

KEYWORD: Criminal Conduct; Alcohol

DIGEST: Over a period of 20years, Applicant was involved in nine alcohol-related incidents. Applicant is still on probation for his sixth DUI conviction. Though Applicant is beginning to understand his periodic, excessive consumption of alcohol is his primary problem, there is too much evidence of denial and minimization regarding his abstinence and a future of sobriety to warrant access to classified information at this time. Clearance is denied.

CASENO: 04-00411.h1

DATE: 11/29/2005

DATE: November 29, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-00411

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Nichole Noel, Esq., Department Counsel

FOR APPLICANT

D. Alan Mann, Esq.

SYNOPSIS

Over a period of 20 years, Applicant was involved in nine alcohol-related incidents. Applicant is still on probation for his sixth DUI conviction. Though Applicant is beginning to understand his periodic, excessive consumption of alcohol is his primary problem, there is too much evidence of denial and minimization regarding his abstinence and a future of sobriety to warrant access to classified information at this time. Clearance is denied.

STATEMENT OF CASE

On March 1, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6, dated January 2, 1992, as reissued through Change 4 thereto, dated April 20, 1999, issued a Statement of Reasons (SOR) to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. On March 21, 2005, Applicant responded to the SOR and requested a hearing before an Administrative Judge.

The case was assigned to me on June 13, 2005. On June 14, 2005, this case was set for hearing on June 30, 2005. The Government submitted ten exhibits, and Applicant submitted two exhibits. Testimony was taken from Applicant and three witnesses. The transcript (Tr.) was received on July 19, 2005.

RULINGS ON PROCEDURE

At the hearing, the Government moved to amend subparagraph 1.e by requesting the referenced city be changed from "incorrect city" to "correct city." Applicant's counsel had no objection to the change. (Tr. 7) Pursuant to E3.1.17. of the Directive, the motion to change subparagraph 1.e. was granted. (Tr. 64)

FINDINGS OF FACT

The SOR alleges criminal conduct and alcohol abuse. Applicant admitted all factual allegations. He originally denied subparagraph 1.e. because the allegation cited the wrong city. He initially denied subparagraph 1.j. because he did not think he had been charged with a felony. After the change was made in subparagraph 1.e, and on realizing under subparagraph 1.j. he had been charged with a felony, Applicant admitted both allegations. Applicant is 40 years old and was hired as a technician by his current employer in 1993. After a three year hiatus in 2000 in another line of work, Applicant returned as a technician to his current employer in January 2003.

Between 1982 to 1988, Applicant claimed he was consuming about 12 beers on the weekend and reaching intoxication three times a year. Applicant was 18 years old when he pled guilty to his first alcohol-related (public intoxication) incident in April 1983 (subparagraph 1.a.). Before the arrest, he had consumed seven or eight glasses of beer at a party. He wanted to challenge the charge but did not want to spend the money for an attorney. A month later, Applicant was arrested for Driving while under the Influence of Liquor (DUI) and (2) Illegal Possession of Alcohol (subparagraph 1.b.). He was intoxicated when he was stopped by the police for having fog lights that were too bright. After failing a blood alcohol test, Applicant was arrested. He was found guilty, sentenced to 10 days in jail; the sentence was suspended. Applicant was ordered to pay a \$200.00 fine and attend a highway intoxication seminar.

In May 1984, Applicant was arrested for Violation of [state] Uniform Controlled Substances Act (subparagraph 1.c.). He was found guilty and ordered to pay a \$300.00 fine. In July 1984 (subparagraph 1.d.), Applicant had consumed five or six beers, and was in a parking lot talking to friends when the police arrested him for Public Intoxication (subparagraph 1.d.). He was fined \$50.00. In August 1984, arrested for and found guilty of DUI (subparagraph 1.e.). He was ordered to serve 2 days of a 30 day sentence, placed on 2 years probation, and ordered to pay a \$500.00 fine. In July 1985, Applicant had consumed eight beers and was charged with DUI (subparagraph 1.f.), found guilty and fined \$500.00.

In January 1988, Appellant was charged with (1) DUI and (2) Speeding (subparagraph 1.g.). Applicant had consumed some liquor and about five beers. He was stopped for speeding after passing another car he believed was going too slowly for the conditions. Applicant was administered four blood alcohol tests but was taken to the police station and charged after failing the field sobriety test. He was found guilty of DUI, and sentenced to 160 days with 100 days suspended. On appeal, Applicant pled to the same charge but the sentence was amended to 158 days suspended, with a \$1,000.00 fine. Applicant was placed on two years probation and his license was suspended for three years. The speeding charge was dismissed.

In April 1998, Applicant was charged with Assault-Reckless Endangerment (subparagraph 1.h.) and (2) Attempting to Flee or Elude the Police. Applicant recalled speeding part of the way home from a bar where he had been drinking with friends. When he arrived in front of his house the police arrested him. He was speeding but he did not remember any police behind him. (u) He pled guilty and was fined \$100.00. In October 1998, Applicant was arrested for DUI. (subparagraph 1.i.). He had been drinking all day at a racetrack all day with his wife. They began to argue on his way home, and he was stopped for changing lanes. After the police officer smell alcohol on him, he was charged with DUI even though he believed he passed the field sobriety test. After pleading guilty to DUI, Applicant was fined, his license was suspended, and he was placed on probation for six months.

On October 19, 2003, Applicant was charged with DUI (subparagraph 1.j.), a felony (GE 10). In the police report, he told the arresting officers he hit a utility pole after he swerved to avoid a car that had suddenly moved into his lane. In his sworn statement, however, he said he fell asleep and hit the pole. On December 6, 2004, Applicant was sentenced to 270 days confinement, sentence suspended, and placed on two years active probation. He was ordered to pay an \$1,100.00 fine and court referral assessments. His license was suspended for one year.

Applicant attended the victims impact panel on March 17, 2005. He completed the court-ordered Level II alcohol education course on May 2, 2005, and the 24 Alcoholics Anonymous (AA) meetings on May 5, 2005. He anticipates being discharged from unsupervised probation in October 2006 (Tr. 72).

Applicant blames his early alcohol problems on the youthful indiscretions of a teenager and young adult. He encountered no alcohol-related problems from 1988 to 1998 because he did not drink and drive. Applicant explains his alcohol problems between 1998 and October 2003 as having

had too much to drink before driving. After completing his court-ordered education programs, Applicant elaborated on program's impact on him. He testified:

Well, it made me realize, you know, that drinking and driving is not something you need to do.

But it also made me realize that I don't have a drinking problem like most of the people in there. I just have used bad judgment in driving. And, you know, I participated in those classes and I've got a lot of good use out of it (Tr. 56).

Concerning his AA attendance, Applicant first stated he completed the court-ordered AA meetings and plans to resume attendance once his sons' baseball season has concluded (Tr. 72). Yet on page 78, Applicant described his AA attendance as ongoing based on the recommendation from the AA organizers. Applicant has no sponsor. He has worked through 5 steps of the 12 step program. Applicant also attends church.

Regarding his future alcohol use, Applicant testified, "Definitely not drink and drive. Like I said, I've had a couple of beers with a dinner, but besides that, that's it. Basically, don't drink is the way I'm looking at it" (Tr. 60). In his answer to the SOR, Applicant never talked about not drinking altogether. Rather, he stated he was not going to drink and drive in the future.

Applicant's direct supervisor mentioned three of many temporary duty locations he and Applicant have traveled to carry out work assignments. His supervisor has never seen Applicant using alcohol on the job. The supervisor recommends Applicant for a security clearance. The president has known Applicant for about 12 years, and sees him 2 days a week on the job. Even though the president is aware of Applicant's alcohol problems, he chose to keep Applicant under contract because he does good work. The government's project coordinator has known Applicant since 1993 and recommends Applicant for a position even after learning about his alcohol record. The vice president of the company believes Applicant is a real problem solver who is committed to resolving his alcohol problems. The coordinating manager believes Applicant is very reliable and is dedicated to accomplishing job projects on time.

POLICIES

Enclosure 2 of the Directive sets forth guidelines containing disqualifying conditions (DC) and mitigating conditions (MC) that should be given binding consideration in making security clearance determinations. These conditions must be considered in every case along with the general factors of the whole person concept. However, the conditions are not automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense.

Burden of Proof

Initially, the government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualifies, or may disqualify, the applicant from being eligible for access to classified information. *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988) "[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. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *See Egan*, 481 U.S. at 531; *see* Directive E2.2.2.

Criminal Conduct (Guideline J)

A history or pattern of criminal conduct demonstrates poor judgment, unreliability and untrustworthiness.

Alcohol Consumption (Guideline G)

Excessive alcohol consumption can lead to poor judgment and increase the risk of unauthorized disclosure of classified information.

CONCLUSIONS

Violating the law demonstrates poor judgment. When an individual engages in a pattern of criminal offenses over a number of years while under the influence of alcohol, he demonstrates extremely poor judgment. Applicant's nine criminal offenses between 1983 and 2003 fall within the scope of criminal conduct (CC) disqualifying condition (DC) E2.A10.1.2.2. (*a single serious crime or multiple lesser offenses*) as exemplifying the 'multiple lesser offenses' portion of the condition. Significantly, Applicant was convicted of DUI five times between 1983 and 1988, and two times between 1998 and October 2003.

There are three mitigating conditions (MC) under the CC guideline that are potentially applicable to the circumstances of this case. CC MC E2.A10.1.3.1. (*the criminal behavior was not recent*) does not apply as the most recent alcohol-related offense occurred less than two years ago. CC MC E2.A10.1.3.2. (*the crime was an isolated incident*) is inapplicable as Applicant committed three alcohol-related offenses in a five year period ending in October 2003.

CC MC E2.A10.1.3.6. (*there is clear evidence of successful rehabilitation*) applies to mitigate when the evidence shows the individual has taken appropriate, remedial measures to stop the adverse conduct from happening again. Applicant's compliance with his probation conditions weighs in his favor. However, his compliance does not carry the same favorable weight as the time after he is discharged from probation in October 2006, when he does not have to worry about incarceration for a probation violation. Due to the recency and frequency of Applicant's criminal conduct, Applicant's evidence in mitigation does not carry his ultimate burden of persuasion under the CC guideline.

Excessive alcohol consumption (AC) leads to questionable judgment and the risk of unauthorized use or disclosure of classified information. Nine alcohol-related convictions (six DUI convictions) in 20 years constitutes a pattern of adverse conduct within the meaning of AC DC E2.A7.1.2.2. (*alcohol-related incidents away from work*) See, ISCR Case No. 01-22403 (App. Bd. Sept. 5, 2002) Preceding most of the alcohol-related offenses, i.e., Applicant had been drinking all day before the October 1998 DUI, Applicant had consumed significant amounts of alcohol. His excessive use of alcohol calls for the application of AC DC E2.A7.1.2.5. (*habitual or binge consumption of alcohol to the point of impaired judgment*) Drinking all day at the race track in October 1998, and then failing to use his turn indicator in a timely fashion is example of binge consumption culminating in impaired judgment that fortunately did not have tragic results.

Though the first three mitigating conditions under AC are potentially applicable to the circumstances of this case, each must be removed from consideration. As noted earlier in CONCLUSIONS, 9 alcohol-related convictions in 20 years constitutes a pattern of adverse conduct. Therefore, AC MC E2.A7.1.3.1. (*the alcohol-related incidents do not indicate a pattern*) does not apply. Applicant committed six alcohol-related offenses by 1988. While he says he used no alcohol between 1988 to 1991, he was on probation for two of the three years and his license was suspended between 1988 and 1991. Furthermore, Applicant resumed drinking in 1991, leading to the alcohol-related conduct in 1998 and October 2003. The absence of alcohol-related incidents between 1988 and 1998 does not overcome the earlier evidence of alcohol-related behavior as Applicant was continuing to consume alcohol during the period. Unfortunately, the alcohol-related conduct from April 1998 through October 19, 2003 demonstrated Applicant was unable to follow through with his promise in 1993 not to drink and drive.

AC MC E2.A7.1.3.2. (*the problem occurred a number of years ago and there is no indication of a recent problem*) is inapplicable as the most recent alcohol-related incident was less than two years ago. Though Applicant stated in December 2003 that he quit drinking, he has continued to drink. Though the sentencing report dated December 6, 2004, indicates that alcohol consumption is prohibited during the probationary period, Applicant has continued to consume alcohol, albeit a limited quantity. Given Applicant's 20-year history of alcohol-related incidents and periods of excessive alcohol consumption, Applicant's continuation of alcohol use leads me to believe Applicant still has a problem with alcohol.

Since Applicant has made a claim that he has basically stopped consuming alcohol, AC MC E2.A7.1.3.3. (*positive changes in behavior supportive of sobriety*) shall be discussed to determine whether Applicant should receive mitigation under this condition. Positive changes in behavior include fundamental adjustments in lifestyle to support sobriety. Though Applicant states he has quit drinking, his words are discredited by his continued consumption of alcohol even on a limited basis. With no network of support or evidence of a changed lifestyle, Applicant exposes himself to the risk of engaging in future alcohol-related behavior as he has in the past. In sum, Applicant has presented insufficient evidence under the three mitigating conditions to find for him under the AC guideline.

Turning to the general factors of the whole person concept, Applicant's alcohol-related behavior was extremely serious as defined by E2.2.1.1. (*the nature, extent and seriousness of the conduct*). Applicant committed 6 DUI offenses in a 20-year period. While Applicant has successfully complied with the terms of probation, he is just beginning to address the primary cause of his alcohol-related behavior, his drinking. However, at this juncture there is insufficient evidence to find for him under E2.2.1.6. (*the presence or absence of rehabilitation and other pertinent behavioral changes*) Without significant evidence under E2.2.1.6., I am unable to find in Applicant's favor under E2.2.1.9. (*the likelihood of continuation or recurrence*) as Applicant is still on probation for his most recent DUI. Applicant's evidence from the president, vice president, and other employees demonstrates he is a good employee. However, that evidence plus Applicant's statements to his colleagues of his intention to resolve his alcohol problem furnishes little insight into Applicant's present commitment to abstinence that also lacks an external network of support which reinforces sustained sobriety. Accordingly, I find against Applicant under the criminal conduct guideline, the alcohol consumption guideline and the whole person concept. Subparagraph 1.c. is found in Applicant's favor as his use occurred before his 20th birthday without evidence of more recent use. Second, over the years alcohol, not marijuana, has been Applicant's drug of choice.

FORMAL FINDINGS

Formal Findings required by Paragraph 25 of Enclosure 3 are:

Paragraph 1 (Criminal Conduct, Guideline J): AGAINST THE APPLICANT.

subparagraph a. Against the Applicant.

subparagraph b. Against the Applicant.

subparagraph c. For 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.

subparagraph j. Against the Applicant.

Paragraph 2 (alcohol consumption, Guideline G) AGAINST THE APPLICANT.

subparagraph a. Against the Applicant.

subparagraph b. Against he 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.

Paul J. Mason

Administrative Judge

1. After hearing Applicant's version of the circumstances of the events leading to the arrest, it is unclear whether an assault occurred.