and the suspended reduction in rank was vacated. Applicant also received a letter of reprimand on April 16, 1995, for making racially disparaging comments toward another airman after he had consumed alcohol.

On May 8, 1995, Applicant again received Article 15 punishment for the offenses of Resisting Apprehension, Disrespect to Sentinel, and Disorderly Conduct/Drunkness committed on April 30, 1995. He was ordered to forfeit \$427.00 pay per month for two months (suspended), reduced one rank (suspended), and restricted to specified limits aboard a military installation. Applicant was also required to attend an outpatient alcohol program in 1995.

Applicant was charged with Driving Under Suspension (Second) on November 17, 1995. He was convicted and placed on probation for one year, ordered to serve 60 days confinement, and was fined \$500.00 (\$250.00 suspended).<sup>(2)</sup> In 1996, Applicant was convicted of Simple Possession of Marijuana and ordered to pay a fine in the amount of \$376.00. He was charged with Driving Under the Influence (DUI) and Driving Under Suspension in December 1997. He pled guilty to Driving Under Suspension, and a jury acquitted him of the DUI charge.

Applicant was charged with Malicious Damage to Personal Property, Breach of Peace, and five counts of Fraudulent Check in February 2001, after he threw an object and broke someone's window during an argument. He was convicted of the damage to property charge and sentenced to serve 30 days in jail and pay a fine in the amount of \$1,025.00. He actually served about 15 days in jail.

On November 12, 2002, Applicant was charged with DUI, and other related charges. His blood alcohol concentration (BAC) at the time of this arrest was .202. He failed to appear for trial and was convicted by a jury in October 2005. He was sentenced to probation, ordered to serve 10 days in jail, pay a fine in the approximate amount of \$1,300.00, and is required to attend a MADD program. Applicant is appealing this conviction. Applicant claims to have completely quit drinking alcohol following this arrest.

Applicant executed and submitted a security clearance application (SF 86) in November 2002. In the SF 86, he answered "No" in response to a question asking if he had ever been charged with or convicted of any offense related to alcohol or drugs, and failed to list any of the alcohol and drug related offenses discussed above. He also answered "No" in response to questions asking if he had been over 180 days delinquent on any debts in the preceding seven years, or was currently over 90 days delinquent on any debt.<sup>(3)</sup> At the time he executed the SF 86, Applicant had five accounts that had been submitted for collection and two that had been charged off as bad debts, all of which were at the time currently more than 90 days delinquent, and also fell within the seven-year window that was asked about.

## **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 J (criminal conduct), Guideline E (personal conduct), and Guideline G (alcohol consumption), 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>(4)</sup> The government has the burden of proving controverted facts.<sup>(5)</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence<sup>(6)</sup>, although the government is required to present substantial evidence to meet its burden of proof.<sup>(7)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(8)</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>(9)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(10)</sup>

No one has a right to a security clearance<sup>(11)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(12)</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>(13)</sup>

## CONCLUSIONS

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.

Applicant was arrested, charged with, and convicted of numerous criminal offenses between 1993 and 2005. Additionally, he deliberately provided false answers in the SF 86 he submitted in November 2002, which was executed subject to the criminal penalties imposed by 18. U.S.C. § 1001. Disqualifying Conditions (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.

The last criminal offense Applicant was charged with occurred more than three years ago. However, Applicant was just recently convicted of that offense, is currently serving a sentence of probation for the offense, and is awaiting the outcome of an appeal to find out if he will have to serve a jail sentence. The only evidence he presented of rehabilitation is his unsubstantiated claim to have quit consuming alcohol following that last arrest. However, considering Applicant's multiple alcohol related offenses, his continued alcohol consumption after being referred to an alcohol program while in the Air Force, and his lack of treatment or involvement with alcoholics anonymous or some similar group since the 2002 arrest, I do not find his claim of abstinence credible. I have considered all Guideline J mitigating conditions, and none apply. Guideline J is decided against Applicant.

Under Guideline E, personal conduct is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Applicant received a letter of reprimand while in the Air Force for making derogatory racial remarks to another airman. He was given a general discharge from the Air Force due to his multiple acts of misconduct. He failed to disclose relevant adverse information about his alcohol and drug charges and multiple financial delinquencies in an SF 86 he submitted in November 2002. Applicant's multiple explanations for the omissions from the SF 86 are inconsistent and not credible.

DC 1: *Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances*; DC 2: *The 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; DC 4: *Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation, or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail*; and DC 5: *A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency* all apply. I have considered all Guideline E mitigating conditions, and none apply. Guideline E is decided against Applicant.

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's multiple alcohol related incidents have caused him to receive Article 15 punishment, criminal convictions, and outpatient alcohol treatment. 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* applies.

As discussed earlier, Applicant is currently on probation for his last alcohol related offense, and his claim of abstinence is not credible. Accordingly, Mitigating Conditions (MC) 2: *The problem occurred a number of years ago and there is no indication of a recent problem* and MC 3: *Positive changes in behavior supportive of sobriety* do not apply. The remaining mitigating conditions clearly have no application to the facts of this case. Guideline G 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, Applicant has failed to mitigate the security concern caused by his criminal and personal conduct and alcohol consumption. He has failed to overcome the case against him or 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 J: Against Applicant

Subparagraphs a-i: Against Applicant

SOR ¶ 2-Guideline E: Against Applicant

Subparagraphs a-e: Against Applicant

SOR ¶ 3-Guideline G: Against Applicant

Subparagraphs a-c: 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 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. This finding of fact is based solely on Applicant's admission to SOR subparagraph 1.d.
3. The SOR incorrectly states that the 90-day delinquent debt question in the SF 86 inquires about debts that had been so delinquent within the preceding seven years.
4. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
5. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
6. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
7. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
8. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
9. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

10. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15

11. *Egan*, 484 U.S. at 528, 531.

12. *Id* at 531.

13. *Egan*, Executive Order 10865, and the Directive.