

KEYWORD: Alcohol

DIGEST: Applicant was arrested in 2000 after being given a field sobriety test and in 2003 for driving under the influence of alcohol (DUI). As a result, he was convicted of an unknown offense in 2000 and DUI in 2003. Applicant made positive changes supportive of sobriety and has not had any alcohol-related incidents in more than three years. Clearance is granted.

CASENO: 03-26702.h1

DATE: 04/10/2006

DATE: April 10, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-26702

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

James A. Kridel Jr., Esq.

SYNOPSIS

Applicant was arrested in 2000 after being given a field sobriety test and in 2003 for driving under the influence of alcohol (DUI). As a result, he was convicted of an unknown offense in 2000 and DUI in 2003. Applicant made positive changes supportive of sobriety and has not had any alcohol-related incidents in more than three years. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. In accordance with Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan 2, 1992), as amended, DOHA issued a Statement of Reasons (SOR) on 9 September 2005 detailing the basis for its decision—security concerns raised under Guideline G (Alcohol Consumption) of the Directive. Applicant answered the SOR in writing on 5 October 2005 and elected to have a hearing before an administrative judge. The case was assigned to me on 28 November 2005. On 22 February 2006, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on 3 March 2006.

FINDINGS OF FACT

Applicant is a 33-year-old data manager (senior analyst) for a defense contractor. Applicant is six feet-two inches tall and weighs 220 pounds. Ex. 1 at 1. Since he began his current employment he has met or exceeded all standards of performance. Exs. A, B. He currently resides with his fiancée in her parent's home. Tr. 34.

In June 2000, Applicant drove his sister and his girlfriend home from a concert, at which, according to his testimony, he had consumed a total of three beers-one before the concert and two during the three-hour concert. Tr. 39-40. On the way home, Applicant was stopped by police. He believes it was for "swerving" or "driving erratically." Tr. 41. He was given field sobriety tests. The police officer then took Applicant to the station. His girlfriend had to drive his sister home. He was eventually charged with an offense, but asserts he is unsure of the exact charge. At trial, he was represented by an attorney. He pled guilty to an offense; he testified he thinks his guilty plea was to reckless driving, but he is not sure. Tr. 44; Ex. 3 at 2-3. His driving privileges were revoked in that state for six months.

Applicant went to work for the defense contractor in November 2002. On 4 December 2002, he completed a security clearance application (SCA) by certifying that his answers were "true, complete, and correct" to the best of his knowledge and belief and acknowledging that a knowing and willful false statement could be punished by fine and/or imprisonment. Ex. 2 at 9. Question 24 asked if Applicant had ever been charged with or convicted of any offenses related to alcohol. Applicant answered "yes," and listed a June 2000 DUI (driving under the influence of alcohol) that resulted in "loss of license for 6 months." Ex. 2 at 7.

In January 2003, Applicant was arrested for driving while intoxicated (DWI). He and a friend, Rob, had gone to a club to see friends and listen to a band. Rob drove and was to be the designated driver. Applicant testified he consumed approximately five beers between 8:00 p.m. and 10:30 p.m. He wanted to leave, but found Rob was intoxicated and in no condition to drive home. So Applicant drove to a diner where they had food and coffee. After about an hour and one-half, Applicant started the drive home. About an hour later, shortly before he arrived home, Applicant was stopped by police "due to erratic driving patterns." Ex. 3 at 2. The officer smelled alcohol on Applicant's breath and had him perform field sobriety tests. Applicant failed the tests and was arrested for DUI. In March 2003, Applicant pled guilty and was convicted of DUI. His driver's license was revoked for six months; he was also fined, and ordered to attend a two-day, twelve-hour alcohol education course. *Id.*; Tr. 48-60.

In October 2003, Applicant was interviewed by a special agent of the Defense Investigative Service (DIS) concerning his SCA. Apparently, based on Applicant's SCA, the DSS agent had investigated Applicant's record and found no evidence he had ever been arrested for or convicted of DUI in 2000. After being so advised, Applicant completed a signed, sworn statement in which he stated that to the best of his knowledge he had not been arrested in May 2000 for driving while intoxicated (DWI), but was issued a "summons for reckless driving." Ex. 3 at 3.

In his Answer to the SOR, Applicant "agreed" with the allegation in the SOR ¶ 1.b that he had been "arrested in June 2000 . . . and charged with Driving Under the Influence," but disagreed that his driver's license was revoked for six months. At the hearing, Applicant was unsure of what he was arrested for, charged with, or convicted of.

Since his 2003 arrest, he has had no alcohol-related arrests or incidents. On occasion he does have a beer or a glass of wine with dinner. He does not drink if he is going to drive.

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 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). 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.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. 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.

CONCLUSIONS

In the SOR, DOHA alleged Applicant consumed alcohol to the point of intoxication from at least 2000 to October 2003 (¶ 1.a); was arrested in June 2000 for DUI and consequently had his driver's license revoked for six months (¶ 1.b); and pled guilty to DUI after a January 2003 arrest (¶ 1.c). In his answer, Applicant denied he drinks to excess; denied his driver's license had been revoked for six months as a result of his June 2000 arrest; but agreed with the rest of the allegations. 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.

The state of the evidence in this case raises issues regarding the burden of proof. Applicant admitted in his SCA that he had been charged with or convicted of DUI in June 2000. In his Answer, he admitted being arrested for and charged with DUI. But in his statement to the DIS agent and at the hearing, he claimed he was not sure what he was charged with or convicted of on that occasion, but he did not think it was DUI. In such a case, who has the burden of establishing

whether he was charged with or convicted of DUI as alleged in the SOR?

An applicant is required to "submit a detailed written answer to the SOR . . . that shall admit or deny each listed allegation." Directive ¶ E3.1.4. At the hearing, "Department Counsel is responsible for presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted." Directive ¶ E3.1.14. "The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." Directive ¶ E3.1.15. To the extent an applicant's answer admits an SOR allegation, there is no controverted allegations which Department Counsel had the burden of proving. ISCR Case No. 99-0424, 2001 WL 675725 (App. Bd. Feb. 8, 2001) (citing Directive ¶ E3.1.14).

After carefully considering all of the evidence, I conclude the evidence is sufficient to show Applicant was arrested for DUI in June 2000. Regardless, the issue in this case is whether Applicant was involved in an alcohol-related incident. I conclude he was.

The Government's evidence established potentially disqualifying conditions under Guideline G. Applicant drank to the point of intoxication between 2000 and 2003 and was involved in two alcohol-related incidents away from work. It is potentially disqualifying for an applicant to be involved in alcohol-related incidents away from work. DC E2.A7.1.2.1.

An applicant may mitigate alcohol consumption security concerns by demonstrating that the alcohol-related incidents occurred a number of years ago and there is no indication of a recent problem (MC E2.A7.1.3.2), and he has made positive changes supportive of sobriety (MC E2.A7.1.3.3). After carefully reviewing all of the evidence, the disqualifying and mitigating conditions, as well as the adjudicative process factors, I find for Applicant. There were two incidents in a three-year period and the last incident was more than three years ago. Applicant has matured, is committed to sobriety, and does not drink and drive any more. He understands the seriousness of excessive alcohol consumption and its possible ramifications on his ability to maintain a security clearance. Under the circumstances, I find for Applicant.

FORMAL FINDINGS

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

Paragraph 1. Guideline G: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

DECISION

In light of all of the circumstances in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

JAMES A. YOUNG

Administrative Judge