

KEYWORD: Alcohol; Personal Conduct

DIGEST: Applicant was convicted of driving while intoxicated in 1995 and 2002. Although he listed the 2002 conviction in a security clearance application he submitted in June 2003, he failed to list the 1995 conviction. Applicant has successfully mitigated the alcohol consumption and personal conduct security concerns that existed in this case. Clearance is granted.

CASENO: 04-03853.h1

DATE: 12/30/2005

DATE: December 30, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-03853

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was convicted of driving while intoxicated in 1995 and 2002. Although he listed the 2002 conviction in a security clearance application he submitted in June 2003, he failed to list the 1995 conviction. Applicant has successfully mitigated the alcohol consumption and personal conduct security concerns that existed in this case. Clearance is granted.

STATEMENT OF THE CASE

On April 19, 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 G, alcohol consumption, and Guideline E, personal conduct. Applicant submitted an answer to the SOR that was received by DOHA on May 16, 2005, admitted all Guideline G allegations, denied the sole Guideline E allegation, and requested a hearing.

The case was assigned to me on August 26, 2005. A notice of hearing was issued on September 15, 2005, scheduling the hearing for October 20, 2005. The hearing was conducted as scheduled. The government submitted seven documentary exhibits that were marked as Government Exhibits (GE) 1-7, and admitted into the record without objection. Applicant testified, but did not submit any documentary evidence. The transcript was received on November 16, 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 31 years old and has been employed as an airframe-and-powerplant (A&P) mechanic by a defense contractor since October 2002. He was previously employed as a structures technician from November 1997 until October 2002. Applicant graduated from high school in 1992, and, following approximately two years of formal schooling, obtained an A&P license in 1994. He has been married since May 1998, and has one four-year-old daughter.

Applicant was laid off from his job due to company downsizing on December 9, 1995, consumed about a case of beer, drove an automobile, and was involved in a one-car accident. He was charged with Driving While Intoxicated (DWI). On January 18, 1996, he was convicted of the DWI and sentenced to serve 30 days in jail (suspended) and his driving privileges were revoked for 30 days. Applicant attended an alcohol class, and nominal fine and court costs were imposed.

Applicant was arrested on June 17, 2002, after a police officer observed his vehicle fail to stop while exiting the driveway of a tavern. Applicant estimates he had consumed five to six beers in approximately two and one-half hours prior to being stopped. His blood alcohol concentration (BAC) was 0.119. Applicant was charged with Driving Under the Influence (DUI), BAC 0.08 or Greater, Fail to Drive in Single Lane, and Fail to Stop Yield from Private Drive. He entered a plea of guilty to the DUI charge on October 17, 2002, and the remaining charges were dismissed. Applicant was sentenced to serve ten days in jail (nine suspended), pay a fine of \$250.00 plus costs, obtain a screening session and complete education and treatment as required, and his driving privileges were suspended for 90 days. He attended two eight-hour alcohol classes and a traffic survival school.

In June 2003, while on a company business trip, Applicant was charged with Disturbing the Peace. He and several other employees stopped at a fast food restaurant after having been at a tavern. One of Applicant's companions became involved in an altercation with some other individuals outside the restaurant. Applicant intervened, the police arrived, and all were cited. Applicant paid a fine.

Applicant began consuming alcohol at parties when he was approximately 17 years old, drinking about three to four beers every couple of weeks to once a month. Applicant began drinking about 12 to 18 beers every two to three days when he was attending A&P school, and about a 12-pack of beer every couple of days once he turned 21. Applicant describes his alcohol consumption as somewhat sporadic following his 1995 DWI arrest. He testified that since the 2002 arrest, he very seldom consumes alcohol, never drinks alone at home, and that since the 2002 arrest he never drives after consuming alcohol. Although he testified the last time he was intoxicated was a few months before the hearing, he defined "intoxication" as follows:

I look at it the way the laws are now, one drink an hour is too much to drive, after going to my all my alcohol classes for the last DUI. That's why I say, if I have one drink, I don't drive. I either have my wife pick me up or call a taxi." (Tr. p. 30)

Applicant submitted a security clearance application (SF 86) in June 2003. He listed his 2002 DUI conviction in response to a question that inquired if he had ever been charged with or convicted of an offense related to alcohol. However, he failed to list the 1995 DWI charge. Applicant provided a statement to a special agent from the Defense Security Service in January 2004 in which he explained the omission was an oversight. He testified the omission was an oversight and due to his believe that he only was required to list offenses that had occurred in the preceding seven years.

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 G, pertaining to alcohol consumption, and Guideline E, pertaining to personal conduct, 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.⁽²⁾ The government has the burden of proving controverted facts.⁽³⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁴⁾, although the government is required to present

substantial evidence to meet its burden of proof.⁽⁵⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁶⁾ 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.⁽⁷⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁸⁾

No one has a right to a security clearance⁽⁹⁾ and "the clearly consistent standard indicates that

security clearance determinations should err, if they must, on the side of denials."⁽¹⁰⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹¹⁾

CONCLUSIONS

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 was convicted of alcohol related driving offenses that occurred in 1995 and 2002. Although he was cited and fined for disturbing the peace in 2003 after he had been drinking alcohol, the record does not establish that his involvement in the altercation that led to issuance of the citation was because he was under the influence of alcohol. Based upon the alcohol related driving offenses, 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

Although Applicant still consumes alcohol, the record does not indicate he has an alcohol problem that requires him to remain abstinent. The two alcohol-related offenses of which he was convicted were separated by almost seven years, are not indicative of a pattern of drinking and driving, and the last offense occurred more than three years ago. Applicant credibly testified he now seldom consumes alcohol and no longer drives at all after drinking. The pattern of continued drinking he described is consistent with what is generally considered to be that of a "social drinker."

Further, Applicant testified as follows about the effect the 2002 DUI conviction has had on his outlook on drinking to excess:

I know, in my past, I have had some problems. Since then, I pretty much do not drink. I'm not going to say I don't drink at all because that would be a lie. If I do, I don't drink in excess. And even if I do have a drink, I do not drive; I call a cab or have my wife come and get me.

I guess, basically, what I'm trying to say is that the DUI I got was basically an eye opener for me. At that age, I had a daughter and a wife and a brand new house, and at this point, I realize there's too much to lose as far as that and my job. (Tr. p. 21)

This testimony and the information contained in the statement he provided to the DSS special agent demonstrate he has matured significantly in the past few years.

Considering all the evidence, Mitigating Conditions (MC) 1: *The alcohol related incidents do not indicate a pattern*; 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* apply. Guideline G is decided for Applicant

Personal conduct under Guideline E 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 listed his 2002 DUI conviction in the SF 86 he submitted in June 2003, but failed to list the 1995 DWI conviction. His explanation for the omission is that it was an oversight and due to his believe that he was only required to list offenses that had occurred in the preceding seven years. Considering his disclosure of the recent conviction, there seemingly is little motivation for Applicant to have deliberately omitted the earlier conviction.

Having viewed Applicant's appearance, demeanor, and manner of testifying, and considering the substance of his testimony, I find his explanations for the omission credible. Further, Applicant does not present himself as a sophisticated or detail oriented individual in matters such as filling out a SF 86. I find Applicant's failure to disclose the 1995 was not a deliberate omission. No disqualifying condition applies, and Guideline E is decided for 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, I find Applicant has overcome the case against him and satisfied his ultimate burden of persuasion. It is clearly consistent with the national interest to grant Applicant a security clearance.

FORMAL FINDINGS

SOR ¶ 1-Guideline G: For Applicant

Subparagraphs a-d: For Applicant

SOR ¶ 1-Guideline E: For Applicant

Subparagraph 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.

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. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
4. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
5. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
6. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
7. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
8. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
9. *Egan*, 484 U.S. at 528, 531.
10. *Id* at 531.
11. *Egan*, Executive Order 10865, and the Directive.