

KEYWORD: Criminal Conduct; Alcohol

DIGEST: Between 1988 and 2003, Applicant was charged with or convicted of five criminal offenses, three of them alcohol related. He has abused alcohol for the last 25 years, including as recently as February 2006. He has failed to learn from his mistakes, and his questionable behavior is likely to recur. He failed to mitigate security concerns raised by his criminal conduct and alcohol consumption. Clearance is denied.

CASENO: 04-06243.h1

DATE: 05/31/2006

DATE: May 31, 2006

---

In re:

-----  
SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 04-06243

**DECISION OF ADMINISTRATIVE JUDGE**

**JUAN J. RIVERA**

**APPEARANCES**

**FOR GOVERNMENT**

Richard Stevens, Esq., Department Counsel

## **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Between 1988 and 2003, Applicant was charged with or convicted of five criminal offenses, three of them alcohol related. He has abused alcohol for the last 25 years, including as recently as February 2006. He has failed to learn from his mistakes, and his questionable behavior is likely to recur. He failed to mitigate security concerns raised by his criminal conduct and alcohol consumption. Clearance is denied.

### **STATEMENT OF THE CASE**

On October 18, 2005, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guideline J (Criminal Conduct) and Guideline G (Alcohol Consumption). 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.<sup>(1)</sup>

Applicant answered the SOR (Answer) on November 11, 2005, and requested a hearing. The case was assigned to me on February 2, 2006. On March 21, 2006, I convened a hearing at which the government presented 10 exhibits, marked GE 1-10, to support the SOR.<sup>(2)</sup> Applicant testified on his own behalf, and presented the testimony of one witness and two exhibits that were admitted without objection and marked AE 1-2. DOHA received the transcript (Tr.) on arch 30, 2006.

### **FINDINGS OF FACT**

In his answer to the SOR, Applicant admitted SOR allegations 1.a, 1.c - 1.d, and 2.a - 2.c. He denied the allegations in subparagraphs 1, 1.b, and 2. Although he admitted the underlying facts alleged in subparagraphs 1 and 2, he denied his behavior disqualified him from holding a security clearance. His admissions are incorporated herein as findings of fact. After a thorough review of the pleadings, Applicant's testimony, and the evidence, I make the following additional findings of fact:

Applicant is 42 years old and has never been married. In 1981, after graduating from high school, he joined the U.S. Navy (Navy) where he served on active duty for 10 years. While in the Navy, Applicant received training on the maintenance of gas turbine engines, electricity, electronics, and fiber optics. In 1991, Applicant was prevented from re-enlisting in the Navy because of pending criminal charges and his failure to comply with weight/height standards. He was honorably discharged in August 1991 as a Petty Officer First Class (E-6).

In December 1991, Applicant was hired by his current employer, a company doing business with the Department of Defense (DOD). He has worked for the same company since and requires a secret level security clearance to access classified areas and equipment to perform his job.

At his hearing, Applicant presented character evidence in the form of testimony by a co-worker, who has known Applicant for two years, and introduced a character reference letter from a supervisor who has observed Applicant's performance for approximately seven years. Both characterized Applicant as a hard-working person, with outstanding work ethic, excellent technical knowledge, and commitment to his job. Applicant also submitted three performance evaluation reports showing he received satisfactory to exceptional ratings during the period June 2002 through July 2005.

Applicant's criminal conduct concerns are, for the most part alcohol related. In 1988, while serving in the Navy as a petty officer first class, he received non-judicial punishment at a commanding officer's mast for hazing. Applicant explained that he and other sailors, as an initiation/welcome prank, subdued a sailor new to the ship and Applicant gave the sailor a hickey on his neck. Alcohol was a contributing factor in this incident.

In October 1990, Applicant forcibly sodomized his best friend's nine-year-old daughter while staying at his friend's home. On the night of the offense, his friend was away from the home on ship duty. Applicant went out drinking with friends and consumed 20 to 26 beers over the course of two to three hours. He then drove back to his friend's home. There was another couple in the living room of the house, along with Applicant's friend's three children. Applicant went into the girl's bedroom and performed oral sex on the girl. He was charged with forcible sodomy and aggravated sexual battery. He pled guilty to forcible sodomy and the assault charge was dismissed. Applicant's sentence was suspended and he was placed on probation for five years. He was sentenced to serve 6 months confinement, but actually only served three months before being placed on probation. A condition of Applicant's probation was that he complete individual and group therapy.

Applicant attended individual and group counseling at the Navy Family Advocacy Program from January 1991 to August 1991, when he was discharged from the Navy. He continued his counseling/therapy on a monthly/bi-monthly basis with state authorized personnel until approximately May 1992. He was diagnosed, in part, as an alcohol abuser. Applicant was also required to register as a sex offender with state authorities every 90 days. He signed a document acknowledging this requirement.

At his hearing, Applicant was evasive when asked to answer questions concerning the diagnosis and prognosis he received as a result of his counseling and treatment. He did claim, however, that his doctors did not consider him a threat to society, but merely an opportunist whose condition was triggered by his use of alcohol. Applicant later testified that except for being told during the counseling that he abused alcohol, he did not remember his alcohol diagnosis/prognosis or whether he was counseled to abstain from consuming alcohol.

In July 1992, while still on probation, Applicant was arrested upon exiting a known prostitute's apartment. He explained he was taking a medication that made him hyper, depressed and angry, and that this, combined with his having a bad day at therapy, caused him to go for a drive. Before he realized it, he stopped his car and solicited the services of a street prostitute. Although initially arrested and cited with prostitution, he was found guilty of visiting a bawdy place. At his hearing, Applicant had no explanation as to why he engaged in illegal behavior while on probation, thereby risking the revocation of his probation. Applicant was released from probation in August 1994. [\(3\)](#)

Around 1992, Applicant requested access to classified information. His clearance was initially denied due to the same security concerns alleged in the pending October 2005 SOR. Applicant appealed and after a hearing, a DOHA administrative judge granted his access to classified information in 1993.

During the 1992 background investigation, Applicant provided two statements to government investigators: one in April 1992 (GE 4), and the second in July 1992 (GE 3). In his April 1992 statement, Applicant described his past history of alcohol consumption. He began consuming alcohol at age 17, and while in the Navy, he drank almost daily when not deployed or underway. His drinking ranged from three to 30 beers on any given occasion. He also would alternate consuming hard liquor, drinking up to one fifth of whiskey per occasion. His degree of intoxication would range from moderate to extreme at least once weekly.

Applicant's initial motivation for drinking was recreational. Later, his drinking became an addiction. He explained he enjoyed going out with friends for a couple of drinks after work as a means of relaxation, but then he would continue drinking. Applicant stated he knew he was an extreme abuser of alcohol, who passed out after binge drinking as well as suffering blackouts and memory loss. In his April 1992 statement, Applicant indicated the last time he had been drinking was February 1991. He claimed he had taken action to completely abstain from alcohol for the rest of his life, and professed his intent to avoid all forms of alcohol. Applicant expressed remorse for assaulting the girl, and vowed to do anything necessary to prevent such incident from happening again.

At his hearing, Applicant testified that he abstained from alcohol from 1991 to 1995. He claimed that although he never stopped socializing with friends, he only consumed non-alcoholic beverages. In 1995, he "fell off the wagon" when one of his friends offered him a beer and he took it. He has been drinking ever since.

In January 2002, Applicant was convicted of driving under the influence of alcohol (DUI). Applicant explained that after having a couple of beers at a friend's house, he and his friend consumed four bottles of wine. He was stopped by a policeman for speeding on his way home and found to be intoxicated. He was fined and sentenced to 60 days in jail (suspended). His drivers license was also suspended for 12 months. Further, he was required to attend an alcohol safety action program (ASAP) for 10 weeks and placed on 12 months unsupervised probation. Applicant has not been arrested for any other alcohol related misconduct since 2002. Except for the court ordered counseling/treatment in 1991 and the 2002 ASAP counseling, he has attended no other alcohol counseling or rehabilitation programs. He explained he has elected not to participate in Alcoholic Anonymous because he does not like the pressure the group imposes on his religious beliefs.

In October 2003, Applicant was convicted of failing to register as a sex offender. Although after his 1991 conviction he signed an acknowledgment of his obligation to register, Applicant alleged he forgot about it. He was sentenced, in part, to 60 days imprisonment (suspended) and placed on one year probation.

In October 2003, Applicant provided a statement to a government investigator in which he described his alcohol consumption since October 2001. He stated that he consumed an average of a six pack of beer, three times a week, with food over the course of a three to four hours. He stated that prior to 2001, he would drink while traveling on duty, and after work with friends.

Concerning his current alcohol consumption, at his hearing Applicant acknowledged that it may be considered excessive by today's standards.<sup>(4)</sup> He consumed alcohol two days before his hearing. Applicant explained he met with friends at a restaurant and had two beers with dinner. He then drove himself home. Applicant has consumed alcohol consistently since 1995, and did not stop drinking after his 2002 DUI conviction.<sup>(5)</sup> He alleged he modified his drinking behavior, controlling when and where he consumes alcohol. He drinks mostly at home, or when he goes out during the weekends, and sometimes after work with friends. The last time he had a good time drinking was a couple of months prior to his hearing, and the last time he believes he was legally intoxicated was two weeks before the hearing. He continues to consume alcohol even though he was advised to abstain. Applicant testified he now limits his consumption of alcohol to six drinks per occasion, and averred it takes up to two fifths of hard liquor to get him intoxicated.

Notwithstanding the above statements, at his hearing Applicant was not candid and forthcoming when discussing his drinking habits. His testimony and demeanor was strained, admitting facts and alcohol consumption only when confronted with prior statements.

Applicant assumes responsibility for his actions. He argued, however, that his DUI is remote because the incident happened four years ago. He claimed that, based on his medical evaluations, work performance, and character references, he is not a threat to society and should be considered rehabilitated. He further argued that he has changed his lifestyle and does not go out to drink as much as he used to.

## **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 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, and the whole person concept.<sup>(6)</sup> Having considered the record evidence as a whole, I conclude Guideline J (Criminal Conduct) and Guideline G (Alcohol Consumption), are the applicable relevant adjudicative guidelines.

## **BURDEN OF PROOF**

The purpose of a security clearance decision is to determine whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information.<sup>(7)</sup> 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 judgment, 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,<sup>(8)</sup> 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.<sup>(9)</sup> 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.<sup>(10)</sup>

## CONCLUSIONS

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.<sup>(11)</sup> The government established its case under Guideline J by showing that Applicant was charged with or convicted of five offenses between 1988 and 2003. Three of the incidents were alcohol related. Disqualifying Condition (DC) 1: *Allegations or admission of criminal conduct*,<sup>(12)</sup> and DC 2: *A single serious crime or multiple lesser offenses*<sup>(13)</sup> apply.

There is no evidence Applicant has been arrested for any other alcohol related incident after his 2002 DUI conviction, or in any criminal misconduct after his 2003 conviction for failure to register as a sex offender. Notwithstanding, in light of the totality of the circumstances and considering Applicant's behavior for the last 12 years, I find his criminal behavior is recent.

Applicant's past behavior forms a pattern of disturbing alcohol abuse and criminal misconduct that cannot be ignored. Since 1988, Applicant has shown he lacks judgment, reliability, and trustworthiness. At the time of his hazing incident, he was 25 years old and was serving in the Navy in a leadership/management position. He knew or should have known that a person in his position was required to set the example, which would not include getting drunk and abusing junior sailors. More importantly, his behavior since 1988 demonstrates he has not learned from his mistakes. His continuing alcohol abuse led to his 1991 conviction for forcible sodomy, and the loss of his best friend and his Navy career.

Applicant continued to demonstrate his lack of judgment by soliciting a prostitute, a criminal offense, while on probation. He was warned by the court that as a condition of his probation he was required to stay out of trouble or his probation would be revoked. He elected to risk serving five years in jail because of his failure to control impulses and lack of discipline.

In 1993, Applicant was made aware of the government's security concerns raised by his criminal conduct and alcohol abuse. He was granted access to classified information, presumably, based on the fact that he had been abstinent since 1991, his promise not to consume alcohol ever again, and the fact he had no additional reported misconduct. Applicant learned nothing from the proceeding. In 1995, he fell off the wagon and continued to abuse alcohol, up to at least two weeks before his 2006 security clearance hearing. Applicant's continuing abuse of alcohol and lack of judgment is further highlighted by his 2002 alcohol conviction, the fact he never stopped drinking alcohol after his DUI conviction, his failure to seek alcohol treatment/counseling, and his failure to register as a sex offender. Considering the totality of the circumstances, Applicant failed to demonstrate clear evidence of successful rehabilitation, and his questionable behavior is likely to recur. Guideline J is decided against the Applicant.

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.<sup>(14)</sup> The government established its case under Guideline G by showing that from 1981, when he was 18 years old, to at least February 2006, at age 42, Applicant abused alcohol, resulting in his exercising questionable judgment and failing to control impulses. Applicant's admitted alcohol abuse was a contributing factor in his commission of three offenses in 1988, 1991 and 2002. Guideline G Disqualifying Condition (DC) 1: *Alcohol-related incidents away from work, such as driving while under the influence,*<sup>(15)</sup> and DC 5: *Habitual or binge consumption of alcohol to the point of impaired judgment,*<sup>(16)</sup> apply here.

Applicant's drinking was addressed through two period of substance abuse counseling while on treatment after his 1991 and 2002 convictions. Notwithstanding, Applicant's past behavior, as well as his testimony and demeanor convince me he continued to abuse alcohol until at least February 2006. He is either unwilling or unable to control his alcohol consumption and has failed to show changes in his behavior that support a finding of sobriety. In light of the totality of the circumstances, and for the same reasons outlined in the above discussion concerning Guideline J, incorporated herein, I conclude none of the Guideline G itigating Conditions apply.

I have carefully weighed all the evidence, and I 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 testimony, his misconduct, the whole person concept, and the adjudicative factors listed in the Directive, I find Applicant has not mitigated the security concerns. Applicant's clearance is denied.

### **FORMAL FINDINGS**

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

Paragraph 1, Criminal Conduct (Guideline J) AGAINST APPLICANT

Subparagraphs 1.a -1.d Against Applicant



Paragraph 2, Alcohol Consumption (Guideline G) AGAINST APPLICANT

Subparagraphs 2.a - 2.c Against 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. Clearance is denied.

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. I marked the government's exhibit list as GE 9 for Identification. The government's memorandum, dated April 12, 2006, forwarding to me Applicant's post-hearing submissions, was marked Appellate Exhibit 1.
3. GE 3.
4. Tr. at 39.
5. Tr. at 57.
6. 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. . . ."
7. *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
8. ISCR Case No. 98-0761, at p. 2 (December 27, 1999)(Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.); ISCR Case No. 02-12199, at p. 3 (April 3, 2006)(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.
9. *Egan*, 484 U.S. 518, at 528, 531.

10. Directive, ¶ E2.2.2.

11. Directive, ¶ E2.A10.1.1.

12. Directive, ¶ E2.A10.1.2.1.

13. Directive, ¶ E2.A10.1.2.2.

14. Directive, ¶ E2.A7.1.1.

15. Directive, ¶ E2.A7.1.2.1.

16. Directive, ¶ E2.A7.1.2.5.