

KEYWORD: Alcohol Consumption, Drug Involvement

DIGEST: Between 1988 and 2004, Applicant was arrested and charged with Driving While Intoxicated (DWI) or Driving Under the Influence (DUI) four times and two other alcohol related offenses. He was also arrested in 1992 and 2004 for possession of drugs or drug paraphernalia. His assertion that he no longer drinks alcohol and does not use drugs is insufficient to overcome the government's security concerns regarding his alcohol consumption and drug involvement. Clearance is denied.

CASE NO: 05-00062.h1

DATE: 06/09/2006

DATE: June 9, 2006

In re:

SSN:

Applicant for Security Clearance

ISCR Case No. 05-00062

DECISION OF ADMINISTRATIVE JUDGE

MARY E. HENRY

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Between 1988 and 2004, Applicant was arrested and charged with Driving While Intoxicated (DWI) or Driving Under the Influence (DUI) four times and two other alcohol related offenses. He was also arrested in 1992 and 2004 for possession of drugs or drug paraphernalia. His assertion that he no longer drinks alcohol and does not use drugs is insufficient to overcome the government's security concerns regarding his alcohol consumption and drug involvement. Clearance is denied.

STATEMENT OF THE CASE

On April 5, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, 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. 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 H (Drug Involvement) 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 April 13, 2005, Applicant submitted a notarized response to the allegations. He elected to have his case decided on the written record in lieu of a hearing.

Department Counsel prepared a File of Relevant Material (FORM) and provided Applicant with a complete copy on March 20, 2006. Applicant had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. He submitted an additional response dated April 10, 2006, but no additional evidence. This case was assigned to me on April 28, 2006.

FINDINGS OF FACT

Applicant admitted all of the allegations in the SOR, except the allegation in subparagraph 1.g., which he denied.⁽¹⁾ Those admissions are incorporated as findings of fact. 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 44-year-old engineer for a defense contractor.⁽²⁾ He has worked for this contractor for sixteen years.⁽³⁾ He held a security clearance from April 1990 until October 1995.⁽⁴⁾ He has held his current security clearance since November 1997.⁽⁵⁾ He completed his security clearance application (SF 86) in November 1996.⁽⁶⁾

Applicant received a bachelor of science degree in electrical engineering from a United States university.⁽⁷⁾ He has been married twice and has one daughter, age 19.⁽⁸⁾

Alcohol Consumption

Applicant began consuming alcohol at age 17.⁽⁹⁾ He usually drank beer.⁽¹⁰⁾ His first alcohol related incident occurred in 1988, when he was arrested for shoplifting a pair of shoes after drinking.⁽¹¹⁾ He plead no contest to the charge, and was fined \$75.00.⁽¹²⁾ In 1990, the police arrested him for having an open container of beer outside a club.⁽¹³⁾ He paid a \$55.00 fine.⁽¹⁴⁾

In January 1992, the police arrested him for DWI after the breathalyzer test indicated his blood-alcohol levels were .166 and .171.⁽¹⁵⁾ He was found guilty of this charge, and sentenced to one year of probation, fined \$455.50, and ordered to perform 50 hours of community service and to attend an alcohol-related driving safety program and a 10 week alcohol awareness class.⁽¹⁶⁾ He attended the court ordered alcohol programs.⁽¹⁷⁾

Two years later, in April 1994, while working in Canada, the Canadian police arrested him and charged him with DWI.⁽¹⁸⁾

He pled guilty to the charge, and the court fined him \$400.00 and suspended his driving privileges in Canada for three months.⁽¹⁹⁾ In 1997, in a signed statement, he opined that his alcohol consumption had decreased since his 1994 DWI arrest.⁽²⁰⁾ He stated that he continued to drink socially, but would not abuse alcohol.⁽²¹⁾

On November 10, 2001, the police arrested and charged him with DWI and possession of an open container. He pled not guilty.⁽²²⁾ The court found him guilty, sentenced him to one day in jail and six months of probation, revoked his driver's license for six months, fined him \$828.00, and ordered him to attend alcohol driving school.⁽²³⁾ In late December 2001 pursuant to court order, he enrolled in an alcohol counseling program and attended two classes.⁽²⁴⁾ This program assessed his driver risk at the lowest alcohol and drug level. He was referred to an outpatient alcohol treatment and education program in January 2002.⁽²⁵⁾ He began this program in February 2002,⁽²⁶⁾ attended 12 sessions, participated in some of the discussions, and successfully completed the program.⁽²⁷⁾ His certified alcohol abuse counselor diagnosed alcohol abuse and noted that his prognosis was good, if Applicant stayed away from alcohol.⁽²⁸⁾ In December 2002, he advised that during the past year, he had drunk to the legal definition of intoxication 12 times, that he no longer drove a car when he consumed any alcohol, that he drank socially, and that he did not have an alcohol problem.⁽²⁹⁾

On October 14, 2004, the police arrested Applicant for his fourth driving and alcohol offense (DUI).⁽³⁰⁾ In a statement prepared a few days later, he acknowledged that his alcohol consumption had increased since his prior statement.⁽³¹⁾ He admitted drinking a couple of beers after work and two to five beers in a social setting.⁽³²⁾ On February 3, 2005, he pled guilty to DUI, a second degree misdemeanor offense.⁽³³⁾ The court fined him \$800.00, revoked his driving privileges for a year, impounded his car for 30 days; placed him on one year of probation, and ordered 50 hours of community service and attendance at alcohol classes.⁽³⁴⁾ In his response to the SOR, he states that since he became a born again Christian, he no longer drinks.⁽³⁵⁾

Drug Involvement

From 1978 until 1987, Applicant occasionally smoked marijuana as a high school and college student.⁽³⁶⁾ He denies smoking or otherwise using marijuana since this time.⁽³⁷⁾ When he was arrested for DWI in 1992, the police also charged him with possession of cannabis (marijuana), which was later dismissed by the court.⁽³⁸⁾ He states that the marijuana belonged to someone in the car.⁽³⁹⁾

In June 1994, local police watched his house as part of a drug operation. One evening, the police observed a car leave Applicant's house.⁽⁴⁰⁾ When a traffic violation occurred, the police stopped and searched the car.⁽⁴¹⁾ The passenger in the car admitted purchasing marijuana from an occupant at Applicant's house and specifically named Applicant's roommate.⁽⁴²⁾ The police obtained a search warrant, which was executed on June 22, 1994.⁽⁴³⁾ The police confiscated 18 drug and drug-related items, including a small bag of marijuana, marijuana seeds, and a bong.⁽⁴⁴⁾ Applicant and his

roommate were arrested.⁽⁴⁵⁾ On July 25, 1994, the state prosecutor notified the court that he had no intent to file formal charges or an information on Applicant.⁽⁴⁶⁾ On August 26, 1994, the court issued an order cancelling all charges against Applicant.⁽⁴⁷⁾

When Applicant was arrested for his fourth DUI, the police also charged him with possession of drug paraphernalia. The record does not reflect the disposition of this charge.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative 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. 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. In addition, each security clearance decision must be based on the relevant and material facts and circumstances, the whole-person concept, and 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.⁽⁴⁸⁾

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.⁽⁴⁹⁾ The government has the burden of proving controverted facts.⁽⁵⁰⁾ The burden of proof is something less than a preponderance of the evidence.⁽⁵¹⁾ 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.⁽⁵²⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁵³⁾

No one has a right to a security clearance,⁽⁵⁴⁾ and "the clearly consistent standard indicates that security clearance

determinations should err, if they must, on the side of denials." (55) Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information. (56) 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. (57) 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.

Drug Involvement - Guideline H: Improper or illegal involvement with drugs, raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of 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's DWI or DUI arrests in 1992, 1994, 2001, and 2004 as well as his 1978 arrest for theft and his 1990 arrest for an open container are alcohol-related incidents away from work. Applicant drank for more than 26 years, often to excess and to intoxication, causing his judgment to be impaired. Although Applicant has denied a drinking problem, his DWI and DUI arrests reflect that his alcohol consumption has been excessive on numerous occasions. He was diagnosed with alcohol abuse by his certified counselor who initially interviewed him in 2002. 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*), AC DC E2.A7.1.2.4. (*Diagnosis by a credential medical professional of alcohol abuse or alcohol dependence*), and AC DC E2.A7.1.2.5. (*Habitual or binge consumption of alcohol to the point of impaired judgment*).

I have considered all the Alcohol Consumption Mitigating Conditions and conclude that none apply. Applicant's six alcohol-related arrests in sixteen years reflects a pattern of conduct which cannot be ignored. His last DUI arrest occurred less than two years ago, and is indicative of a recent problem. He has stated on several occasions that he reduced his alcohol consumption and would not drive when drinking, when, in fact, the opposite occurred. Thus, his recent statement that he no longer drinks because he is a born again Christian is entitled to little weight. Finally, his statement is insufficient proof that he has been rehabilitated from his long pattern of alcohol consumption. He has always denied that he has an alcohol problem, even after a diagnosis of alcohol abuse. Given his inability to control or cease his alcohol consumption over the years, it is highly likely that he will drink in the future. Applicant has not overcome the government's case and mitigated the government's security concerns. Guideline G is found against Applicant.

The government established its case as to allegations 2.a., 2.b., and 2.d. under Guideline H. While a high school and college student and until 1987, Applicant illegally used marijuana, a controlled substance. To use this drug, he had to possess it. In 1992, he was arrested and charged with possession of marijuana, and in 2004 with possession of drug paraphernalia. Drug Involvement Disqualifying Condition (DI DC) E2.A8.1.2.1. (*Any drug abuse...*), ⁽⁵⁸⁾ and DI DC E2.A8.1.2.2. (*Illegal drug possession, including cultivation, processing, manufacture, purchase sale, or distribution*) apply.

The government did not establish its case as to Allegation 2.c. The state prosecutor's decision to drop the drug charges one month after Applicant's 1994 arrest support his contention that he was not involved in his roommate's drug activities. The passenger in the car had identified his roommate as the person who sold her marijuana, not applicant. From this evidence, it can be inferred that the prosecutor believed Applicant had not been involved in his roommate's drug activities. Allegation 2.c. under Guideline H is found in favor of Applicant.

While Applicant's admitted use of marijuana occurred many years ago, his most recent arrest and charge for drug paraphernalia raises questions about his continued occasional use of this illegal substance. His denial of drug use is insufficient to overcome the government's case. He has not mitigated the government's concerns. Guideline H is found against him. 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

Subparagraph 1.e: Against Applicant

Subparagraph 1.f: Against Applicant

Subparagraph 1.g: Against Applicant

Subparagraph 1.h: Against Applicant

Subparagraph 1.I: Against Applicant

Subparagraph 1.j: Against Applicant

Subparagraph 1.k: Against Applicant

Paragraph 2, Guideline H (Drug Involvement): AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: For Applicant

Subparagraph 2.d: 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 a security clearance for Applicant. Clearance is granted or denied.

Mary E. Henry

Administrative Judge

1. Item 3 (Response to SOR, dated April 13, 2005) at 1-3.

2. Item 4 (Applicant's security clearance application, dated November 8, 1996) at 2.

3. *Id.*

4. *Id.* at 9; Item 20 (Decision of Administrative Judge Elizabeth M. Matchinski, dated October 27, 1995).

5. Item 22 (Defense Office of Hearings and Appeals memorandum, dated November 19, 1997) at 1.

6. Item 4, *supra* note 2, at 1.

7. Item 4, *supra* note 2, at 2.

8. *Id.* at 4-5; Item 12 (Alcohol counseling intake report, December 2001) at 3.

9. Item 7 (Applicant's signed statement, dated January 1, 1995) at 5.

10. *Id.* at 3, 5; Item 12, *supra* note 8, at 4; Item 16 (Applicant's signed statement, dated December 17, 2002) at 2; Item 18 (Applicant's signed statement, dated October 21, 2004) at 1-2.

11. Item 5 (Police report and other documents related to his arrest in May 1988) at 2.

12. Item 7, *supra* note 9, at 4.

13. *Id.*

14. *Id.*

15. *Id.* at 3.

16. *Id.*; Item 4, *supra* note 2, at 8.

17. Item 7, *supra* note 9, at 3.

18. Item 8 (Applicant's second signed statement, dated January 9, 1995) at 1.

19. *Id.* at 1-2.

20. Item 9 (Applicant's signed statement, dated October 30, 1997) at 1.

21. *Id.* at 3.

22. Item 10 (Arrest report and court docket sheets) at 4.
23. *Id.* at 6-8.
24. Item 12, *supra* note 8, at 1; Item 15 (Treatment questionnaire on Applicant and for court) at 2.
25. Item 12, *supra* note 8, at 8.
26. Item 13 (Records from outpatient alcohol treatment program) at 1.
27. *Id.* at 7, 10-12.
28. Item 15, *supra* note 24, at 1-2.
29. Item 16, *supra* note 10, at 2.
30. Item 17 (Memorandum from Applicant to security clearance office, dated November 2, 2004) at 1.
31. Item 18, *supra* note 10, at 1.
32. *Id.*
33. Item 19 (Applicant correspondence to security clearance office, dated February 4, 2005) at 1.
34. *Id.*
35. Item 3, *supra* note 1, at 7.
36. Item 9, *supra* note 20, at 1; Item 12, *supra* note 8, at 4.
37. *Id.*; Item 18, *supra* note 10, at 3.
38. Item 7, *supra* note 9, at 3-4.
39. *Id.*
40. Item 6 (Police reports and court documents related to June 22, 1994 arrest) at 5-6.
41. *Id.*
42. *Id.* at 6.
43. *Id.* at 1-4.
44. *Id.* at 3.
45. *Id.* at 4.
46. *Id.* at 8.
47. *Id.*
48. Directive, Enclosure 2, ¶ E2.2.1.1. through E2.2.1.9.
49. ISCR Case No. 96-0277 (July 11, 1997) at 2.
50. ISCR Case No. 97-0016 (App. Bd., December 31, 1997) at 3; Directive, Enclosure 3, ¶ E3.1.14.

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

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

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

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

55. *Id.*

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

57. Executive Order No. 10865 § 7.

58. Drug abuse is defined in E2.A8.1.1.2.1 to include drugs materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970.