

KEYWORD: Alcohol; Personal Conduct

DIGEST: Applicant was arrested for Driving Under the Influence of Alcohol on three occasions from 1992 to 2001. He successfully completed an alcohol counseling program required as a condition of probation entered in the third case. Applicant failed to disclose his first two arrests and his participation in alcohol counseling on his Security Clearance Application (SF 86) submitted in February 2003. He has maintained total sobriety since September 2003, without recurrence of any substance abuse issues, and he demonstrated other positive changes in his personal lifestyle since retiring from the Navy in 2002. Applicant successfully mitigated security concerns arising from his alcohol consumption and personal conduct. Clearance is granted.

CASENO: 04-04959.h1

DATE: 10/06/2005

DATE: October 6, 2005

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-04959

**DECISION OF ADMINISTRATIVE JUDGE**

**DAVID S. BRUCE**

**APPEARANCES**

**FOR GOVERNMENT**

**FOR APPLICANT**

Brian Schempf, Esq.

**SYNOPSIS**

Applicant was arrested for Driving Under the Influence of Alcohol (DUI) on three occasions from 1992 to 2001. He successfully completed an alcohol counseling program required as a condition of probation entered in the third case. Applicant failed to disclose his first two arrests and his participation in alcohol counseling on his Security Clearance Application (SF 86) submitted in February 2003. He has maintained total sobriety since September 2003, without recurrence of any substance abuse issues, and he demonstrated other positive changes in his personal lifestyle since retiring from the Navy in 2002. Applicant successfully mitigated security concerns arising from his alcohol consumption and personal conduct. Clearance is granted.

**STATEMENT OF THE CASE**

On, January 19, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Review Program*, dated January 2, 1992, as amended and modified (Directive), issued a Statement of Reasons (SOR) to Applicant alleging facts that raise security concerns addressed in the Directive under Guideline G, Alcohol Consumption, and Guideline E, Personal Conduct. The SOR detailed why DOHA could not preliminarily determine under the Directive that it is clearly consistent with the national interest to grant or continue Applicant's request for a security clearance. By his letter and answer dated January 28, 2005, Applicant admitted with explanations the allegations of subparagraphs 1.a - 1.c. of the SOR, and denied the allegations of subparagraphs 2.a. and 2.b., and requested a hearing before an administrative judge.

The case was assigned to me on July 5, 2005, and I conducted the hearing on July 28, 2005. The government submitted four exhibits (GE) 1 through 4, which were admitted without objection. Applicant testified at the hearing along with six witnesses on his behalf, and further offered four exhibits (AE) A through D, also admitted without objection. DOHA received the hearing transcript (Tr.) on August 5, 2005.

## FINDINGS OF FACT

Applicant's admissions to the allegations of the SOR are incorporated herein by reference. In addition, after a thorough review of the pleadings, transcript, and exhibits, I make the following findings of fact:

Applicant is 42 years old and has been employed as a tradesman by a defense contractor since June 2002.<sup>(1)</sup> He is highly regarded by his supervisors at work and is considered reliable and dependable, and an outstanding employee.<sup>(2)</sup> He has been married to his present wife since 1987, and he has one adult child from his first marriage, which ended in divorce.<sup>(3)</sup> Applicant served honorably in the United States Navy from 1982-2002,<sup>(4)</sup> and he previously held a confidential security clearance while serving in the Navy.<sup>(5)</sup> He received various commendations and achievement awards during his time on active duty.<sup>(6)</sup>

Since September 2003, Applicant has become an active and respected participant and member of the church he attends regularly with his wife. In addition to attending services every Sunday, he also assists the congregation by helping out with cleaning and other maintenance chores around the church facility.<sup>(7)</sup>

In March 1992, Applicant was arrested by military police for DUI.<sup>(8)</sup> The alcohol-related charge in the case was ultimately dismissed.

On February 23, 1994, Applicant was charged with DUI in a state court and was found guilty of the offense on May 16, 1994. He was given a 30 day suspended jail sentence and Applicant paid the fines and costs imposed by the court. He also completed all requirements imposed by the military as a result of the incident.<sup>(9)</sup>

Applicant was found guilty of a second DUI offense on May 7, 2001, resulting from an incident that occurred on March 23, 2001. Applicant paid the fines and costs ordered in the case and also received a 60 day jail sentence, with all but five days of the sentence suspended. He was placed on probation in the case and he successfully completed an alcohol substance abuse program as a condition of his probation.<sup>(10)</sup> His driving privileges were also restricted for three years as a part of the disposition of the case.

Applicant had an alcohol ignition inter-lock device installed on his motor vehicle for a period of one year following his

second DUI conviction. <sup>(11)</sup> He has not consumed alcohol since September 2003. <sup>(12)</sup> Applicant also attends Alcoholics Anonymous meetings on a weekly basis. <sup>(13)</sup>

Applicant submitted his Security Clearance Application (SF 86) on February 6, 2003. In his answer to Question 24. **Your Police Record - Alcohol/Drugs Offenses** (*Have you ever been charged with or convicted of any offenses(s) related to alcohol or drugs? For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the record.*), Applicant failed to list his arrests for DUI that occurred on March 11, 1992, and February 23, 1994.

In his response to Question 30. **Your Use of Alcohol** (*In the last 7 years, has your use of alcoholic beverages (such as liquor, beer, wine) resulted in any alcohol-related treatment or counseling (such as for alcohol abuse or alcoholism?)*), Applicant answered "No".

## **POLICIES**

Enclosure 2 of the Directive, *Adjudicative Guidelines For Determining Eligibility For Access To Classified Information*, sets forth the criteria which must be evaluated when determining security clearance eligibility. The adjudicative guidelines specifically distinguish between those factors that are considered in denying or revoking an employee's request for access to classified information (Disqualifying Conditions), together with those factors that are considered in granting an employee's request for access to classified information (Mitigating Conditions). By acknowledging that individual circumstances of each case are always different, the guidelines provide substantive standards to assist an administrative judge in reaching fair and impartial common sense decisions.

The adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at well-informed decisions. Section E2.2. of Enclosure 2 of the Directive describes the essence of scrutinizing all appropriate variables in a case as the "whole person concept." In evaluating the conduct of the applicant and the circumstances in any case, the factors an administrative judge should consider pursuant to the concept are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of the participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Protecting national security is the paramount concern in reaching a decision in any case, and is dependent upon the primary standard that issuance of a clearance must be clearly consistent with the interests of national security. Granting an applicant's clearance for access to classified information is predicated on a high degree of trust and confidence in the individual. Accordingly, decisions under the Directive must include consideration of not just the *actual* risk of disclosure of such information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information in any aspect of his or her life. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information.<sup>(14)</sup> The decision to deny a security clearance request to an individual is not necessarily a determination of the loyalty of the applicant.<sup>(15)</sup> It is merely an indication the applicant has not met the strict guidelines established by the Department of Defense for issuing a clearance.

In accordance with the Directive, the government bears the burden of proof in the adjudicative process to first establish conditions by substantial evidence which indicate it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information.<sup>(16)</sup> The legal standard for the burden of proof is something less than a preponderance of the evidence.<sup>(17)</sup> When the government meets this burden, the corresponding heavy burden of rebuttal then falls on the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the position of the government, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.<sup>(18)</sup>

Upon consideration of all the evidence submitted in this matter, the following adjudicative guidelines are appropriate for evaluation with regard to the facts of this case:

**Guideline G - Alcohol Consumption is a security risk 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.**

**Guideline E - Personal conduct is a security concern because conduct involving questionable judgment, trustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.**

## CONCLUSIONS

I have thoroughly considered all the facts in evidence in this case and the legal standards required by the Directive. The government has established a *prima facie* case for disqualification under Guideline G.

Based on all the evidence, Alcohol Consumption Disqualifying Condition (AC DC) E2.A7.1.2.1. (*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 in this case.

Applicant admits conduct that constitutes alcohol-related incidents away from work. He was arrested three times for alcohol-related driving offenses over the nine year period from March 1992 to March 2001. He was found guilty of the last two offenses that occurred in 1994 and 2001, and he served five days in jail for the last case. His driver's license was suspended and restricted for three years following the last incident, and such sanctions serve to heighten Applicant's multiple offender status and the seriousness of his case. Applicant's conduct during the time period constituted a blatant disregard and lack of respect for the serious responsibilities associated with his driving privilege. He also failed to take advantage of the professional intervention that was made available to him by the military as a part of his initial arrest in 1992, by continuing to drink to the extent of getting arrested a second time two years later. Applicant's extensive involvement with alcohol during this time period raises serious concerns about his judgment and reliability. The government's evidence and Applicant's admissions constitute substantial evidence of disqualifying conditions under Guideline G.

I have considered all the Alcohol Consumption Mitigating Conditions (AC MC), and specifically AC MC E2.A7.1.3.2. (*The problem occurred a number of years ago and there is no indication of a recent problem*), and E2.A7.1.3.3. (*Positive changes in behavior supportive of sobriety*). I conclude both apply in this case.

Security concerns raised by alcohol consumption may be mitigated under the Directive if the conduct is not recent. Applicant's initial drunk driving charge that was ultimately dismissed occurred in 1992, and his second offense for which he was found guilty occurred in 1994. Both matters were totally resolved within a short time after each occurred, I find they are not recent. Applicant's third incident which resulted in his second conviction occurred in March 2001, over five years ago. While under some circumstances a conviction five years ago might be considered recent, I find in this matter the incident is not recent. The disposition of the case was not deferred, and Applicant successfully completed all aspects of his court imposed probation to include completing an alcohol treatment program, and a three year period of suspension/restriction of his driver's license without incident. He also fully complied with the ignition inter-lock system that was installed on his automobile for a year during his probation period. There have been no recurring alcohol or other criminal incidents of any kind since 2001. Accordingly, under the circumstances of this case, I find all three alcohol arrests are not recent and that this mitigating condition applies.

Applicant has also shown positive changes in his behavior indicating sobriety. Applicant made the decision to initially stop drinking when the ignition device was installed on his car, when he believed he could not drink at all during the period the system was in place.<sup>(19)</sup> Shortly after Applicant retired from the Navy in 2002, his personal lifestyle changed and he became more sensitive and caring for the needs of his wife, who was experiencing serious medical issues at the time.<sup>(20)</sup> His improved relationship with his wife culminated by him being baptized and joining his wife's church and becoming an active and respected member.<sup>(21)</sup> Most of all, Applicant has not consumed alcohol since at least September 2003, and his sobriety was corroborated through credible testimony of several witnesses at the hearing.<sup>(22)</sup>

Based on all the evidence, I have considered all the Personal Conduct Disqualifying Conditions (PC DC), and, specifically, PC DC E2.A5.1.2.2. (*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*). I conclude none apply in this case.

Applicant certainly knew when he completed his SF 86 in February 2003 he had been charged with DUI in 1992 and 1994, and that he was found guilty of the 1994 offense. He was also aware he completed all counseling and other requirements the Navy imposed upon him as a result of the 1992 arrest. While he listed the 2001 DUI conviction in response to Question 24 of the questionnaire, he failed to disclose the other arrests. In response to Question 30, he further failed to disclose he completed an alcohol substance abuse counseling program as a specific condition of probation imposed upon him by the court in the same case. The omissions regarding his alcohol therapy and treatment were misleading. Upon first observation, it is reasonable to conclude Applicant considered such omissions to be relevant and material to a security clearance investigation that could result in an unfavorable decision, demonstrating possible dishonesty.

Nevertheless, Applicant credibly testified he mistakenly believed Question 24 to require him to only list arrests that occurred within seven years of completing his SF 86. Applicant also testified he believed the Navy knew about his 1992 arrest because it involved military police, and that both arrests were a part of his employment record maintained by the government.<sup>(23)</sup> It does not logically follow Applicant would attempt to hide incidents that he thought were already known to the government. He readily admitted his mistake in confusing the seven year limitation that applied to several different questions in the same section of the application, to also apply to Question 24.<sup>(24)</sup> As to his omission regarding Question 30, Applicant admitted his mistake in his belief that the question only applied to treatment received for a medical condition of alcohol 'abuse' when directed by a physician,<sup>(25)</sup> and not to alcohol awareness counseling he thought was intended simply to convince people to not drink and drive. He erroneously concluded the counseling he received for his alcohol problems was not treatment for 'abuse' or the disease of 'alcoholism' in the medical context, particularly since it did not involve medications of any kind. Applicant admitted he should have considered both questions more carefully, but his failure to do so was not intentional. He openly discussed both omissions with the investigator when required. I find Applicant's testimony was reasonable and credible, and his omissions were not made deliberately. Accordingly, PC DC E2.A5.1.2.2. does not apply in this case.

I have considered all the evidence including Applicant's credibility and demeanor, and I have also considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting national interests. Applicant's loyalty to the United States is not in question. I am persuaded by the totality of the evidence that it is clearly consistent with the national interest to grant Applicant a security clearance. For the reasons stated, Applicant has fully mitigated the security concerns caused by the alcohol consumption and personal conduct considerations. Accordingly, Guideline G and Guideline E raised by the government are decided for Applicant.

## **FORMAL FINDINGS**

In accordance with Section E3.1.25 of Enclosure 3 of the Directive, the following are the formal findings as to each allegation in the SOR:

Paragraph 1. Alcohol Consumption (Guideline G) FOR THE APPLICANT

Subparagraph 1.a. For the Applicant Subparagraph 1 b. For the Applicant

Subparagraph 1.c. For the Applicant

Paragraph 2. Personal Conduct (Guideline E) FOR THE APPLICANT

Subparagraph 2.a. For the Applicant

Subparagraph 2.b. For the 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.

David S. Bruce



Administrative Judge

1. GE 1 (Applicant's Security Clearance Application submitted February 6, 2003), at 1.
2. Tr. at 36-40 and 43-46.
3. GE 1, *supra* note 1, at 3-4.
4. *Id.*, at 5.
5. *Id.*, at 7.
6. AE A (Good Conduct Award dated June 24, 2000), and AE B (Certificate of Release or Discharge From Active Duty (DD Form 214) dated July 18, 2003). See also Tr. at 74.
7. Tr. at 58-60.
8. GE 4 (Incident Report dated March 11, 1992), at 1-3.
9. Applicant's answer to SOR dated January 28, 2005, at 1.
10. AE D (Alcohol Safety Action Program Final Report dated July 12, 2005).
11. GE 2 (Applicant's statement dated February 24, 2004), at 2.
12. Tr. at 79. See also Tr. at 30, 39, 44-45, 51-52, 60-61, and 68-69.
13. GE 3 (Applicant's answers to Interrogatories dated April 22, 2004), at 4.
14. Directive, Enclosure 2, Para. E2.2.2.
15. Executive Order 10865 § 7.
16. ISCR Case No. 96-0277 (July 11, 1007) at p. 2.
17. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
18. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Para. E3.1.15.
19. Tr. at 80.
20. *Id.*

21. *Id.*, at 67-70.

22. See transcript references, *supra* note 12.

23. Tr. at 77.

24. Tr. at 76-78.

25. Tr. at 77-78.