

KEYWORD: Alcohol; Personal Conduct

DIGEST: Applicant failed to mitigate security concerns about alcohol abuse stemming from four alcohol-related arrests. He also failed to mitigate security concerns about his deliberate falsification of his security clearance application. Clearance is denied.

CASENO: 04-12565.h1

DATE: 02/27/2006

DATE: February 27, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-12565

**DECISION OF ADMINISTRATIVE JUDGE**

**MATTHEW E. MALONE**

**APPEARANCES**

**FOR GOVERNMENT**

Ray T. Blank, Esquire, Department Counsel

**FOR APPLICANT**

**SYNOPSIS**

Applicant failed to mitigate security concerns about alcohol abuse stemming from four alcohol-related arrests. He also failed to mitigate security concerns about his deliberate falsification of his security clearance application. Clearance is denied.

**STATEMENT OF THE CASE**

After reviewing the results of Applicant's background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding <sup>(1)</sup> it is clearly consistent with the national interest to give Applicant a security clearance. On July 14, 2005, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed in the Directive under Guideline G (alcohol consumption) and Guideline E (personal conduct). Applicant timely answered the SOR, and requested a hearing.

The case was assigned to me on September 29, 2005, and I convened a hearing October 19, 2005. The parties appeared as scheduled and the government presented six exhibits (GE 1 through 6), which were admitted without objection. Applicant testified in his own behalf, and submitted one document admitted without objection as Applicant's Exhibit (AE) A. DOHA received the transcript (Tr) on November 1, 2005.

**FINDINGS OF FACT**

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

Applicant is 34 years old and has held his current job with a defense contractor since March 2001. He works as a technician supporting satellite information links for forward-deployed armed forces. Applicant has held a top secret level security clearance for 14 years. He first received a clearance while serving as an enlisted man in the U.S. Navy between October 1989 and October 1999. He received an honorable discharge and left the service as a third class petty

officer (paygrade E-4).

Applicant has been married twice. His first marriage lasted from 1991 until 1995, when he and his wife divorced. They had one child together and now share custody. Applicant re-married in October 2000, but that marriage also ended in divorce in 2004. Applicant's first wife regards him as a good and responsible father. She testified at hearing in support of Applicant, and the two appear to have a friendly, mature relationship.

In November 1994, Applicant was stopped for running a red light. He had been drinking earlier and failed a field sobriety test. Applicant was charged with and eventually convicted of driving under the influence (DUI) of alcohol. He was assessed a fine and court costs, sentenced to 30 days in jail, and ordered to attend an alcohol safety awareness program (ASAP). The jail sentence was suspended, he was placed on probation for one year, and his driving privileges were restricted for one year.

In 1995, he was interviewed by a government investigator as part of an earlier security clearance background investigation. In a signed, sworn statement given at the interview, Applicant stated his 1994 DUI was an isolated incident, and that he would avoid driving after drinking in the future. In the same statement, he acknowledged having, on one occasion, consumed alcohol to the point of passing out. His level of drinking in 1995 was on the order of six or seven beers in a sitting twice weekly. When he was again interviewed in February 2004, Applicant indicated his alcohol consumption was generally unchanged since 1995. At his hearing, he stated his alcohol consumption is still the same. He regards being intoxicated as having impaired speech and motor functions, loss of memory, blackouts, and so forth. The last time Applicant was intoxicated according to his own definition was at a wedding in January 2004. <sup>(2)</sup>

In October 1995, the Department of the Navy Central Adjudication Facility (DON CAF), which is responsible for adjudicating security clearances for Naval personnel, reviewed his background, including the circumstances of his 1994 DUI. His clearance was renewed after DON CAF determined the DUI to be an isolated incident, which, at the time it was.

In May 1999, while onboard a U.S. Navy warship on extended deployment, Applicant received non-judicial punishment (NJP) for unauthorized possession of alcohol and for being drunk on duty. He was reduced in rank from petty officer second class (paygrade E-5) to petty officer third class, restricted to the ship for 60 days, and ordered to forfeit one-half month's pay for two months. Applicant and some shipmates had consumed mixed drinks in their berthing area. When he mustered for duty, a supervisor smelled alcohol on his breath and had Applicant's belongings searched, whereupon a bottle of liquor was found in Applicant's possession. Applicant explained he and his friends were celebrating Applicant's decision to leave the Navy. He was honorably discharged at the end of his obligated service in October 1999.

In May 2001, Applicant went to dinner with his wife and a friend. He insists he had only one alcoholic drink at dinner. After dinner, he found that his truck had become stuck in a sandy area (Applicant lives near a beach). As he was trying

to get the vehicle back on the road, a policeman arrived and pointed out to Applicant a "no trespassing" sign. The officer also asked Applicant if he had been drinking, to which Applicant replied he had consumed one drink at dinner. The officer took Applicant into custody and charged him with public intoxication and intent to trespass. Applicant was eventually convicted of both charges and assessed fines and court costs.

In June 2003, Applicant was arrested and charged with DUI after being stopped by a police officer. He avers he had "two or three beers over a two hour period" at a friend's house just before getting into his car.<sup>(3)</sup> Applicant's blood alcohol content (BAC) when he was pulled over was .19%, nearly twice the legal limit in that jurisdiction. The charges were eventually dismissed when it was determined the police lacked probable cause to stop him in the first place.

Applicant submitted a security clearance application (SF 86) on June 24, 2002, wherein he disclosed his 1999 NJP and his 1994 DUI. He did not disclose his 2001 arrest for public intoxication and intent to trespass, either in response to question 24 (alcohol-related arrests/charges) or question 26 (other arrests). When asked about this omission by a government investigator in February 2004, he stated "I did not list these charges on my SF 86 because they either had not happened at the time I filled out the form or I had not yet been convicted. I was not intentionally trying to omit pertinent information or falsify the form."<sup>(4)</sup> At his hearing, Applicant explained his omission of the 2001 arrest as a product of either rushing through the form or confusing the requirements of questions 24 or 26.<sup>(5)</sup>

Applicant was faced with similar questions when he was interviewed by investigators after his first DUI in 1994. After omitting pre-USN drug use from a security questionnaire, he stated he thought he only had to list information from the preceding five years.<sup>(6)</sup>

Applicant is highly regarded at work. He occupies a position of responsibility and is potentially on call around the clock to respond to emergencies and unplanned events. There have been no reports of misconduct at work and he has not been any adverse contacts with law enforcement since is 2003 DUI.

### **POLICIES AND BURDEN OF PROOF**

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest<sup>(7)</sup> for an applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it establishes that it is not clearly consistent with the national interest for an applicant to have access to classified information. The applicant must then present sufficient evidence to refute, extenuate or

mitigate the government's case. Because no one has a right to a security clearance, applicants bear a heavy burden of persuasion to comply with the government's compelling interest in ensuring each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own.<sup>(8)</sup> The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.<sup>(9)</sup>

The Directive sets forth adjudicative guidelines<sup>(10)</sup> for consideration when evaluating an applicant's suitability for access to classified information. Security clearance decisions must reflect consideration of disqualifying and mitigating conditions listed under each adjudicative guideline as may be applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having considered the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are Guideline E (personal conduct) and Guideline G (alcohol consumption).

## CONCLUSIONS

The security concern about alcohol consumption, as expressed through Guideline G, is that 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>(11)</sup> The government alleged in the SOR that Applicant has been charged four times with alcohol-related offenses, and has been convicted of three of those charges (SOR ¶¶ 1.a - 1.d). The fourth charge (SOR ¶ 1.a) was dismissed for lack of probable cause to detain Applicant in the first place. However, it is undisputed he had a .19% BAC at the time he was arrested. One of the charges was brought based on Applicant's drinking while in a duty status on board a Navy warship (SOR ¶ 1.c). The government also alleged Applicant consumes alcohol to the point of intoxication at least once a year (SOR ¶ 1.e). This record presents sufficient evidence to support these allegations and the government's preliminary decision to deny or revoke a clearance for this applicant under Guideline G. Specifically, disqualifying condition (DC) 1,<sup>(12)</sup> DC 2,<sup>(13)</sup> and DC 5<sup>(14)</sup> apply to these facts.

By contrast, this record requires consideration of Guideline G mitigating condition (MC) 2,<sup>(15)</sup> and MC 3.<sup>(16)</sup> Applicant's last alcohol-related arrest was more than two years ago, but the value of this mitigator is limited by Applicant's pattern of behavior and ongoing use of alcohol. Applicant also presented several character witnesses who vouched for his responsibility and reliability. While this information supports application of MC 3, Applicant's alcohol-related conduct occurs about every two or three years. Indeed, his last three are almost exactly two years apart. He still engages in conduct - drinking - that was the underlying cause for his arrests. Social drinking, even allowing for occasional intoxication, is not usually cause for concern in assessing one's suitability for a security clearance. But this individual has a history of alcohol-related arrests and has not thought it necessary to alter the way he uses alcohol. Absent information showing more definitively he is not likely to engage in excessive drinking in the future, Applicant

cannot overcome the government's concerns about his use of alcohol. I conclude Guideline G against the Applicant.

The government has also expressed concerns about Applicant's trustworthiness through SOR allegations that he deliberately falsified his answer to SF 86 Question 24 (alcohol-related arrests) when he failed to disclose his 2001 arrest and conviction for public intoxication (SOR ¶ 2.a). Under Guideline E, a security concern arises where it is shown an applicant has exhibited questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Such conduct may indicate the person may not properly safeguard classified information. (17) The record evidence shows Applicant did not list his arrest as alleged, but to be disqualifying, the omission must have been intentional. Applicant listed other disqualifying information in response to other questions, so on first glance, this omission appears to be an oversight by Applicant. However, his statement to a government investigator and his testimony on this point at hearing present inconsistent explanations for his omission. In light of the fact investigators confronted him with a similar omission when he was interviewed in 1995, there is no reason to think Applicant did not intentionally omit his 2001 arrest. At the very least, he should have listed this event in response to question 26 (other arrests). Having considered all of the available information relevant to this issue, I conclude Guideline E DC 2 (18) applies here.

I have also considered these facts in light of the Guideline E mitigating conditions. Of those potentially applicable to these facts, (19) I conclude none are supported by this record. The omitted information was directly material to assessing Applicant's suitability for access, and the omission was recent insofar as it involves the SF 86 that serves as the basis for his most recent investigation. Further, Applicant has completed similar questionnaires before and there is no information to suggest he relied on anyone else's advice when completing the SF 86 at issue here. The completion of a security questionnaire is the initial step in requesting a security clearance. Because false or incomplete information given in the questionnaire is capable of affecting the way government investigators obtain complete and accurate information about an applicant, it is material. Moreover, a false answer is material even if there is no proof it actually influenced Applicant's background investigation. In light of all available information on this issue, I conclude Guideline E against the Applicant.

A fair and commonsense assessment (20) of the entire record before me shows the government properly expressed reasonable doubts about Applicant's suitability to have access to classified information. The SOR was based on sufficient, reliable information about Applicant's history of alcohol use, and about his willingness to be forthcoming in his statements to the government. Such issues bear directly on an applicant's ability to protect classified information, and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. Available information about his current circumstances is not sufficient to show it is clearly consistent with the national interest to grant Applicant a security clearance.

### **FORMAL FINDINGS**

Formal findings regarding each SOR allegation are as follows:

Paragraph 1, Guideline G (Alcohol): AGAINST THE APPLICANT

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

Subparagraph 1.c: Against the Applicant

Subparagraph 1.d: Against the Applicant

Subparagraph 1.e: Against the Applicant

Paragraph 2, Guideline E (Personal Conduct): AGAINST THE APPLICANT

Subparagraph 2.a: Against the 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 the Applicant. Clearance is denied.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. Tr., 96 - 97, 105 - 106.
3. GE 4; Tr., 100 - 102.

4. GE 3.
5. Tr., 77 - 78; 108 - 109.
6. GE 5.
7. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
8. *See Egan*, 484 U.S. at 528, 531.
9. *See Egan*; Directive E2.2.2.
10. Directive, Enclosure 2.
11. Directive, E2.A7.1.1.
12. Directive, 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.
13. Directive, E2.A7.1.2.2. Alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job.
14. Directive, E2.A7.1.2.5. Habitual or binge consumption of alcohol to the point of impaired judgment.
15. Directive, E2.A7.1.3.2. The problem occurred a number of years ago and there is no indication of a recent problem.
16. Directive, E2.A7.1.3.3. Positive changes in behavior supportive of sobriety.
17. Directive, E2.A5.1.1.
18. Directive, 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.
19. Directive, E2.A5.1.3.2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily.
- Directive, E2.A5.1.3.3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts.
- Directive, 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.
20. Directive, E2.2.3.