

KEYWORD: Alcohol; Personal Conduct; Criminal Conduct

DIGEST: In 1988 and 1998 Applicant was convicted for driving under the influence of alcohol (DUI). In 1998, after complying with all counseling requirements, he failed to attend final face-to-face interviews with his counselor and, therefore, was considered to have failed his rehabilitative treatment program. In 2004, he completed his 1998 treatment program and was given a favorable prognosis retroactive to 1998. In 2002, Applicant mistakenly failed to disclose his 1988 DUI on his SF 86. Applicant mitigated the alcohol consumption, personal conduct, and criminal conduct security concerns raised by his actions. Clearance is granted.

CASE NO: 04-03251.h1

DATE: 05/11/2006

DATE: May 11, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-03251

DECISION OF ADMINISTRATIVE JUDGE

JUAN J. RIVERA

APPEARANCES

FOR GOVERNMENT

Richard A. Stevens, Esq., Department Counsel

FOR APPLICANT

SYNOPSIS

In 1988 and 1998 Applicant was convicted for driving under the influence of alcohol (DUI). In 1998, after complying with all counseling requirements, he failed to attend final face-to-face interviews with his counselor and, therefore, was considered to have failed his rehabilitative treatment program. In 2004, he completed his 1998 treatment program and was given a favorable prognosis retroactive to 1998. In 2002, Applicant mistakenly failed to disclose his 1988 DUI on his SF 86. Applicant mitigated the alcohol consumption, personal conduct, and criminal conduct security concerns raised by his actions. Clearance is granted.

STATEMENT OF THE CASE

On March 29, 2005, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guideline G (Alcohol Consumption), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct). The SOR informed Applicant that, based on information available to the government, DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to grant him access to classified information.⁽¹⁾ On April 11, 2005, Applicant answered the SOR (Answer) and requested a clearance decision based on the written record without a hearing.

Department Counsel prepared a File of Relevant Material (FORM) on August 31, 2005. The FORM was mailed to Applicant on September 2, 2005. He acknowledged receipt of the FORM on September 14, 2005, and did not object to anything contained in the FORM or submit additional information for consideration within the 30-day time period provided to him. The case was assigned to me on October 28, 2005.

FINDINGS OF FACT

Applicant admitted the SOR allegations in subparagraphs 1.a - 1.e. He denied subparagraphs 1., 2., 2.a, 2.b, 3., and 3.a. His admissions are incorporated herein as findings of fact. After a thorough review of the pleadings and exhibits, I make the following additional findings of fact:

Applicant is 54 years old, divorced, and has three adult sons. He completed approximately two years of college from January 1975 to December 1976.⁽²⁾ Since 1994, Applicant has been working for a telecommunications company doing business with the Department of Defense. He is a senior project manager and seeks to retain his security clearance to continue his current job.

The security concerns in Applicant's case originate from his history of excessive alcohol consumption. In 1988, Applicant was convicted for driving under the influence of alcohol (DUI). He was sentenced to 24 hours confinement, fined \$310, ordered to attend counseling/rehabilitation, and his license was suspended for six months. In 1998, Applicant again was convicted for DUI. He was sentenced to 48 hours confinement, fined \$829, his license was suspended for one year, and he was required to undergo alcohol evaluation and treatment.

From June to August 1998, Applicant attended an intensive outpatient alcohol rehabilitative treatment program. He was diagnosed as being alcohol dependent and was required to attend follow up counseling. Applicant explained his work required him to travel frequently and, as such, he would be unable to attend the counseling sessions in person. The alcohol counselor accommodated him and agreed to conduct telephonic consultations. Notwithstanding, Applicant was required to attend certain face-to-face interviews to complete the program. Because of job requirements, he failed to attend the face-to-face interviews and, as a result, was deemed to have failed to complete his alcohol treatment aftercare requirements. Applicant stated he failed to realize he had not completed his aftercare requirements until 2003 when another State denied him a drivers license for failure to complete his 1998 treatment. Because of his failure to complete the 1998 treatment program, Applicant was required to participate in additional alcohol rehabilitative treatment.

From January to April 2004, Applicant enrolled in an intensive alcohol outpatient treatment program. His April 2004 discharge summary indicates Applicant completed all the short and long-term goals that had been previously identified in his 1998 treatment program. Additionally, he completed all the 2004 aftercare/outpatient therapy requirements. Based on the 2004 alcohol counselor's interviews and interactions with the Applicant, the counselor reached several important conclusions: she noted that Applicant had matured since 1998, that he "has been able to maintain a life free of any criteria relating to substance abuse/dependence, and that he has not used alcohol in a manner that would result in any maladaptive behavior, significant impairment, or distress." Applicant's final diagnosis was that of "alcohol dependence without physiological dependence, in sustained full remission."⁽³⁾

There is no evidence Applicant has been involved in any alcohol related misconduct since 1998 or that he has ever mishandled or otherwise risked the compromise of classified information.

In December 2002, Applicant submitted a security clearance application (SF 86) in which he provided false answers to question 24. He answered "YES" to question 24, which asked whether he had ever been charged with or convicted of any offenses related to alcohol or drugs, and disclosed his 1998 DUI. Applicant failed to disclose his 1988 DUI

conviction, however.

In his answer to the SOR, Applicant admitted the 1988 DUI conviction and his failure to disclose it on the SF 86. He claimed, however, his omission was not deliberate and that he did not intend to deceive with his answer. Applicant explained he followed the instructions on the "Checklist of All Information Required to Complete an EPSQ" provided to him when filling out the SF 86. Because the checklist (line 19) asked for treatment and/or counseling in the last seven years, he followed the checklist guidance rather than the instructions for question 24 on the SF 86 itself.

SOR subparagraph 2.b, alleges that Applicant deliberately falsified material facts in a December 2003 interview with a Department of Defense (DOD) investigator when he failed to disclose his 1988 DUI to the investigator until he was asked to sign an alcohol release form. There is no evidence of a December 2003 interview attached to the FORM, - i.e., a statement signed by the Applicant or a memorandum for the record prepared by the investigator documenting the results of the interview. Consistent with his explanation concerning his failure to disclose his 1988 DUI on the SF 86, Applicant admitted he did not disclose to the investigator his 1988 DUI, because he believed, based on the checklist instructions, that he only had to disclose alcohol related incidents within the last seven years.

Concerning Applicant's past consumption of alcohol, the January 2004 medical information questionnaire completed by a medical practitioner at the request of the government, indicates Applicant used to consume three to four beers approximately four times per month. Applicant's last reported use of alcohol was in 1998. Although the Applicant provided no information concerning his current use of alcohol, a close reading of the discharge summary and the medical information questionnaire, suggest that since 1998, Applicant modified his behavior and has abstained from the use of alcohol, and avoids people, places, and activities that relate to alcohol. The available evidence suggests Applicant has changed his lifestyle. He is now a mature, responsible person, and has demonstrated a favorable progress resulting in his abstaining himself from the use of alcohol.

POLICIES

The Directive sets forth adjudicative guidelines which must be considered in evaluating an Applicant's eligibility for access to classified information. The administrative judge must take into account both disqualifying and mitigating conditions under each adjudicative guideline applicable to the facts and circumstances of the case. The guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the granting or denial of access to classified information. However, the guidelines are not viewed as inflexible ironclad rules of law. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive, ⁽⁴⁾ and the whole person concept. ⁽⁵⁾ Having considered the record evidence as a whole, I conclude Guideline G (Alcohol Consumption), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct) are the applicable relevant adjudicative guidelines.

BURDEN OF PROOF

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information.⁽⁶⁾ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest to ensure each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own.

The government has the initial burden of proving controverted facts alleged in the SOR. To meet its burden, the government must establish by substantial evidence⁽⁷⁾ a prima facie case that it is not clearly consistent with the national interest for the applicant to have access to classified information. The responsibility then shifts to the applicant to refute, extenuate or mitigate the government's case. Because no one has a right to a security clearance, the applicant carries a heavy burden of persuasion.⁽⁸⁾ The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of protecting national security.⁽⁹⁾

CONCLUSIONS

Under 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.⁽¹⁰⁾ The government established its case under Guideline G by showing that Applicant, on at least two occasions, consumed alcohol to excess and to the point of intoxication.⁽¹¹⁾ He was convicted twice for exercising exceedingly poor judgment as demonstrated by his two DUI convictions. Guideline G Disqualifying Condition (DC) 1: *Alcohol-related incidents away from work, such as driving while under the influence ...* ;⁽¹²⁾ DC 4: *Evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program,*⁽¹³⁾

and DC 5: *Habitual or binge consumption of alcohol to the point of impaired judgment,*⁽¹⁴⁾ apply here.

Applicant's drinking was addressed through two periods of treatment in 1998 and 2004. His prognosis is good in light of the fact that he has no physiological dependence on alcohol and is currently in a sustained full remission. There is no

evidence Applicant has been involved in any alcohol related misconduct since 1998. To the contrary, the available evidence suggests that after 1998 Applicant changed his lifestyle and no longer consumes alcohol, and avoids people, places, and activities that relate to alcohol. In 2004, after his four months intensive outpatient treatment, Applicant was characterized by his alcohol counselor as a mature, responsible person, that demonstrated a favorable progression abstaining himself from the use of alcohol.

Applicant's two alcohol related incidents, although serious, occurred 10 years apart, and there is no evidence that Applicant has ever consumed alcohol, let alone engaged in further alcohol related misconduct. In light of the totality of the circumstances, I conclude Guideline G Mitigating Conditions (MC) 1: *The alcohol related incidents do not indicate a pattern,* ⁽¹⁵⁾ MC 2: *The problem occurred a number of years ago and there is not indication of a recent problem,* ⁽¹⁶⁾ and C 3: *Positive changes in behavior supportive of sobriety,* ⁽¹⁷⁾ apply.

Under Guideline E (Personal Conduct), personal conduct is always a security concern because it asks the ultimate question - whether a person's past conduct instills confidence the person can be trusted to properly safeguard classified information. An applicant's conduct is a security concern if it involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Such behavior could indicate that the person may not properly safeguard classified information. ⁽¹⁸⁾

The government established that Applicant failed to disclose his 1988 DUI on his SF 86, and later, to a DoD investigator. Notwithstanding, the available evidence does not support the conclusion that Applicant's omissions were deliberate. Applicant disclosed his 1998 DUI conviction as well as the fact that he was required to participate in alcohol rehabilitative treatment. The rehabilitative treatment discharge summary and the medical information questionnaire indicate Applicant cooperated and was a willing participant in the program. He provided program counselors with information concerning his 1988 alcohol conviction, use of marijuana as an adolescent, and past alcohol consumption habits.

Applicant's explanations for his failure to disclose the information - i.e., that the checklist of information required to complete an EPSQ asked him for treatment /counseling bearing in the last seven years -- is credible in light of the totality of the facts and circumstances, including the checklist itself, Applicant's 1998 and 2004 participation in alcohol treatment programs, the 10 years period between his first and second DUIs, and the fact that he has not been involved in any alcohol related incident since 1998. Apart from the two DUI convictions, there is nothing in the record to indicate Applicant has the propensity to disregard the law or lacks judgment. I also considered the fact that Applicant must have known his 1998 treatment file would contain all the information he had provided the program counselors concerning his past history with alcohol, including his 1988 conviction. Considering the totality of the circumstances, I find Applicant's omission was not deliberate or committed with the intent to mislead the government.

Concerning SOR allegation 2.b, Applicant admitted his failure to disclose his 1988 DUI to the DOD investigator. As discussed above, Applicant believed he only had to disclose alcohol related information that occurred within the last seven years. For the same reasons outlined above in the discussion of SOR paragraph 2.a., I find that the evidence does

not establish Applicant's omission was deliberate. Although Applicant admitted that he failed to disclose his 1988 DUI on the SF 86 and to the investigator, he denied his omissions were deliberate or made with the intent to mislead. Considering the record as a whole, the evidence is not sufficient to establish by substantial evidence, that the Applicant's omissions were deliberate, Guideline E is decided for the Applicant.

Under Guideline J (Criminal Conduct), a history or pattern of criminal conduct is a security concern because it may indicate an unwillingness to abide by rules and regulations and may show the applicant to be lacking in judgment, reliability and trustworthiness.⁽¹⁹⁾ Because of my findings concerning the allegations in SOR paragraph 2, above, I conclude there is no violation of federal law. Notwithstanding, Applicant's two DUI convictions are very serious offenses that create doubt about his judgment, reliability and trustworthiness. I conclude Guideline J Disqualifying Condition (DC) 2: *A single serious crime or multiple lesser offenses*,⁽²⁰⁾ apply.

After considering all of the Guideline J Mitigating Conditions (MC), I find that MC 1: *The criminal behavior is not recent*,⁽²¹⁾ and MC 6: *There is clear evidence of successful rehabilitation*, apply. Applicant is 54 years old. Available evidence shows that during his lifetime he has been involved in only two incidents (two DUIs) demonstrating questionable judgment. Applicant's DUIs occurred 10 years apart, and there is no evidence he has been involved in any further questionable behavior since 1998. As such, I find Applicant's behavior is not recent, and he has demonstrated clear evidence of successful rehabilitation. Guideline J is decided for the Applicant.

Applicant deserves credit for changing his lifestyle, for his efforts to stay away from alcohol, and to avoid people, places, and activities that relate to alcohol. I find his current behavior is sufficient to mitigate the security concerns raised by his alcohol consumption. Applicant's behavior since 1998 indicates he is not likely to engage in future similar questionable behavior. Guideline E is decided for the Applicant.

I have carefully weighed all of the evidence, and I have applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guidelines. Considering all relevant and material facts and circumstances present in this case, including Applicant's response to the SOR, his misconduct, the whole person concept, and the adjudicative factors listed in the Directive, I find Applicant has mitigated the security concerns.

FORMAL FINDINGS

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1, Alcohol Consumption (Guideline G) FOR APPLICANT

Subparagraph 1.a - 1.e For Applicant

Paragraph 2, Personal Conduct (Guideline E) FOR APPLICANT

Subparagraph 2.a - 2.b For Applicant

Paragraph 3, Criminal Conduct (Guideline J) 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 or continue a security clearance for Applicant. Clearance is granted.

Juan J. Rivera

Administrative Judge

1. Required by Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992) (Directive), as amended.

2. Applicant's personal information was obtained from his security clearance application, FORM, Item 5, and his Answer to the SOR, Item 4.
3. FORM, Item 4.
4. Directive, Section 6.3. Each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate: the nature and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the age of the applicant; the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation; and the probability that the circumstances or conduct will continue or recur in the future.
5. Directive, E2.2.1. ". . . The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. . . ."
6. *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2 (Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.); ISCR Case No. 02-12199 (April 3, 2006) p. 3 (Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.); Directive, ¶ E3.1.32.1.
8. *Id.* at 528, 531.
9. *See Egan*; Directive E2.2.2.
10. Directive, E2.A7.1.1.
11. Applicant was diagnosed as "alcohol dependent without physiological dependence, in sustained full remission," by medical practitioners at the rehabilitative treatment facility he attended in 1998 and 2004.
12. Directive, E2.A7.1.2.1.
13. Directive, E2.A7.1.2.4.
14. Directive, E2.A7.1.2.5.
15. Directive, E2.A7.1.3.1.
16. Directive, E2.A7.1.3.2.
17. Directive, E2.A7.1.3.3.
18. Directive, E2.A5.1.1.
19. Directive, E2.A10.1.1.
20. Directive, E2.A10.1.2.2.
21. Directive, E2.A10.1.3.1.