

KEYWORD: Criminal Conduct; Alcohol

DIGEST: Between 1998 and 2003, Applicant was arrested four times. He had two alcohol-related incidents away from work-one in 1998 and one in 2003, both resulting in convictions for Driving Under the Influence of Alcohol. In June 2002 he wrongfully took another's property, resulting in a petty larceny charge and deferred prosecution for two years. One month later, an affray with his son led to a criminal assault charge that was later dropped. Applicant failed to mitigate the security concerns arising from his history of criminal conduct and excessive alcohol consumption. Clearance is denied.

CASENO: 04-12642.h1

DATE: 04/06/2006

DATE: April 6, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-12642

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL J. BRESLIN

APPEARANCES

FOR GOVERNMENT

Richard Stevens Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Between 1998 and 2003, Applicant was arrested four times. He had two alcohol-related incidents away from work—one in 1998 and one in 2003, both resulting in convictions for Driving Under the Influence of Alcohol. In June 2002 he wrongfully took another's property, resulting in a petty larceny charge and deferred prosecution for two years. One month later, an affray with his son led to a criminal assault charge that was later dropped. Applicant failed to mitigate the security concerns arising from his history of criminal conduct and excessive alcohol consumption. Clearance is denied.

STATEMENT OF THE CASE

On June 26, 2003, Applicant submitted a security clearance application. The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant under 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), as amended (the "Directive"). On August 10, 2005, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. The SOR alleges security concerns raised under Guideline J, Criminal Conduct, and Guideline G, Alcohol Consumption, of the Directive.

Applicant answered the SOR in writing on August 30, 2005. He elected to have a hearing before an administrative judge.

I received the case assignment on December 20, 2005. With the concurrence of Applicant and Department Counsel, I convened the hearing on February 9, 2006. The government introduced Exhibits 1 through 9. Applicant presented Exhibit A and testified on his own behalf. At Applicant's request I left the record open to afford him the opportunity to submit additional material for consideration. On March 1, 2006, Applicant submitted Exhibit B, which I admitted without objection. DOHA received the final transcript of the hearing (Tr.) on February 16, 2006.

FINDINGS OF FACT

Applicant admitted the factual allegations in the SOR. (Applicant's Answer to SOR, dated August 30, 2005.) Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, I make the following additional findings of fact.

Applicant was born in December 1960. (Ex. 1 at 1.) He began working for his current employer, a defense contractor, in 1979. (*Id.* at 2.) He attended an apprentice school from 1979 to 1983, and earned a certificate as a journeyman. (Ex. 1 at 1; Tr. at 9.) He received a security clearance in June 1980. (*Id.* at 6.)

He was married in 1979. (Ex. 1 at 2.) Two children were born of the marriage. (Tr. at 9.) Applicant later separated from his wife.

In August 1998, Applicant went to a local racecourse, and drank several beers while watching the races. (Ex. 2 at 1.) While driving home, he was stopped at a traffic safety checkpoint. (*Id.*) His blood-alcohol content (BAC) was .09%, above the legal limit. (Ex. 2 at 1.) Authorities cited him, *inter alia*, for Driving Under the Influence of Alcohol (DUI), a traffic offense. (Ex. 5.) Applicant was found guilty in accordance with his plea, and sentenced to five months confinement (suspended) and a \$500.00 fine. (Ex. 5 at 2.) The court also required Applicant to attend a 16-week alcohol safety course, which Applicant completed in May 1999. (Ex. 8; Ex. 9; Tr. at 25-26.) He also attended meetings of Alcoholics Anonymous (AA) as part of the program. (Tr. at 33.)

Applicant dated a woman for about 8 years, and they lived together for almost two years. (Ex. 2 at 2.) Applicant and his girlfriend argued about the discipline of her teenaged daughter and eventually separated. (Tr. at 22.) In June 2002 he went to visit the woman, and learned she had purchased a new sport utility vehicle for the daughter. (Ex. 2 at 2.) Applicant did not feel the child deserved the new vehicle, so he removed the temporary license plates from the vehicle and threw them away. (Ex. 2 at 2; Tr. at 22.) Shortly thereafter, authorities arrested him and charged him with petty larceny, a misdemeanor. (Ex. 2 at 2; Ex. 6 at 1.) Applicant pled *nolo contendere*; the court found facts sufficient to find guilt, but deferred adjudication and placed Applicant on probation for two years. (Ex. 2 at 2; Ex. 6 at 2.) He was prohibited from contacting his former girlfriend or her daughter.

On July 12, 2002, Applicant was preparing for a family camping trip. (Ex. 2 at 2.) His son—a college student—came home after a day of drinking alcohol and did not help prepare for the trip. (*Id.*) Applicant and his son got into a heated argument, which developed into a physical altercation. The local police responded, arrested Applicant, and cited him for Assault and Battery on a Family Member. (Ex. 7.) Later, Applicant's son did not want to cooperate in the prosecution and the state dropped the charges. (Ex. 2 at 3; Ex. 7 at 2.) Applicant asserts his relationship with his son has improved

dramatically since the incident. (Tr. at 17.)

Applicant submitted a security clearance application in June 2003. (Ex. 1.) He properly reported his criminal history on the form.

On November 2, 2003, Applicant was returning from a Halloween party at about 12:30 a.m. (Ex. 2 at 3.) According to Applicant, he was a passenger in a van operated by a friend. When the friend saw a driver's safety checkpoint ahead, he pulled over, climbed into the back seat, and asked Applicant to drive. (Ex. 2 at 3.) Applicant drove up to the sobriety checkpoint where local police stopped him. Applicant took a field sobriety test; a subsequent breath test revealed a BAC of .11%. (Ex. 2 at 3.) Authorities charged Applicant with DUI-Second Offense. (Ex. 4.) The court found Applicant guilty of simple DUI, and sentenced him to five months confinement (suspended), a \$250.00 fine, a suspended license for 12 months, and payment of court costs. (Ex. 4 at 2.) Applicant also completed an alcohol safety course required by the court. (Ex. A.)

Following his second arrest for DUI, Applicant was referred to a 24-week alcohol intervention program. (Ex. B; Tr. at 34.) Upon admission, a certified substance abuse counselor diagnosed "Alcohol Abuse." (*Id.*) Between February and June 2004, Applicant attended 14 group counseling sessions and three individual sessions. (Ex. B.) He also attended AA meetings as required. (Tr. at 33.) Applicant maintained sobriety while in the program. The staff discharged him because the treatment goals were met. (Ex. B.) Upon discharge, the counselor diagnosed "Alcohol Abuse (in early sustained remission)." (Ex. B.) Applicant asserts he abstained from alcohol for almost one year. (Tr. at 39.)

In June 2004, a security investigator interviewed Applicant, who provided a written statement relating to his criminal offenses and alcohol usage. (Ex. 2.) Applicant denied any current problem with alcohol. (Ex. 2 at 2.) He indicated he consumed a few beers at home, and that over a weekend he may consume a 12-pack of beer. He stated his alcohol consumption never caused any work-related problems, and that he does not drink and drive. (Ex. 2 at 2.)

At the hearing, Applicant indicated he now drinks about six beers over a weekend, normally while watching sports on television. (Tr. at 41.) He denied drinking to the point of intoxication. He believed he would have to consume eight or nine beers to become intoxicated. (Tr. at 43.)

POLICIES

The President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." (*Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).) In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch.

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. The adjudicative guidelines at issue in this case are:

Guideline J, Criminal Conduct: A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. (Directive, ¶ E2.A10.1.1.)

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. (Directive, ¶ E2.A7.1.1.)

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

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." (Directive, ¶ E2.2.1.) An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. (*Id.*) An administrative judge should consider the following factors: (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. (*Id.*)

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. (Directive, ¶ E3.1.14.) Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. (Directive, ¶ E3.1.15.) An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." (ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).) "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." (Directive, ¶ E2.2.2.)

A person granted access to classified information enters into a special relationship with the government. 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. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. (Exec. Ord. 10865, § 7.) It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

CONCLUSIONS

I considered carefully all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

Guideline J, Criminal Conduct

Paragraph E2.A10.1.2.1 of the Directive provides that "allegations or admission of criminal conduct" may be disqualifying. Similarly, under ¶ E2.A10.1.2.2 of the Directive, it may be disqualifying where an applicant committed "a single serious crime or multiple lesser offenses." Applicant's criminal record includes four arrests: two DUIs (in 1998 and again in 2003); the assault and battery charge in 2002; and the petty larceny offense. I find both these potentially disqualifying conditions raised in this case.

Under the Directive, the security concerns arising from a history of criminal conduct may be mitigated. Under ¶ E2.A10.1.3.1 of the Directive, it may be mitigating when "the criminal behavior was not recent." The Directive does not define the term "recent"; the recency of an incident is determined by considering all the circumstances, including the applicant's age, his pattern of behavior over a period of time, and the number of years since the last incident relative to the entire course of conduct. Applicant's history of criminal involvement extends a period of about 5 years (1998 to 2003), and occurred when Applicant was between the ages of 37 and 41, an adult by any measure. He had no subsequent criminal conduct for about three years. Considering all the circumstances, I conclude Applicant's criminal conduct is recent and this potentially mitigating condition does not apply.

The Directive, ¶ E2.A10.1.3.2, also provides that it may be mitigating where "the crime was an isolated incident." As noted above, Applicant had two offenses related to driving while under the influence of alcohol, and two other arrests (petty larceny and assault) within a few months. His crimes are not isolated incidents; therefore, this potentially mitigating condition does not apply.

Paragraph E2.A10.1.3.4 of the Directive states it may be mitigating where "the factors leading to the violation are not likely to recur." Similarly, under ¶ E2.A10.1.3.6 of the Directive, it may be mitigating where "there is clear evidence of successful rehabilitation." The crucial issue is whether Applicant has been successfully rehabilitated, so that further criminal incidents will not occur. Applicant has the burden of demonstrating his successful rehabilitation. Turning to the offenses in question, the common element is exceptionally poor judgment and the lack of self-control. This was demonstrated when Applicant—a mature individual—chose to drive on two occasions after drinking excessive quantities of alcohol. It must also be noted that he completed an alcohol education course (including attendance at AA meetings) after the first DUI, but nonetheless drove under the influence of alcohol a second time. I also note that after his brush with the law in June 2002, about one month later he was again arrested after a scuffle with his son. These repeated incidents tend to demonstrate a lack of amenability to rehabilitation. While he successfully completed the second alcohol abuse counseling program the second time, it is too early to tell if it had a lasting effect. Considering all the circumstances, Applicant has not met his burden of producing clear evidence of successful rehabilitation. I conclude these potentially mitigating conditions do not apply.

I carefully considered the "whole person" concept and the potentially disqualifying and mitigating conditions relevant to this guideline. Applicant has been discredibly involved with law enforcement on multiple occasions, reflecting a lack of judgment or self-control unusual in someone of his age. I conclude Applicant has not mitigated the security concerns arising from his history of criminal conduct.

Guideline G, Alcohol Consumption

Paragraph E2.A7.1.2.1 of the Directive provides that it may be a disqualifying condition if the evidence reveals "[a]lcohol-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." The evidence reveals two incidents—in August 1998 and August 2003—where Applicant committed alcohol-related offenses away from work. The evidence raises this potentially disqualifying condition.

Under ¶ E2.A7.1.2.4 of the Directive, "[e]valuation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program" may be disqualifying. After his second DUI, Applicant was diagnosed as exhibiting "Alcohol Abuse" by a certified substance abuse counselor working for the hospital's counseling program. It is not clear whether the person making the diagnosis qualifies as a licensed clinical social worker" as required by the Directive; therefore, I cannot find this potentially disqualifying condition applies. However, I will consider these circumstances as part of the "whole person" concept.

The security concerns arising from excessive alcohol consumption can be mitigated. Under the Directive, ¶ E2.A7.1.3.1, it may be mitigating where "[t]he alcohol-related incidents do not indicate a pattern." Applicant's two incidents were very similar; each involved his decision to drive an automobile after having too much to drink in social settings. I conclude this potentially mitigating condition does not apply.

Under ¶ E2.A7.1.3.2 of the Directive, it may be mitigating where "[t]he problems occurred a number of years ago and there is no indication of a recent problem." Applicant's first alcohol-related incident occurred in 1998-over seven years ago. However, the second incident happened in 2003 and is recent. I conclude this potentially mitigating condition does not apply.

Paragraph E2.A7.1.3.3 provides that "[p]ositive changes in behavior supportive of sobriety" may also be a mitigating factor. Following his second DUI, Applicant attended a second, longer alcohol abuse counseling course. He gained an increased appreciation of the dangers of excessive drinking. He continues to consume alcohol in moderation, but does not drink before driving anymore. I find this potentially mitigating condition applies.

The Directive, ¶ E2.A7.1.3.4, indicates it may be mitigating where:

Following a diagnosis of alcohol abuse or alcohol dependence, the individual has successfully completed inpatient or outpatient rehabilitation along with aftercare requirements, participates frequently in meetings of Alcoholics Anonymous or a similar organization, has abstained from alcohol for a period of at least 12 months, and received a favorable prognosis from a credentialed medical professional or licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

As noted above, Applicant received a diagnosis of Alcohol Abuse by a substance abuse counselor, but it is not clear whether she was a licensed clinical social worker as required. Applicant participated in AA meetings as required, but no longer attends. He abstained from alcohol for less than 12 months. Although the counselor indicated he completed the treatment successfully, she did not make a prognosis. I find this potentially mitigating condition does not apply, but I will consider the relevant facts as part of the "whole person" concept.

I considered the potentially disqualifying and mitigating factors in light of the "whole person" concept. Applicant is a mature individual who worked for a defense contractor for many years. His alcohol-related incidents occurred between the ages of 37 and 41-an age when he should be stable and responsible. He went through an alcohol awareness program after his first DUI, but had a second incident within five years, suggesting a lack of amenability to rehabilitation. Although the petty larceny and assault charges are not especially serious, they reflect poor judgment and a lack of self-control. I conclude Applicant has not mitigated the security concerns arising from his history of excessive alcohol consumption.

FORMAL FINDINGS

My conclusions as to each allegation in the SOR are:

Paragraph 1, Guideline J: 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 G: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

DECISION

In light of all of 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.

Michael J. Breslin
Administrative Judge