

KEYWORD: Alcohol; Personal Conduct

DIGEST: In a period of six months, Applicant was arrested and charged with driving while intoxicated, disciplined twice by the United States Army for alcohol-related conduct, and was discharged from the Army for failing to complete an alcohol and substance abuse program. He continues to drink. He did not intentionally falsify his answers regarding his alcohol counseling on his security clearance application. He has mitigated the government's concerns regarding his personal conduct, but did not mitigate the government's security concerns regarding his alcohol consumption. Clearance is denied.

CASENO: 04-11029.h1

DATE: 03/27/2006

DATE: March 27, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-11029

**DECISION OF ADMINISTRATIVE JUDGE**

**MARY E. HENRY**

**APPEARANCES**

**FOR GOVERNMENT**

Julie R. Edmunds, Esq., Department Counsel

Fahryn Hoffman, Esq., Department Counsel

**FOR APPLICANT**

Alan V. Edmunds, Esq.

**SYNOPSIS**

In a period of six months, Applicant was arrested and charged with driving while intoxicated (DWI), disciplined twice by the United States Army for alcohol-related conduct, and was discharged from the Army for failing to complete an alcohol and substance abuse program. He continues to drink. He did not intentionally falsify his answers regarding his alcohol counseling on his security clearance application. He has mitigated the government's concerns regarding his personal conduct, but did not mitigate the government's security concerns regarding his alcohol consumption. Clearance is denied.

**STATEMENT OF THE CASE**

On August 10, 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 Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons 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. Specifically, the SOR set forth security concerns arising under Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct) of the Directive. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. On August 29, 2005, Applicant submitted a notarized response to the allegations and requested a hearing.

This matter was assigned to me on November 2, 2005. A first notice of hearing was issued on November 8, 2005, scheduling the hearing for December 1, 2005. Applicant's counsel timely filed a Motion for Continuance, which was

granted by Order dated November 21, 2005. A second notice of hearing was issued on November 23, 2005, and a hearing was held on January 5, 2006. Five government exhibits and six Applicant exhibits were admitted into evidence. (1) The record was held open until January 19, 2006 to allow Applicant to submit additional documentation. This documentation was received on January 19, 2006, it is admitted into evidence as Applicant exhibits H and I without government objection. Applicant and one witness testified. The hearing transcript was received on January 12, 2006.

### **PROCEDURAL RULINGS**

At the hearing, the government moved to amend the SOR to correct the date in allegation 2.a., and Applicant, through counsel, did not object to the government's motion. (2) The Motion to Amend the SOR was granted. (3) The date in allegation 2.a. of the SOR is corrected from October 29, 2003 to October 16, 2003.

Applicant denied the allegation in subparagraph 1.b., which alleges an arrest for DWI and speeding on December 28, 2002 in State A. The arrest occurred on this date in State B. The government provided him with copies of all the exhibits it intended to offer into evidence, including Government Exhibits 3 and 4, the documents related to this arrest. (4) As Applicant received these documents and provided evidence at the hearing regarding this arrest, he had fair notice of these charges and an opportunity to respond. Allegation 1.b. of subparagraph 1 of the SOR is amended to reflect State B.

### **FINDINGS OF FACT**

Applicant admitted the allegations under Guideline J, subparagraphs 1.a., 1.c., and 1.d., and with explanation, Guideline E, subparagraph 2.a., of the SOR. (5) Those admissions are incorporated here as findings of fact. He denied allegation 1.b. under Guideline J. After a complete review of the evidence in the record and upon due consideration, I make the following additional findings of fact:

Applicant is a 23-year-old switchboard operator for a defense contractor. (6) He has worked for this contractor since October 2003. (7) He served one year in the United States Army. (8) He completed a security clearance application (SF 86) in October 2003. (9)

At the age of 16, Applicant began drinking beer socially with friends twice a month.<sup>(10)</sup> After he joined the Army in 2002, he started drinking more.<sup>(11)</sup> He drank at least twice a week, increased his beer consumption, and added drinking hard liquor.<sup>(12)</sup> On December 28, 2002, at age 20, he drank four beers and two shots of tequila with friends at club near the base where he was stationed.<sup>(13)</sup> At the end of the evening, he drove his friends to the base. On the way, the police stopped him for speeding. When he told the police he had been drinking, the police conducted a field sobriety test, which he failed, and a breathalyzer test, which registered .11%. The police arrested and charged him with DWI. He spent about 30 minutes in jail before he was released to the Army military police.

As a result of this incident, the Army disciplined Applicant under Article 15 of the Uniform Code of Military Justice (UCMJ).<sup>(14)</sup> As non-judicial punishment, he received an oral reprimand, 45 days of extra duty and 15 days of restriction.<sup>(15)</sup> In the state trial court, he pled guilty to a reduced charge of driving while ability impaired.<sup>(16)</sup> The court fined him \$150.00, placed him on one year of probation, and suspended his driver's license for one year.<sup>(17)</sup>

Less than a month later, on January 18, 2003, Applicant and friends spent an evening drinking beer and rum.<sup>(18)</sup> He drank approximately six beers and four shots of rum that the evening.<sup>(19)</sup> When he returned to his barracks, he got into a fight with his best friend.<sup>(20)</sup> His friend cut his arm with a beer bottle, necessitating 18-21 stitches to close the wound.<sup>(21)</sup> The Army disciplined him under Article 15 of the UCMJ for drinking under age (he was 20).<sup>(22)</sup> As punishment, he was confined to the base for 45 days; given 45 days of extra duty; not allowed to wear civilian clothes for 45 days; required to attend an alcohol substance abuse program (ASAP); and his pay was reduced for two months.<sup>(23)</sup> He attended all but one or two of the ASAP classes.<sup>(24)</sup>

Several months after this incident and before he completed the ASAP program, Applicant and friends drove to Canada to party at some clubs.<sup>(25)</sup> During the course of the evening, he drank three beers.<sup>(26)</sup> They left Canada about 3:00 a.m.<sup>(27)</sup> The U.S. Border Patrol stopped them at the border, and checked their identification.<sup>(28)</sup> The Border Patrol found a problem with one of his buddy's identification, and all were reported to the military.<sup>(29)</sup> The next day he received an oral reprimand for this incident.<sup>(30)</sup> Later, he was given a choice of leaving the Army under either a Chapter 9 (alcohol rehabilitation failure) with a honorable discharge or a Chapter 13 (unsatisfactory performance) with a less than honorable discharge.<sup>(31)</sup> He chose the Chapter 9 discharge and was discharged from the Army in August 2003.<sup>(32)</sup>

During the year he was in the Army, Applicant was intoxicated about 10 times.<sup>(33)</sup> In the last two years, he has been intoxicated about 15 times.<sup>(34)</sup> He acknowledges that he has a problem with alcohol, and that after being evaluated, he was told he was abusive of alcohol.<sup>(35)</sup> The record contains no evidence of an alcohol abuse diagnosis. He recently enrolled in an alcohol safety program, which was to begin on February 13, 2006.<sup>(36)</sup> He continues to drink beer with friends.<sup>(37)</sup> He usually drinks three or four beers on weekends or while watching football on television.<sup>(38)</sup>

On January 30, 2004, Applicant completed his security clearance application. He answered "no" to the following question in the SOR:

#### 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)? Do not repeat information reported in EPSQ Module 19 (Section 21 from the SF-86)."

He initially answered "yes" to this question, but because he did not have the specific information related to his treatment when completing his security clearance application, he changed his answer to "no".<sup>(39)</sup> He spoke with his supervisor about the information problem, and understood he would be interviewed to discuss his alcohol issue if he answered "no".<sup>(40)</sup> He was interviewed, and provided his alcohol treatment information in a signed statement, dated March 21, 2005.<sup>(41)</sup>

His supervisors describe him as a reliable and capable employee.<sup>(42)</sup> He is willing to work overtime when necessary; he takes on extra duties; and comes to work every day.<sup>(43)</sup> He has never come to work drunk.<sup>(44)</sup> His immediate supervisor indicated that it is not easy to do the SF-86 on line.<sup>(45)</sup> She also testified that it was her understanding that if there was a question about an answer on the application, he would be interviewed at work.<sup>(46)</sup>

He also works a second job at a restaurant.<sup>(47)</sup> His supervisors at this job describe him as a good employee, who is reliable and a team player.<sup>(48)</sup>

### **POLICIES**

Enclosure 2 of the Directive sets forth adjudication guidelines which must be considered in the evaluation of security suitability. 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 in Paragraph E2.2., Enclosure 2 of the Directive, are intended to assist the

administrative judge in reaching fair and impartial common sense decisions.

Included in the guidelines are disqualifying conditions and mitigating conditions applicable to each specific guideline. In addition, each security clearance decision must be based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically, these are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 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.<sup>(49)</sup> 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.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>(50)</sup> The government has the burden of proving controverted facts.<sup>(51)</sup> The burden of proof is something less than a preponderance of the evidence.<sup>(52)</sup> Once the government has met its burden, the burden shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.<sup>(53)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(54)</sup>

No one has a right to a security clearance,<sup>(55)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(56)</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.<sup>(57)</sup> Section 7 of Executive Order 10865 specifically provides 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." The decision to deny an individual a security clearance is not necessarily a determination as to the allegiance, loyalty, and patriotism of an applicant.<sup>(58)</sup> It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

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

**Alcohol Consumption - Guideline G: 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.**

**Personal Conduct - Guideline E: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulation could indicate that the person may not properly safeguard classified information.**

## CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate adjudicative factors, I conclude the following with respect to the allegations set forth in the SOR:

The government has established its case under Guideline G. Applicant began drinking while in high school. After joining the Army, his drinking increased very significantly and included hard liquor. He frequently drank to impairment with his friends when off-duty. Because of his excessive drinking, he was arrested for DWI after going to a club; he got into a fist fight with his best friend, resulting in a severe cut to his arm which required medical attention; and the Army discharged him. Even though he acknowledges a problem with alcohol, he continues to drink regularly with friends. By continuing to drink, he places himself in jeopardy for future drunk-driving arrests and other alcohol related problems. Applicant's conduct clearly falls within 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*), and AC DC E2.A7.1.2.5. (*Habitual or binge consumption of alcohol to the point of impaired judgment*).

Applicant did attend military ordered alcohol counseling beginning in January 2003. *See* Government Exhibit 2, *supra* note 10, at 2. He did not complete the counseling, but acknowledges that he was told he was abusive of alcohol. The record does not contain any reports from a qualified physician, medical professional or licensed clinical social worker indicating that he is alcohol dependent or an alcohol abuser. Thus, Alcohol Consumption Disqualifying Conditions (AC DC) E2.A7.1.2.3. (*Diagnosis by a credentialed medical profession... of alcohol abuse or alcohol dependence*), AC DC E2.A7.1.2.4. (*Evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program*) and AC DC E2.A7.1.2.6. (*Consumption of alcohol, subsequent to a diagnosis of alcoholism by a credentialed medical professional and following completion of an alcohol rehabilitation program*) do not apply.

A security concern based on alcohol consumption can be mitigated in several ways. While Applicant's DWI and fight occurred three years ago, he continues to drink on a regular basis after acknowledging that he has a problem with alcohol. He has stopped drinking hard liquor; however, he continues to drink beer in moderate quantities, which could lead to future problems. The record reflects a pattern of drinking, which he knows has the potential to be harmful to him. Although he has enrolled in an alcohol safety program, he has not completed the program. The effect this program will have on his current drinking behavior is unknown. He continued to drink after attending the Army sponsored alcohol abuse program, and was discharged from the Army because of this decision. Thus, he has not established a mitigating condition under Alcohol Consumption Mitigating Conditions (AC MC) E2.A7.1.3.1. (*The alcohol related*

incidents do not indicate a pattern), 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 AC MC E2.A6.1.3.3. (Positive changes in behavior supportive of sobriety). Finally since the record contains no evidence of a diagnosis of alcohol abuse or alcohol dependence, AC MC E2.A7.1.3.4. (Following diagnosis of alcohol abuse or alcohol dependence, the individual has successfully completed inpatient or outpatient rehabilitation... ) does not apply.

The government has established its case under Guideline E. In answering the security clearance application, Applicant changed his response to Question 30 from "yes" answer to "no".

By so doing, he deliberately omitted material and relevant facts necessary to the determination of his security clearance eligibility and trustworthiness. His conduct clearly falls with Personal Conduct Disqualifying Condition E2.A5.1.2.2. (The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement...).

A security concern based on personal conduct can be mitigated in several ways. When he realized that he did not have all the necessary information to complete his answer to Question 30, Applicant discussed the problem with his supervisor, who had experience with completing security clearance applications. From this conversation, he understood that if he answered "no", he would be interviewed by an investigator, at which time he would be able to provide in full all the necessary information to complete his answer. He changed his "yes" answer to "no", and waited to be interviewed. When he was interviewed, he voluntarily disclosed his enrollment in an alcohol treatment program. He has established that Personal Conduct Mitigating Condition E2.A5.1.3.4. (Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided) applies. <sup>(59)</sup> He has mitigated the government's security concerns about his personal conduct.

Finally, I have considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. He has been honest about his drinking in the past and now. By not drinking hard liquor and enrolling in an alcohol safety program, he has taken some steps towards resolving his drinking issues. However, since he has acknowledged a problem with alcohol, his decision to continue drinking raises concerns about his judgment and reliability. I am not convinced that he fully understands the negative consequences of his decision to drink. He has not mitigated the government's security concerns. Accordingly, for the reasons stated, I find that it is not clearly consistent with the national interest to grant a security clearance to Applicant.

### **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 G (Alcohol Consumption): AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Paragraph 2, Guideline E (Personal Conduct): FOR APPLICANT

Subparagraph 2.a: For Applicant

### **DECISION**

In light of all of the circumstances presented by the record in this case, it is clearly not consistent with the national interest to grant a security clearance for Applicant. Clearance is denied.

Mary E. Henry

Administrative Judge

1. Applicant withdrew his Exhibit B at the hearing. Tr. at 18.

2. Tr. at 7-8.

3. *Id.*

4. *Id.* at 8-9.
5. Applicant's response to SOR, dated August 29, 2005, at 1-2.
6. Government Exhibit 1 (Applicant's security clearance application, signed October 15, 2003, and later dated January 30, 2004) at 2.
  7. *Id.*; Tr. at 30.
8. Government Exhibit 1, *supra* note 6, at 2; Applicant Exhibit H (Certificate of Release or Discharge from Active Duty) at 1.
  9. Government Exhibit 1, *supra* note 6, at 1.
  10. Tr. at 38; Government Exhibit 2 (Applicant's statement, signed March 21, 2005) at 3.
    11. Tr. at 39; Government Exhibit 2, *supra* note 10, at 3.
    12. *Id.*
    13. Tr. at 39-40; Government Exhibit 2, *supra* note 10, at 1.
  14. Government Exhibit 4 (Report of Unfavorable Information for Security Determination, dated March 21, 2003, and Commander's Report of Disciplinary or Administrative Action, dated February 12, 2003) at 1, 4.
    15. *Id.* at 4.
    16. Government Exhibit 2, *supra* note 10, at 1-2; Tr. at 42-43.
    17. Government Exhibit 2, *supra* note 10, at 2; Tr. at 43.
    18. *Id.*
    19. Government Exhibit 2, *supra* note 10, at 2.
    20. *Id.*; Tr. at 43-44.
    21. *Id.*
  22. Government Exhibit 5 (Documents concerning the Article 15 discipline, dated January 27, 2003) at 1-2; Tr. at 45.
    23. Tr. at 45-46.
    24. Government Exhibit 2, *supra* note 10, at 3.
    25. *Id.*; Tr. at 46.
    26. Tr. at 46.
    27. *Id.* at 46-47.
    28. *Id.*; Government Exhibit 2, *supra* note 10, at 3.
    29. *Id.*
    30. Government Exhibit 2, *supra* note 10, at 3.

31. *Id.*; Tr. at 48.

32. *Id.*; Applicant Exhibit H, *supra* note 8, at 1.

33. Tr. at 49; Government Exhibit 2, *supra* note 10, at 4.

34. Tr. at 50.

35. *Id.* at 33-34, 45-46.

36. Applicant Exhibit I (Letter, dated January 19, 2006).

37. Tr. at 49-50.

38. *Id.*

39. *Id.* at 31-32, 51.

40. *Id.*

41. Government Exhibit 2, *supra* note 10, at 5.

42. Applicant Exhibit A (Statement, dated December 1, 2005); Applicant Exhibit C (Statement, dated December 3, 2005); Applicant Exhibit F (Performance Appraisal for 2004), Applicant Exhibit G (New Hire Probationary Report, dated April 13, 2004); Tr. at 24-26.

43. Tr. at 24-26.

44. *Id.* at 23.

45. *Id.* at 26-27.

46. *Id.* at 27.

47. *Id.* at 50.

48. Applicant Exhibit D (Statement dated December 20, 2005); Applicant Exhibit E (Statement, dated December 16, 2005).

49. Directive, Enclosure 2, ¶ E2.2.1.1. through E2.2.1.9.

50. ISCR Case No. 96-0277 (July 11, 1997) at 2.

51. ISCR Case No. 97-0016 (App. Bd., December 31, 1997) at 3; Directive, Enclosure 3, ¶ E3.1.14.

52. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

53. ISCR Case No. 94-1075 (App. Bd., August 10, 1995) at 3-4; Directive, Enclosure 3, ¶ E3.1.15.

54. ISCR Case No. 93-1390 (App. Bd. Decision and Reversal Order, January 27, 1995) at 7-8; Directive, Enclosure 3, ¶ E3.1.15.

55. *Egan*, 484 U.S. at 531.

56. *Id.*

57. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.

58. Executive Order No. 10865 § 7.

59. I have considered the remaining Personal Conduct Mitigating Conditions and conclude that none apply.