

KEYWORD: Criminal Conduct

DIGEST: Applicant was arrested in 1990 for DUI (with a blood alcohol content registered at .29%) and convicted in 2003 of aggravated criminal trespass (after consuming three swallows of beer at home). After the 1990 incident, he substantially diminished his consumption of alcohol as to quantity and frequency. There is very little similarity in the allegations to support a pattern of criminal conduct, and there have been no alcohol-related problems or other criminal conduct over the past three years. There is significant rehabilitation and other pertinent behavioral changes, and recurrence is unlikely. Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the government's case. Clearance is granted.

CASENO: 04-08591.h1

DATE: 05/16/2006

DATE: May 16, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-08591

DECISION OF CHIEF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was arrested in 1990 for DUI (with a blood alcohol content registered at .29%) and convicted in 2003 of aggravated criminal trespass (after consuming three swallows of beer at home). After the 1990 incident, he substantially diminished his consumption of alcohol as to quantity and frequency. There is very little similarity in the allegations to support a pattern of criminal conduct, and there have been no alcohol-related problems or other criminal conduct over the past three years. There is significant rehabilitation and other pertinent behavioral changes, and recurrence is unlikely. Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the government's case. Clearance is granted.

STATEMENT OF THE CASE

On October 1, 2002, Applicant applied for a security clearance and submitted a Security Clearance Application (SF 86).
[\(1\)](#) On June 9, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, 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 Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. The SOR detailed reasons under Guideline J (criminal conduct) 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, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn, written statement, dated June 27, 2005, Applicant responded to the SOR allegations and requested a hearing. Department Counsel indicated the government was ready to proceed on January 24, 2006, and the case was assigned to me on March 23, 2006. A notice of hearing was issued on April 4, 2006, scheduling the hearing for April 27, 2006. It was held as scheduled. During the hearing, five Government exhibits, three Applicant exhibits, and the testimony of two Applicant witnesses (including Applicant) were received. The transcript (Tr.) was received on May 10, 2006.

FINDINGS OF FACT

Applicant has admitted the factual allegations pertaining to criminal conduct under Guideline J (subparagraphs 1.a. and 1.b.). Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 50-year-old employee of a defense contractor, and he is seeking to retain a secret security clearance which was initially granted to him in September 1992.⁽²⁾ He has been employed by the same government contractor since November 1977,⁽³⁾ and currently serves as facilities maintenance technician IV,⁽⁴⁾ referred to as a maintenance mechanic.⁽⁵⁾ His immediate supervisor, a coworker for close to 25 years, and the manager of human resources, both support his application and characterize his work performance in positive terms. His overall performance appraisal was "above expectations" in 2005 and "outstanding" in 2004.⁽⁶⁾ He is well-respected by his managers and peers.⁽⁷⁾ His supervisor has never seen him display anger in an inappropriate manner.⁽⁸⁾ Applicant was first married in 1975 and divorced in 1978.⁽⁹⁾ He married his second wife in 2001.⁽¹⁰⁾ They have had no children together, but she has two daughters from prior marriages,⁽¹¹⁾ neither of whom reside with them.⁽¹²⁾

Applicant was an alcohol abuser whose consumption of alcohol has resulted in two incidents with the authorities. While it is not known when he first started using alcohol, and the general frequency and quantity of his initial alcohol consumption was never developed, Applicant has, in the past, abused alcohol on at least some occasions. During the period 1985-1990, he consumed approximately one 12-pack of beer per day, with his friends.⁽¹³⁾

In March 1990, he and a friend consumed six 7-ounce beers over a five hour period.⁽¹⁴⁾ At about 4 p.m. that afternoon, they went to a night club where, over an additional two hour period, Applicant consumed "a couple" of mixed drinks.⁽¹⁵⁾ After leaving the night club, he was stopped by the police for operating what was thought to be a stolen automobile. It was not stolen.⁽¹⁶⁾ He was, instead, charged with driving under the influence, and subsequently administered a blood test. Applicant's blood alcohol content registered .29%.⁽¹⁷⁾ He subsequently entered a plea of guilty to the charge and was sentenced, in part, to one year in jail with all but 48 hours suspended, and ordered to attend an alcohol program.⁽¹⁸⁾ The program, lasting three weeks, consisted of alcohol education, including videos and lectures.⁽¹⁹⁾

After his 1990 DUI, Applicant abstained from consuming alcohol, for unspecified reasons, until approximately 1998.⁽²⁰⁾ When he resumed consuming alcohol, the quantity and frequency were drastically reduced.⁽²¹⁾ At the time of the hearing, in April 2006, Applicant consumes "a beer every now and then,"⁽²²⁾ estimated by him as "one beer a month, maybe less."⁽²³⁾ He no longer consumes any alcohol other than beer.⁽²⁴⁾ He had no other incidents with the law of any type until 2003.⁽²⁵⁾

In April 2003, an incident occurred following which Applicant was arrested and charged with (1) domestic violence-simple assault, and (2) public intoxication.⁽²⁶⁾ Those charges were eventually dismissed and Applicant pled guilty to a lesser charge of aggravated criminal trespassing.⁽²⁷⁾ He was sentenced, in part, to 11 months and 29 days in jail with all but time served suspended, supervised probation, and ordered to have no violent contact with the victim.⁽²⁸⁾ The victim was his wife.

There are three inconsistent versions, one official one and two different ones from Applicant, of the events leading up to Applicant's arrest. According to the official record developed by the police interviews with those involved or merely present during the incident, Applicant had argued with his wife, grabbed her by the head, and pushed her face into a shelf hanging on the wall. He then purportedly held a handgun pointed at her and threatened to kill her. The victim's temples and face were bloody. When the police arrived, Applicant was standing in the driveway of the residence and appeared to be unsteady on his feet with slurred speech. One of Applicant's guns was located in his sister's vehicle parked nearby.⁽²⁹⁾

Applicant's first version of the incident differed substantially from the official version. He contends he came into the house from the garage for supper, shaved, and entered the living room. When his wife approached him he saw some dried blood on her face. He did not know how she had gotten hurt, but denied causing her any injury.⁽³⁰⁾ As he was wiping the blood from her face with a wet rag, she handed him the beer she had been drinking. When her daughter saw the blood on the rag, she called the police.⁽³¹⁾ At that point, his wife and step-daughter got into a shouting match, which continued until the police arrived. One deputy stated someone would have to go to jail that night, and talked with Applicant.⁽³²⁾ When they went outside onto the porch, Applicant was arrested, hence, the public intoxication charge.⁽³³⁾ Although his wife wanted to drop the charges, the prosecutor refused to do so.⁽³⁴⁾ Applicant claimed the only alcohol he consumed that night were a few swallows from his wife's beer can,⁽³⁵⁾ and his sister, a witness that night, confirmed that fact.⁽³⁶⁾ The handgun was eventually returned to him by the authorities.⁽³⁷⁾

Applicant's second version differed somewhat from the other two versions. He admitted he and his wife had been arguing--screaming and hollering--throughout the evening about her 17-year-old daughter bringing young men into their house at night. He was doing "honey-do's" in the garage throughout the evening when the argument included the step-daughter as a participant.⁽³⁸⁾ During the argument, the step-daughter called the police. He denied touching, pushing, or shoving his wife:⁽³⁹⁾ "To the best of my knowledge I did not touch her."⁽⁴⁰⁾ He denied brandishing a handgun or threatening his wife with it that evening,⁽⁴¹⁾ and contends his wife supported his position in court.⁽⁴²⁾ Moments after the step-daughter called the police, Applicant called his sister, and when she arrived on the scene, he handed his gun, which was in the house, to her for safekeeping.⁽⁴³⁾ He offered no explanation as to why he did so. He denied having consumed any alcohol other than the few swallows, characterized as "pretty good ones," of his wife's beer.⁽⁴⁴⁾

The aggravated criminal trespassing charge resulted from inconsistent information regarding the residence addresses of Applicant and his wife. They had originally resided in separate houses before they were married. Their respective addresses were 10 digits apart on the same street. Unfortunately for Applicant, he failed to update his address

information on his operator's license. Since he did not, according to the police, reside at the location of the incident, he was charged with criminal trespass.⁽⁴⁵⁾ After considering each of the versions and the circumstances surrounding them, as well as the eventual court actions as well as those of his wife, I give greater credence to Applicant's second and most recent version over both the official version and his first one.

Applicant and his wife attended counseling and their relationship is "pretty good."⁽⁴⁶⁾ They still reside together in a new house.⁽⁴⁷⁾ Her daughter no longer resides with them.

Applicant has not been involved in any incidents, with or without alcohol, since the 2003 incident.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision set forth in Section E2.2., Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider 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 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.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guideline most pertinent to an evaluation of the facts of this case:

Criminal Conduct--Guideline J: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, pertaining to this adjudicative guideline are set forth and discussed in the Conclusions section below.

Since the protection of the national security is the paramount consideration, the final decision in each case must be arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security" or "clearly consistent with the national interest."⁽⁴⁸⁾ For the purposes herein, despite the different language in each, I have concluded all of the standards are the same. In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences that are grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the government to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. Because of this special relationship, the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides that industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, an assessment of credibility, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to each allegation set forth in the SOR:

While the facts in this case involve the consumption of alcohol, this is not a case brought under Guideline G. Instead, it appears that the government was satisfied that any such allegations related to alcohol were in all probability mitigated by time and circumstances. The government has established its case under Guideline J. Applicant's alcohol consumption has resulted in two arrests for alcohol-related incidents, 13 years apart, both of which were followed up by court action. That criminal conduct falls within Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1. (*allegations or admission of criminal conduct, regardless of whether the person was formally charged*).

A DUI incident 13 years before a criminal trespassing incident do not constitute a pattern of criminal activity. The only common features of the two separate criminal incidents are that they both involved alcohol, at least to some degree, and they both involved Applicant. Two disparate criminal actions separated by 13 years of satisfactory conduct, with no further criminal conduct occurring thereafter raises Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1. (*the criminal behavior was not recent*), E2.A10.1.3.2. (*the crime was an isolated incident*), and E2.A10.1.3.6. (*there is clear evidence of successful rehabilitation*).

Applicant should not be held forever accountable for his past conduct because there is a clear indication of subsequent reform, remorse, or rehabilitation. In this instance, Applicant has no subsequent DUIs, and has, in fact, dramatically decreased his alcohol consumption to a point to where it is negligible. As to the alcohol consumption during the second incident, the only clear evidence is that Applicant took several swallows of his wife's beer, nothing more, and the police report reference to Applicant being unsteady on his feet with slurred speech, with no reference to any odor of alcohol, does not establish his unreasonable consumption of alcohol. Furthermore, in considering the "whole person concept," I find substantial indication of rehabilitation and other pertinent behavioral changes, the absence of potential for pressure, coercion, exploitation, or duress, and little likelihood of recurrence now that Applicant's step-daughter, the cause of much of his stress, no longer resides with him and his wife. Consequently, I conclude that Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the government's case with respect to Guideline J. Accordingly, allegations 1.a. and 1.b. of the SOR are concluded in favor of Applicant.

For the reasons stated, I conclude Applicant is eligible for access to classified information.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1., Guideline J: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: 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.

Robert Robinson Gales

Chief Administrative Judge

1. Government Exhibit 1 (Security Clearance Application, dated October 1, 2002).

2. *Id.* at 7.

3. Applicant Exhibit A (letter from employer manager of human resources, dated April 26, 2006).

4. *Id.*

5. Tr. at 16.

6. Applicant Exhibit A, *supra* note 3.

7. *Id.*

8. Tr. at 41.

9. Government Exhibit, *supra* note 1, at 2.

10. *Id.*

11. *Id.* at 3-4.

12. Tr. at 17.

13. Government Exhibit 3 (Statement, dated August 27, 2004) at 3.

14. *Id.* at 1.

15. *Id.*

16. *Id.* at 1-2.

17. Response to SOR, dated June 27, 2006.

18. Government Exhibit 3, *supra* note 13, at 2.

19. *Id.*

20. *Id.* at 3.

21. Tr. at 24.

22. *Id.*

23. *Id.* at 25.

24. *Id.*

25. Government Exhibit 3, *supra* note 13, at 3.

26. Response to SOR, *supra* note 17.

27. *Id.*

28. *Id.*; Applicant Exhibit B (letter from Applicant's attorney, dated April 25, 2006).

29. Government Exhibit 5 (Affidavit of Complaint, dated April 29, 2003).

30. Government Exhibit 2 (Statement, dated November 11, 2003) at 1.

31. *Id.*
32. *Id.* at 2.
33. *Id.*
34. *Id.*
35. *Id.*
36. Applicant Exhibit C (letter from Applicant's sister, undated).
37. Applicant Exhibit B, *supra* note 28.
38. Tr. at 18.
39. *Id.* at 19.
40. *Id.*
41. *Id.* at 20-21.
42. *Id.* at 22.
43. *Id.* at 32.
44. *Id.* at 22, 36.
45. *Id.* at 23.
46. *Id.* at 29.
47. *Id.*
48. The Directive, as amended by Change 4, dated April 20, 1999, uses "clearly consistent with the national interest" (Sec. 2.3.; Sec.2.5.3.; Sec. 3.2.; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.; Sec. E3.1.26.; and Sec. E3.1.27.), "clearly consistent with the interests of national security" (Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (Enclosure 2, Sec. E2.2.2.).