

KEYWORD: Alcohol; Criminal Conduct

DIGEST: Applicant was convicted of alcohol-related driving offenses in 1999 and 2002. He has failed to mitigate the security concerns that exist in this case. Clearance is denied.

CASE NO: 04-09779.h1

DATE: 06/16/2006

DATE: June 16, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-09779

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Sabrina E. Redd, Esquire, Department Counsel

FOR APPLICANT

W. Thomas Lacy, Esquire

SYNOPSIS

Applicant was convicted of alcohol-related driving offenses in 1999 and 2002. He has failed to mitigate the security concerns that exist in this case. Clearance is denied.

STATEMENT OF THE CASE

On June 21, 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. [\(U\)](#) The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline G (alcohol consumption) and Guideline J (criminal conduct). Applicant submitted an answer to the SOR that was received by DOHA on July 18, 2005, denied all SOR allegations, and requested a hearing.

The case was assigned to me on January 19, 2006. A notice of hearing was issued on February 13, 2006, scheduling the hearing for March 1, 2006. The hearing was conducted as scheduled. The government submitted 11 documentary exhibits that were marked as Government Exhibits (GE) 1-11, and admitted into the record without objection. Applicant testified and submitted six documentary exhibits that were marked as Applicant's Exhibits (AE) 1-6, and admitted into the record without objection. The transcript was received on March 23, 2006.

PROCEDURAL MATTERS

Following the close of the hearing on March 1, 2006, the record was held open for 30 days to provide Applicant the opportunity to submit additional documentation in support of his case. Three exhibits were timely received, marked as AE 7-9, and admitted into the record without objection. Seven items of correspondence from the attorneys have been marked as Appellate Exhibits (App. Ex.) I-VII, and are also included in the record.

A cover letter (App. Ex. III) from Applicant's attorney accompanied AE 7-9 in which he requested an additional 30 days in which to submit still more documents in support of his case. Department Counsel did not object to the extension of time (AE VI), and the record was held open for an additional 30 days. Applicant submitted two more documents on May 1, 2006, that were marked as AE 10 and 11, and admitted into the record without objection (App. Ex. VII).

AE 10 and 11 were accompanied by a cover letter (App. Ex. IV) in which Applicant's attorney requested yet another extension of time to attempt to obtain and submit more documents in support of Applicant's case. A conference call was held with Applicant's attorney and a substitute Department Counsel on June 6, 2006. Applicant's attorney stated he had not yet received any additional documents for submission. Applicant's request to leave the record open past June 6, 2006, for the submission of additional documents was thereupon denied.

FINDINGS OF FACT

After a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is a 33-year-old man who has been continuously employed by a defense contractor, presently as a reliability engineer, since October 2002. He was previously employed by the same defense contractor as an electronics technician from June 2001 until May 2002, and was unemployed from May until October 2002. Applicant's performance assessments and letters of recommendation indicate he has been very successful in his work performance, and is considered to be thorough, dependable, knowledgeable and trustworthy.

Applicant served on active duty in the U.S. Navy as an aviation structural mechanic and rescue swimmer from June 1990 until June 2001. He earned three good conduct awards, attained the rank of petty officer second class (paygrade E-5), and was awarded an honorable discharge. He was awarded a bachelor of science degree in aeronautics in October 2005, and was offered admission into an MBA program in April 2006.

Applicant has been married since April 2001. He has one son who is about two years old, and his wife is pregnant with their second child who is due in October 2006.

Applicant was arrested on November 12, 1999, and charged with (Ct.1) Driving Under the Influence of Alcohol (DUI) and (Ct. 2) Driving While Having a 0.08% or Higher Blood Alcohol. His Blood Alcohol Concentration (BAC) was 0.14%. On January 18, 2000, he pled guilty to Count 2 and Count 1 was dismissed. He was sentenced to serve 36 months supervised probation, five days confinement in a work release program, ordered to pay a total fine of \$1,480, complete a drinking driver program, participate in any treatment program designated by his probation officer, and participate in the Navy's alcohol and substance abuse program. (GE 5)

A violation of probation petition was filed against Applicant on March 23, 2000, due to his failure to sign up for and complete the five day work release portion of his sentence. On April 6, 2000, he appeared in court, his probation was modified, and he was re-referred to the work release program. He apparently thereafter completed the work release sentence. (GE 5 & AE 8)

On January 29, 2002, Applicant's case was calendared for arraignment on a violation of probation petition on February 11, 2002, alleging his failure to complete Alcohol Information School (AIS). Applicant failed to appear for the arraignment on February 11, 2002, and a warrant was issued. On February 20, 2002, the warrant was recalled, Applicant admitted the violation of probation, his probation was revoked, reinstated, and modified to re-refer him to AIS. He appeared in court on April 17, 2002, and was granted additional time to July 17, 2002 to complete AIS. Finally, Applicant appeared in court on June 3, 2002, and requested that AIS be deleted as a condition of his probation. The Court granted the request and modified Applicant's probation by deleting AIS and suspending his driver's license for six months. Because Applicant failed to complete the AIS, the state in which he was convicted will not reissue him a driver's license. (GE 5 & AE 8)

Applicant moved to his current state of residence in July 2002. (GE 1) He was arrested in this state on November 2, 2002, and charged with (Ct. 1) Resisting Officer, (Ct. 2) Expired Tag, and (Ct. 3) DUI. On January 22, 2003, he pled nolo contendere to Count 1, and guilty to Counts 2 and 3. He received a suspended fine and sentence on Count 1. On Count 3, he was sentenced to 12 months probation, 72 hours in jail, 30 days community service, fined \$1,362, and ordered to turn in his license plates to probation, have an interlock device installed in his vehicle, and obtain an evaluation. The sentence for Count 2 was ordered merged with the sentence on Count 3. (GE 10 and GE 11) Applicant successfully completed all conditions of probation, including payment of probation fees, by January 5, 2004.

Applicant obtained an alcohol evaluation on December 11, 2002. The certified addictions counselor who performed the evaluation reported that Applicant told her he had consumed 3-4 glasses of wine over a 4-hour period prior to his November 2002 arrest. He told her about the 1999 DUI arrest, but claimed he had only drunk three beers before he was arrested at that time. He also told her he was not on probation. The counselor concluded Applicant did not meet the DSM IV-TR criteria for alcohol abuse or dependence and that no treatment was necessary. (AE 2)

At the hearing of this case, Applicant admitted he had actually consumed twice as much alcohol before his 1999 arrest than he reported to the counselor. (Tr. p. 44) He appeared in court on the 1999 DUI case in June 2002, and the Court ordered all terms and conditions of probation previously imposed to remain in full force and effect. (GE 5) Having been placed on 36 months probation in January 2000, Applicant was still on probation at the time he obtained the evaluation. Applicant was unable to provide a reason at the hearing for his failure to disclose to the counselor that he was still on probation at that time. (Tr. p. 46)

At the hearing, Applicant testified he is active in a number of community activities. He described his alcohol consumption as consistent with what would be considered a social drinker, and testified that when he does drink it is only two or three glasses of wine or two or three beers. He emphatically denied he ever drives a motor vehicle after consuming alcohol.

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 (alcohol consumption) and Guideline J (criminal 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.

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

There is no evidence to support the allegation in SOR subparagraph 1.a that Applicant consumed alcohol to excess and the point of intoxication, to include daily, until at least January 2004. Accordingly, subparagraph 1.a is decided for Applicant.

Applicant was convicted of alcohol related driving offenses that occurred in 1999 and 2002. Guideline G, Disqualifying Condition (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*; and Guideline J, DC 2: *A single serious crime or multiple lesser offenses* apply.

In January 2000, Applicant was convicted of driving while his BAC was 0.08% or higher. He initially failed to complete the work release portion of his sentence in a timely manner and a probation violation was filed. He thereafter completed the work release portion of his sentence, but he never completed the requirement that he attend an alcohol information school. Instead, following the filing of another probation violation, he appeared in court on two occasions, obtained additional time to complete the school, and eventually had that portion of his sentence vacated and his driving privileges suspended for six months.

Applicant was charged with DUI in November 2002, while still on probation and with his driving privileges suspended in another state for an alcohol-related offense. Applicant has repeatedly denied being intoxicated when he was arrested and claimed to have only drunk a few glasses of wine before encountering the arresting officers. However, he pled guilty to the DUI, and was placed on probation, and ordered to pay a substantial fine and serve 72 hours in jail as a consequence of that plea. His denials of being intoxicated and statements of how much alcohol he consumed before being arrested are not credible.

Applicant obtained an alcohol evaluation in connection with the 2002 DUI. He minimized the amount of alcohol he had consumed in regards to both his alcohol related offenses and falsely denied he was on probation, despite having been in court in connection with the first offense a mere six months earlier. The false information he provided to the counselor seriously undermines the validity of her findings and the recommendation she made, apparently for use in court. [\(12\)](#)

It has been more than three and one-half years since Applicant's last offense. However, his conduct in committing two alcohol-related offenses in three years, the second while still on probation for the first; his failure to timely complete court ordered conditions of probation in connection with the first offense which demonstrated a failure to appreciate the seriousness of his misconduct and the importance of obeying court issued mandates; and his minimization of his alcohol consumption and providing other false information to a counselor during an alcohol evaluation cause continuing concern about his alcohol use despite his testimony to the contrary. Accordingly, I find Guideline G, Mitigating Conditions (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* do not apply.

For the same reasons, I find Guideline J, MC 1: *The criminal behavior was not recent*; MC 2: *The crime was an isolated incident*; MC 4: *. . . the factors leading to the violation are not likely to recur*; and MC 6: *There is clear evidence of successful rehabilitation* do not apply. The remaining mitigating conditions under Guideline G and Guideline J have no application to the facts of this case.

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, Applicant has failed to mitigate the security concern caused by his alcohol consumption and criminal conduct. He has failed to overcome the case against him or satisfy his ultimate burden of persuasion. It is not clearly consistent with the national interest to grant Applicant a security clearance. Guideline G and Guideline J are decided against Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline G: Against Applicant

Subparagraph a: For Applicant

Subparagraph b: Against Applicant

Subparagraph c: Against Applicant

SOR ¶ 2-Guideline J: Against Applicant

Subparagraph a: 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.

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.
12. The evaluation was completed about one month before the date Applicant's pleas were entered in the 2002 case.