

KEYWORD: Alcohol; Criminal Conduct

DIGEST: Thirty-one-year-old Applicant's alcohol consumption resulted in three arrests during a nine-year span for a variety of alcohol-related charges, all of which were followed up either by court action or military nonjudicial punishment. During one such incident, he failed a field sobriety test and his breathalyzer registered .09%, despite Applicant's contention he had consumed only one eight- ounce Bacardi Limón on the rocks about 20 minutes before his arrest. Applicant has failed to mitigate or overcome the government's case. Clearance is denied.

CASENO: 05-01226.h1

DATE: 04/10/2006

DATE: April 10, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-01226

DECISION OF CHIEF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Thirty-one-year-old Applicant's alcohol consumption resulted in three arrests during a nine-year span for a variety of alcohol-related charges, all of which were followed up either by court action or military nonjudicial punishment. During one such incident, he failed a field sobriety test and his breathalyzer registered .09%, despite Applicant's contention he had consumed only one eight- ounce Bacardi Limón on the rocks about 20 minutes before his arrest. Applicant has failed to mitigate or overcome the government's case. Clearance is denied.

STATEMENT OF THE CASE

On August 10, 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 Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. The SOR detailed reasons, under Guideline G (alcohol) and Guideline J (criminal conduct), 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, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn written statement, dated August 29, 2005, Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the government's written case on January 23, 2006. A complete copy of the file of relevant material (FORM) was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. No submission was made by the February 26, 2006, deadline. The case was assigned to me on March 17, 2006.

RULINGS ON PROCEDURE

As part of the FORM, Department Counsel moved to amend subparagraph 1.c. of the SOR to conform to the evidence. More specifically, the amendment sought to delete the city identified in the subparagraph and substitute therefor another city. Applicant was advised of his opportunity to file objections to the motion or, in the absence of any objection, to file an answer to the amended allegation. As no response was received from Applicant, the motion was granted.

FINDINGS OF FACT

Applicant has admitted all of the factual allegations pertaining to alcohol under Guideline G (subparagraphs 1.a. through 1.d.) and personal conduct under Guideline E (subparagraph 2.a). Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 31-year-old employee of a defense contractor, and he is seeking to retain a confidential security clearance. (1) An interim clearance was granted in August 2003. (2) He was previously granted a secret security clearance in 1993. (3) Applicant served in an enlisted status on active duty with the U.S. Marine Corps from November 1992 until February 1999. (4) He has been employed by the same government contractor since February 2002, and currently serves as a pipefitter. (5) The quality of his work performance has not been provided. He has never been married.

Applicant is an alcohol abuser. While it is not known when he first started using alcohol, and the general frequency and quantity of his alcohol consumption was never developed, Applicant has abused alcohol on at least three occasions during a nine-year period commencing in 1995 and continuing until 2004.

In June 1995, when he was 20 years old, he was arrested and charged with driving under the influence. (6) There is no evidence of the circumstances leading up to his arrest, the quantity of his consumption, if any, or if a blood alcohol or breathalyzer test was administered. He received probation before judgment from the local traffic court. (7)

In October 1998, he was arrested by military police and charged with drunken driving. (8) Applicant contends he consumed only one eight-ounce Bacardi Limón on the rocks about 20 minutes before driving through the gate of the

military facility.⁽⁹⁾ Because he emitted the "strong odor of an alcoholic beverage" at the gate, he was administered a field sobriety test, which he failed. Nearly two hours later, he was administered a breathalyzer test which resulted in a reading of .09%.⁽¹⁰⁾ He weighed 175 pounds at the time of the arrest.⁽¹¹⁾ He received nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §0815, to include forfeiture of \$200.00 for two months, 14 days extra duty, and 14 days restriction.⁽¹²⁾

In March 2004, he was arrested and charged with driving under the influence.⁽¹³⁾ Applicant contends he was driving with a friend who was sick and periodically vomiting. Because of his friend's sickness, he pulled over to the curb several times. He was stopped by the police for swerving in his lane while checking on his friend.⁽¹⁴⁾ There is no other evidence of the circumstances leading up to his arrest, the quantity of his alcohol consumption, if there was any, or if a blood alcohol or breathalyzer test was administered. In January 2005, Applicant successfully completed a substance abuse treatment and driving improvement program identified as an Alcohol Safety Action Program (ASAP). The final evaluation reflected his attitude as good and his participation as fair.⁽¹⁵⁾ Applicant was to be monitored until May 17, 2005.⁽¹⁶⁾ There is no evidence of any further court action.

Applicant continued to consume alcohol until at least April 2004,⁽¹⁷⁾ but there is no evidence of the quantity or frequency of such consumption. He claims he is being more responsible about his alcohol consumption and either stays home or has a designated driver.⁽¹⁸⁾

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

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 set forth in Section E2.2., Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all

available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider are: (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.

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.

Criminal Conduct--Guideline J: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

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 section below.

Since the protection of the national security is the paramount consideration, the final decision in each case must be arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security" [\(19\)](#) or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded all of the standards are the same. In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences that are grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the government to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. Because of this special relationship, 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. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides that 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." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to each allegation set forth in the SOR:

The government has established its case under Guideline G. Commencing at some point in June 1995 or prior thereto, and continuing periodically until at least arch 2004, Applicant exhibited a pattern of questionable judgment, irresponsibility, and immature behavior by abusing alcohol. His alcohol consumption resulted in three arrests for alcohol-related incidents (1995, 1998, and 2004), all of which were followed up either by court action or military nonjudicial punishment. These incidents and the conduct which contributed to the incidents fall 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*). Because there is no evidence that alcohol had any impact on his job performance and activities, there does not appear to be any justification to apply AC DC 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*).

Following the most recent incident, the court mandated he participate in an ASAP program. He did so, and his final evaluation rated his attitude as "good" and his participation as "fair." The absence, however, of evidence of any alcohol-related evaluation or diagnosis precludes application of AC DC E2.A7.1.2.3. (*diagnosis by a credentialed medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence*) or 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*).

Because of the paucity of record evidence, there is little evidence to describe Applicant's history of alcohol consumption, both as to quantity and frequency. In fact, with the exception of the 1998 incident, there is no evidence Applicant even consumed alcohol in connection with the remaining incidents. Applicant contended he consumed only one eight-ounce Bacardi Limón on the rocks about 20 minutes before his 1998 arrest, but he failed a field sobriety test. Nearly two hours later, a breathalyzer test resulted in a reading of .09%. Because he weighed 175 pounds at that time, it appears he minimized the amount of his alcohol consumption because such a blood alcohol percentage is more consistent with a higher level of alcohol consumption.

It is unclear if there were some changes in Applicant's alcohol consumption, and he may have, in fact, decided to avoid becoming alcohol-impaired. The only evidence of such changes applies to his either remaining home or having a designated driver, but does not address actual alcohol consumption. The absence of such evidence negates the application of Alcohol Consumption Mitigating Condition (AC MC) E2.A7.1.3.3. (*positive changes in behavior supportive of sobriety*). No other AC MCs apply.

Although I am underwhelmed by the evidence, both from the government and Applicant, under the evidence presented, I possess little confidence that Applicant's alcohol abuse will not recur. Moreover, Applicant's failure to present meaningful mitigation of the allegations, his continued consumption of alcohol, and his minimization of his alcohol consumption related to the 1998 incident, indicate he does not yet have a full understanding of the situation. Applicant has failed to mitigate or overcome the government's case pertaining to alcohol. Accordingly, allegations 1.a. through 1.d. of the SOR are concluded against Applicant.

The government has established its case under Guideline J. Applicant's alcohol consumption has resulted in three arrests for alcohol-related incidents over a nine year period, all of which were followed up by court action. That criminal conduct clearly falls within Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1. (*allegations or admission of criminal conduct, regardless of whether the person was formally charged*). None of the CC MCs apply. While a person should not be held forever accountable for misconduct from the past, without a clear indication of subsequent reform, remorse, or rehabilitation, I am unable to determine with reasonable certainty the probability that such conduct will not recur in the future. Consequently, I conclude that Applicant has failed to mitigate or overcome the government's case. Accordingly, allegation 2.a. of the SOR is concluded against Applicant.

For the reasons stated, I conclude Applicant is not eligible for access to classified information.

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: 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 J: AGAINST APPLICANT

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

Robert Robinson Gales

Chief Administrative Judge

1. Item 4 (Security Clearance Application (SF 86), dated June 19, 2003) at 8.
2. *Id.*
3. *Id.* at 7.
4. *Id.* at 2.
5. *Id.*
6. Item 2 (Response to SOR, dated August 24, 2005).
7. *Id.*
8. Item 7 (Military Police Report, dated October 16, 1998) at 2.
9. Item 5 (Statement, dated April 12, 2004) at 2.
10. Item 7, *supra* note 8, at 5.
11. *Id.* at 3.
12. Item 6 (Commander's Report of Disciplinary or Administrative Action (DA Form 4833), dated December 15, 1998).
13. Item 2, *supra* note 6.
14. *Id.*
15. ASAP Final Report, dated January 22, 2005, attached to Item 2.
16. *Id.*
17. Item 2, *supra* note 6.
18. Item 5, *supra* note 9, at 2.
19. The Directive, as amended by Change 4, dated April 20, 1999, uses "clearly consistent with the national interest" (Sec. 2.3.; Sec.2.5.3.; Sec. 3.2.; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.; Sec. E3.1.26.; and Sec. E3.1.27.), "clearly consistent with the interests of national security" (Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (Enclosure 2, Sec. E2.2.2.).