KEYWORD: Alcohol; Personal Conduct; Criminal Conduct

DIGEST: In December 1987, Applicant received nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ) for driving while intoxicated (DWI), and an oral reprimand for an open-container violation. He was convicted of DWI in the summer of 2000. He was convicted of DWI again in 2003, but the charge was dismissed after he was granted a new trial. He did not disclose the two 1987 incidents on his security clearance application (SF 86), because they were more than seven years old. He refuted the allegations of a second DWI and intentional falsification of his SF 86, and he mitigated the security concerns based on alcohol consumption and criminal conduct. Clearance is granted.

CASE NO: 04-12916.h1

DATE: 06/20/2006

DATE: June 20, 2006

In re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 04-12916

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Fahryn Hoffman, Esq., Department Counsel

Kathryn D. MacKinnon, Esq., Department Counsel

FOR APPLICANT

Elizabeth L. Newman, Esq.

SYNOPSIS

In December 1987, Applicant received nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ) for driving while intoxicated (DWI), and an oral reprimand for an open-container violation. He was convicted of DWI in the summer of 2000. He was convicted of DWI again in 2003, but the charge was dismissed after he was granted a new trial. He did not disclose the two 1987 incidents on his security clearance application (SF 86), because they were more than seven years old. He refuted the allegations of a second DWI and intentional falsification of his SF 86, and he mitigated the security concerns based on alcohol consumption and criminal conduct. Clearance is granted.

STATEMENT OF THE CASE

On September 30, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. The SOR alleges security concerns under Guidelines G (Alcohol Consumption), J (Criminal Conduct), and E (Personal Conduct). Under Guideline G, it alleges alcohol consumption "at times to excess and to the point of intoxication" from 1982 to January 2003 (¶ 1.a). Under both Guidelines G and J, it alleges four alcohol-related driving offenses (¶¶ 1.b-1.e, 2.a). Under Guideline E it alleges deliberate failure to disclose two alcohol-related driving offenses on the SF 86 (¶ 3.a).

Applicant answered the SOR in writing on October 27, 2005. He admitted the allegations under Guidelines G and J in part and offered explanations, denied the allegations of falsification of his SF 86 under Guideline E, and requested a hearing. The case was assigned to another administrative judge on January 30, 2006, and reassigned to me on February 17, 2006, to accommodate Applicant's request for a hearing at the Washington Hearing Office. On March 9, 2006, DOHA issued a notice of hearing setting the case for April 4, 2006. The case was heard as scheduled. DOHA received the transcript (Tr.) on April 19, 2006.

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is a 45-year-old systems engineer manager[(1)] for a defense contractor. He has worked for his current employer since December 2002. He served as an officer on active duty in the U.S. Army from August 1984 to August 1990. He has been married since July 1987 and has two children.[(2)] In his current position, he was evaluated as "exceptional" for the rating periods from April to December 2003, January to December 2004, and January to December 2005.[(3)]

Applicant began consuming alcohol in college. From 1982 to 1984, he consumed five beers or three drinks of hard liquor at a time about once a week, and he consumed six to seven drinks and became intoxicated about twice a year at parties.[(4)]

On December 3, 1987, while Applicant was on active duty in the Army, he was apprehended for driving while impaired. The incident occurred after he and some of his troops were celebrating after successful completion of an exercise. One of his noncommissioned officers drove back onto the Air Force base where the exercised occurred, with Applicant in the back seat. After the driver exited the car at his billets, Applicant drove a short distance to the officers' billets. On the way, he ran a stop sign, ran over a curb, and was stopped by the military police. His commander was summoned, a blood alcohol test was administered, and he received nonjudicial punishment under Article 15, Uniform Code of Military Justice, 10 U.S.C. § 815.[(5)] His punishment was forfeiture of $500 pay per month for two months. In addition, his driving privileges were suspended for one year, he was ordered to attend alcohol and drug abuse prevention training, and he was reprimanded.[(6)]

On December 30, 1987, Applicant was apprehended for violating the suspension of his driving privileges and an open-container violation. The open container of beer was left in Applicant's car by a friend. Applicant received an oral reprimand for bad judgment.[(7)]

In April 1990, Applicant's security clearance was revoked. His eligibility for a clearance was restored in May 1991, after he left active duty, based on the favorable recommendation of his last commander and the passage of time.[(8)] In 1996, he was offered a sensitive government position after submitting to a full lifestyle and counterintelligence investigation and receiving a security clearance.[(9)]

On July 28, 2000, Applicant was arrested for DWI after spending an afternoon drinking with friends. His breathalyzer test indicated a blood-alcohol content of .122.[(10)] He pleaded "nolo contendere" and was sentenced to 150 days in jail (suspended), a $500 fine, and probation for 18 months. He was ordered to undergo an alcohol abuse program and a victim-impact program.[(11)] According to his wife, he was "devastated" by the conviction.[(12)] He stopped drinking at home, limited himself to an occasional drink at a social occasion, and became "basically paranoid" about drinking and driving after this arrest and conviction.[(13)]

On January 2, 2003, Applicant joined some old drinking friends at a "gentlemen's club." His wife warned him to be very careful and to not drink and drive.[(14)] He testified he consumed one beer over a two-hour period. As he drove away from the club, he was stopped for speeding. He submitted to a breathalyzer, which indicated a blood-alcohol content of .06. The police officer suspected the reading was not accurate, and he told Applicant he was taking him "downtown" for another breathalyzer. A field sobriety test was not videotaped because the police officer's camera was inoperative. Applicant refused to submit to any more tests except field sobriety tests.[(15)] He was charged with DWI (2nd offense) based on the officer's observations (bloodshot eyes, slurred speech, smell of alcohol on breath, unsteady balance, and nystagmus).[(16)] He pleaded not guilty but was convicted by a jury on October 7, 2003. He was sentenced to 30 days in jail and a $1,500 fine.[(17)] A breathalyzer was installed in his vehicle and remained there for about a year.[(18)]

Applicant was released from jail on October 9, 2003 and on October 15, 2003, he was granted a new trial, for reasons not reflected in the case file.[(19)] The DWI charge was dismissed, and the case was refiled on a charge of obstructing a passageway (apparently based on the fact he was in the drive-through lane of a fast-food restaurant when he was stopped by the police).[(20)] Applicant pleaded "no contest," and was sentenced to three days in jail (already served), a $2,000 fine, 24 months of probation, and 24 hours of community service.[(21)] Applicant no longer associates with his old drinking friends.[(22)]

Applicant executed his SF 86 on February 20, 2003. In response to question 24, asking if he had ever been charged with or convicted of any offenses related to alcohol or drugs, he disclosed his July 2000 arrest, but he did not disclose the two incidents in December 1987.[(23)] He denied falsifying his answer, explaining that he believed question 24 applied only to state and local records, not military nonjudicial punishments. He believed nonjudicial punishments were covered by question 25, which asks about disciplinary proceedings, including nonjudicial punishments, in the last seven years.[(24)] He testified he disclosed his military disciplinary actions under question 25 on previous SF 86s.[(25)]

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, 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." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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).

The Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1. through 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (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 applicant'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. Directive ¶¶ E2.2.1.1. through E2.2.1.9.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in persons with access to classified information. However, the decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3; *see* 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). "[S]ecurity clearance determinations

should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

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. A disqualifying condition (DC 1) may arise from alcohol-related incidents away from work, such as driving under the influence. Directive ¶ E2.A7.1.2.1.

The government's evidence regarding the July 2003 incident had significant factual gaps, filed in by Applicant's testimony. He testified he had consumed only one drink and registered only .06 blood-alcohol content on the breathalyzer. The arrest warrant recited only the police officer's observations, not a blood-alcohol test. Apparently those observations were not recorded on videotape. The basis for the judge's decision to grant a new trial and the prosecutor's decision to dismiss the DWI and substitute a charge of obstructing a passageway is not clear. I found Applicant's account of the incident plausible, credible, and persuasive. I conclude Applicant has refuted the allegation in SOR ¶ 1.e, and I resolve it in his favor. I further conclude he has refuted SOR ¶ 1.a in part, in that his excessive alcohol consumption ended in January 2000, not January 2003 as alleged. However, the alcohol-related incidents in December 1987 and January 2000 are sufficient to establish DC 1.

A disqualifying condition also may arise if there is "[h]abitual or binge consumption of alcohol to the point of impaired judgment." Directive ¶ E2.A7.1.2.5. The evidence of Applicant's excessive alcohol consumption during college and during his military service establishes DC 5.

An applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). Security concerns based on alcohol consumption can be mitigated (MC 1) by showing that "[t]he alcohol-related incidents do not indicate a pattern." Directive ¶ E2.A7.1.3.1. Security concerns under this guideline also can be mitigated (MC 2) by showing "[t]he problem occurred a number of years ago and there is no indication of a recent problem." Directive ¶ E2.A7.1.3.2. The offenses in 1987 are too remote in time from the January 2000 DWI to constitute part of a "pattern" under MC 1, and they are not "recent" within the meaning of MC 2. The ultimate disposition of the charges in the July 2003 incident was favorable to Applicant and inconsistent with a pattern of alcohol abuse. I conclude MC 1 and MC 2 are established.

"Positive changes in behavior support of sobriety" can mitigate security concerns under this guideline (MC 3). Directive ¶ E.A7.1.3.3. Applicant substantially changed his drinking habits after his DWI conviction in 2000. He is now an occasional moderate drinker who will not drive after drinking. His arrest in January 2003 after the "boys' night out" was a one-time relapse, akin to a sober alcoholic "falling off the wagon." Since January 2003, Applicant no longer socializes with his old drinking friends. He has become very family-oriented. He has established a reputation as an outstanding and dependable worker. More than three years have passed without incident since his arrest in July 2003, and more than six years have passed since his DWI conviction. He impressed me as sincere and honest at the hearing. I conclude MC 3 is established.

Under the general adjudicative guidelines, I have also taken particular note of Applicant's recent demonstrations of maturity (Directive ¶ E2.2.1.4.), his apparent rehabilitation (Directive ¶ E2.2.1.6.), his strong motivation to avoid alcohol-related incidents (¶ Directive ¶ E2.2.1.7.), the absence of potential for pressure, coercion, exploitation, or duress (Directive ¶ E2.2.1.8.), and the low likelihood of recurrence (Directive ¶ E2.2.1.9.). After considering the disqualifying and mitigating conditions and evaluating the evidence in the context of the whole person, I conclude Applicant has mitigated the security concern based on alcohol consumption.

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. Disqualifying conditions may be based on allegations or an applicant's admission of criminal conduct, whether or not charged (DC 1). Directive ¶ E2.A10.1.2.1. A single serious crime or multiple lesser offenses may also be disqualifying (DC 2). Directive ¶ E2.A10.1.2.2. Applicant's record of disciplinary actions, arrests, and convictions establishes DC 1 and DC 2.

A security concern based on criminal conduct may be mitigated by showing the criminal behavior was not recent (MC 1) or was an isolated incident (MC 2). Directive ¶ E2.A10.1.3.1., E2.A10.1.3.2. *See also* Directive ¶ E2.2.1.3. (frequency and recency of conduct). For the reasons discussed above under Guideline G, I conclude MC 1 and MC 2 under this guideline are established.

An acquittal is a mitigating condition (MC 5) under this guideline. Applicant was not acquitted of DWI after his July 2003 arrest, but I consider the judge's decision granting a new trial and dismissing the charge as sufficiently close to an acquittal to constitute a mitigating condition.

Criminal conduct can be mitigated by showing clear evidence of successful rehabilitation (MC 6). Directive ¶ E2.A10.1.3.6. The issue under MC 6 is whether there has been a significant period of time without any evidence of misconduct, and whether the evidence shows changed circumstances or conduct. "Only with the passage of time will

there be a track record that shows whether a person, through actions and conduct, is willing and able to adhere to a stated intention to refrain from acting in a way that the person has acted in the past." ISCR Case No. 97-0727, 1998 DOHA LEXIS 302 at *7 (App. Bd. Aug. 3, 1998).

The Directive is silent on what constitutes a sufficient period of reform and rehabilitation. The sufficiency of an applicant's period of conduct without recurrence of past misconduct does not turn on any bright-line rules concerning the length of time needed to demonstrate reform and rehabilitation, but rather on a reasoned analysis of the facts and circumstances of an applicant's case based on a careful evaluation of the the record within the parameters set by the Directive. If the evidence shows that a significant period of time has passed without evidence of misconduct by an applicant, then an administrative judge must articulate a rational basis for concluding why that significant period of time does not demonstrate changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation. ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

Six years have elapsed since Applicant's last DWI conviction, and more than three years have elapsed since his questionable arrest for DWI and its generally favorable disposition. As discussed above under Guideline G, Applicant has made substantial changes in lifestyle and behavior. I conclude MC 6 is established.

After weighing the disqualifying and mitigating conditions under this guideline and considering the "whole person" factors discussed above under Guideline G, I conclude Applicant has mitigated the security concern based on criminal conduct.

Guideline E (Personal Conduct)

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1. A disqualifying condition (DC 2) under this guideline may be established by "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." Directive ¶ E2.A5.1.2.2.

When a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time the omission occurred. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004)

Applicant's explanation that he believed military disciplinary actions should be listed only under question 25 rather than question 24 was plausible. His testimony that he disclosed the military disciplinary actions under question 25 in previous security clearance applications was uncontradicted. Based on his testimony and demeanor and all the evidence of record, I found his testimony believable. I conclude DC 2 is not established, because he has refuted the allegation of falsifying his SF 86. No other disqualifying conditions under this guideline are established.

FORMAL FINDINGS

The following are my findings as to each allegation in the SOR:

Paragraph 1. Guideline G (Alcohol): FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: For Applicant

Paragraph 2. Guideline J (Criminal Conduct): FOR APPLICANT

Subparagraph 2.a: For Applicant

Paragraph 3. Guideline E (Personal Conduct): FOR APPLICANT

Subparagraph 3.a: 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 Applicant a security clearance. Clearance is granted.

LeRoy F. Foreman

Administrative Judge

1. Tr. 46.

2. Tr. 48.

3. Applicant's Exhibits (AX) B, C, D.

4. Government Exhibit (GX) 2 at 2.

5. Tr. 49-53.

6. GX 2 at 5; GX 3 at 1; Tr. 120.

7. *Id.* at 2; Answer to SOR at 2; Tr. 56-60.

8. GX 3 at 23-25, admitted in evidence at Tr. 119; Tr. 44.

9. AX A; Tr. 45-47.

10. Tr. 65-67.

11. GX 5 at 1, 4.

12. Tr. 145.

13. Tr. 148.

14. Tr. 149.

15. Tr. 130.

16. GX 7.

17. GX 8.

18. *Id.* at 2*;* Tr. 76.

19. *Id.*; GX 9.

20. GX 10.

21. GX 11at 1.

22. Tr. 150.

23. GX 1 at 6.

24. Tr. 78.

25. Tr. 92.