

KEYWORD: Alcohol; Criminal Conduct; Personal Conduct

DIGEST: Between 1970 and 1992, Applicant was arrested and charged with six alcohol-related criminal offenses, including three arrests for Driving Under the Influence (DUI), an arrest for affray (fighting) and two felony arrests for aggravated assault or aggravated battery. Following his conviction for aggravated battery with a firearm, he served 3 years and 7 months in jail, which disqualifies him for a clearance under 10 U.S.C. § 986. He continued to drink and drive after his last arrest in 1992. He deliberately failed to disclose all his alcohol-related offenses when he completed his security clearance application in May 2002. He has not mitigated the government's security concerns regarding his alcohol consumption, criminal conduct, and personal conduct. Clearance is denied.

CASENO: 05-01325.h1

DATE: 03/28/2006

DATE: March 28, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-01325

DECISION OF ADMINISTRATIVE JUDGE

MARY E. HENRY

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Between 1970 and 1992, Applicant was arrested and charged with six alcohol-related criminal offenses, including three arrests for Driving Under the Influence (DUI), an arrest for affray (fighting) and two felony arrests for aggravated assault or aggravated battery. Following his conviction for aggravated battery with a firearm, he served 3 years and 7 months in jail, which disqualifies him for a clearance under 10 U.S.C. § 986. He continued to drink and drive after his last arrest in 1992. He deliberately failed to disclose all his alcohol-related offenses when he completed his security clearance application in May 2002. He has not mitigated the government's security concerns regarding his alcohol consumption, criminal conduct, and personal conduct. Clearance is denied.

STATEMENT OF THE CASE

On July 25, 2005, the Defense Office of Hearings and Appeals (DOHA), 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, issued a Statement of Reasons (SOR) to Applicant. 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), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct) 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 September 20, 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 December 16, 2005. Applicant had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. He did not submit a response or additional evidence. This case was assigned to me on February 9, 2006.

FINDINGS OF FACT

Applicant admitted the allegations under Guideline G, subparagraphs 1.a. through 1.g., and Guideline E, subparagraph 3.a. of the SOR.⁽¹⁾ Those admissions are incorporated here as findings of fact. He denied the remaining allegations.⁽²⁾ 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 58-year-old mechanic for a defense contractor.⁽³⁾ He has worked for this contractor for four years.⁽⁴⁾ He completed a security clearance application (SF 86) in May 2002.⁽⁵⁾

Applicant and his second wife have been married for 34 years.⁽⁶⁾ They have a daughter and a son, ages 31 and 20.⁽⁷⁾ He has two daughters, ages 37 and 38, from his prior marriage, and a step-daughter, age 35.⁽⁸⁾

Applicant began drinking as early as 1970.⁽⁹⁾ In April 1970, after he had been drinking, the police arrested and charged him with the felony offense of resisting arrest, assault and battery, breaking and entering, and aggravated assault on a police officer.⁽¹⁰⁾ He tried to cut the police officer with oyster knives during his arrest.⁽¹¹⁾ He pled nolo contendere to resisting arrest, and the other charges were dropped.⁽¹²⁾ The court placed him on probation for three years and fined him \$150.00 in court costs.⁽¹³⁾ He continued to drink. In April 1976, after he had been drinking, he got into a bar fight, which resulted in the police arresting and charging him with affray, a misdemeanor.⁽¹⁴⁾ The court fined him \$36.00 for this incident.⁽¹⁵⁾

After drinking for 16 hours in February 1982, Applicant and his mother-in-law fought.⁽¹⁶⁾ When she would not leave his house, he fired a 12 gauge shotgun into the air one time.⁽¹⁷⁾ A police officer had been sitting across the street and heard the shot.⁽¹⁸⁾ The police officer approached him, and he twice fired the shotgun at the police officer.⁽¹⁹⁾ The police arrested and charged him with aggravated battery with a firearm.⁽²⁰⁾ He pled not guilty due to intoxication.⁽²¹⁾ The court found him guilty and sentenced him to 7 years in jail, recommending placement in a prison with alcohol facilities.⁽²²⁾ He served 3 years and 7 months of his sentence.⁽²³⁾

Between 1988 and 1992, Applicant was arrested twice for driving under the influence (DUI) while in a foreign country.⁽²⁴⁾ In 1992, the state police arrested and charged him with DUI.⁽²⁵⁾ He pled guilty.⁽²⁶⁾ The court sentenced him to two

days in jail, fined him, suspended his driver's license for one year, and required him to attend an alcohol information course.⁽²⁷⁾ Subsequent to his 1992 arrest, he continued to drive after drinking, although he was not arrested.⁽²⁸⁾

In his May 2002 statement, Applicant said that he reduced his alcohol consumption from one to two cases of beer a week to five or six beers on Friday night.⁽²⁹⁾ He does not believe he has an alcohol problem.⁽³⁰⁾ In his response to the SOR, he stated that he had stopped drinking two years ago, but has not provided any evidence which supports his statement.⁽³¹⁾

On May 16, 2002, Applicant completed his security clearance application. He answered "yes" to the following question in the SOR:

Question 24. Your Police Record - Alcohol/Drug Offenses

Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs? For this item report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607.

He then listed his felony arrest for aggravated battery in 1982.⁽³²⁾ Applicant admits that he did not list his 1970 felony arrest for aggravated assault on a police officer and other charges; his arrest for fighting in 1976; and his DUI arrest in 1992.⁽³³⁾ He did not list his 1970 and 1976 alcohol-related arrests because he did not think about them.⁽³⁴⁾ He states that he failed to disclose his 1992 DUI arrest and his DUI arrests in a foreign country because he thought he only had to list those arrests which occurred in the seven years prior to completing the application.⁽³⁵⁾ When meeting with the investigator to discuss his prior arrests, he acknowledged all his arrests when presented with verifying documentation.⁽³⁶⁾

POLICIES

Enclosure 2 of the Directive sets forth adjudication 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. In addition, each security clearance decision must be based on the relevant and material facts and circumstances, the whole-person concept, along with 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.⁽³⁷⁾ 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.

Additionally, Title 10, United States Code, § 986, prohibits the Department of Defense from granting or renewing a security clearance to any employee of a DoD contractor who has been convicted of a crime in any court of the United States, has been sentenced to imprisonment for a term exceeding one year, and has been incarcerated for more than one year. The statute also provides that, in meritorious cases, the Secretary of Defense or his designee may authorize a waiver of the prohibition.

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.⁽³⁸⁾ The government has the burden of proving controverted facts.⁽³⁹⁾ The burden of proof is something less than a preponderance of the evidence.⁽⁴⁰⁾ 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.⁽⁴¹⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁴²⁾

No one has a right to a security clearance,⁽⁴³⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽⁴⁴⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽⁴⁵⁾ 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.⁽⁴⁶⁾ 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.

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

Personal Conduct - Guideline E: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulation could indicate that the person may not properly safeguard 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 alcohol-related arrests in 1970, 1976, and 1982, as well as his 1992 DUI arrest are alcohol-related incidents away from work. Applicant began drinking more than 30 years ago. He often drank to excess and to intoxication, causing his judgment to be impaired. Although Applicant denies that he has an alcohol problem, his criminal and DUI arrests reflect that his alcohol consumption has been excessive on numerous occasions. He has admitted he continued to drink, and sometimes drive, for at least 10 years after his last arrest. By continuing to drink regularly, he placed himself in jeopardy for future alcohol-related problems. 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*), and AC DC E2.A7.1.2.5. (*Habitual or binge consumption of alcohol to the point of impaired judgment*).

A security concern based on alcohol consumption can be mitigated in several ways. While Applicant's DWI and alcohol related-arrests occurred many years ago, he continued to drink on a regular basis for more than 10 years after his last arrest. The record reflects a pattern of drinking, which led to multiple arrests, a criminal conviction, and jail time. During this time, he enrolled in an alcohol safety program, and an alcohol program. He continued to drink after completing these programs. Thus, he has not established a mitigating condition under Alcohol Consumption Mitigating

Conditions (AC MC) E2.A7.1.3.1. (*The alcohol related incidents do not indicate a pattern*), and AC MC E2.A7.1.3.2. (*The problem occurred a number of years ago and there is no indication of a recent problem*).

Given his more than 30 years of excessive drinking, Applicant's statement that he stopped drinking two years ago is insufficient by itself to establish his burden of showing positive changes in behavior supportive of sobriety. His long-term drinking makes it highly unlikely that he simply quit drinking one day, without the aid and support of a treatment program or alcoholics anonymous, particularly since he did not stop drinking following participation in previous alcohol programs. Furthermore, because of his lack of candor with the investigator about his drinking arrests and criminal history, I find his statement regarding his sobriety entitled to little weight. Thus, he has not established a mitigating condition under AC MC E2.A6.1.3.3. (*Positive changes in behavior supportive of sobriety*). Finally since the record contains no evidence of a diagnosis of alcohol abuse or alcohol dependence, AC MC E2.A7.1.3.4. (*Following diagnosis of alcohol abuse or alcohol dependence, the individual has successfully completed inpatient or outpatient rehabilitation... .*) does not apply. He has not overcome the government's security concerns under Guideline G.

The government has established its case under Guideline J. Over a period of 22 years, Applicant has been arrested several times for DUI, once for fighting after drinking, and twice for felony aggravated assault or battery. His criminal conduct raises 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*) and CC DC E2.A10.1.2.2. (*A single serious crime or multiple lesser offenses*).

While Applicant's last arrest occurred 12 years ago, this simple fact is not enough to find his criminal conduct is not recent. All of his arrests and criminal charges since 1970 have been directly related to excessive drinking. I cannot ignore the fact his drinking is the underlying cause for his arrests. Even after being arrested for DUI in 1992, he continued to drink excessively, and occasionally drive, which is criminal conduct, for at least 10 more years. His criminal behavior is recent. Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1. (*The criminal behavior was not recent*), and CC MC E2.A10.1.3.2. (*The crime was an isolated incident*) do not apply. Likewise, he was not pressured into drinking; rather he voluntarily drank alcohol, knowing the potential criminal consequences of his conduct. CC MC E2.A10.1.3.3. (*The person was pressured or coerced into committing the act...*) and CC MC E2.A10.1.3.4. (*The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to reoccur*) are not applicable.

He has not been acquitted of any of the criminal charges. Even though he has stated that he stopped drinking alcohol two years ago, and thus, asserts that his criminal conduct related to drinking will not occur in the future, he has not presented any clear evidence, such as documentation of AA attendance or alcohol rehabilitation, which would show successful rehabilitation of his criminal behavior. Given his lack of truthfulness with the investigator about his criminal history, his statement indicating successful rehabilitation is entitled to little weight. He has not established that CC MC E2.A10.1.3.5. (*Acquittal*), and CC MC E2.A10.1.3.6. (*There is clear evidence of successful rehabilitation*) apply.

The government alleges that Applicant is disqualified from having a security clearance under 10 U.S.C. § 986 because he was convicted of aggravated assault with a firearm, and sentenced to seven years in jail. Absent a waiver from the

Secretary of Defense, the Department of Defense may not grant or continue a security clearance for any applicant who has been sentenced by a U.S. court to confinement for more than one year and actually served at least one year in confinement. Applicant admitted that he was convicted of this felony offense, and that he actually served three years and seven months in jail. I conclude that 10 U.S.C. § 986 applies in this case, and precludes the Department of Defense from granting a security clearance, absent a waiver. Thus, he has not mitigated the government's concerns about his security worthiness under Guideline J.

The government has established its case under Guideline E. Applicant admits he left out material fact from his SF-86 when he answered Question 24. By so doing, he deliberately omitted material and relevant facts necessary to the determination of his security clearance eligibility and trustworthiness. His conduct clearly falls with Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.2. (*The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement...*) and PC DC E2.A5.1.2.3. (*Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination*).

Applicant did not list his 1992 DUI arrest or mention his DUI arrests in a foreign country because he thought he only needed to identify arrests within seven years of May 16, 2002. His assertion that he misread this question is reasonable. However, his statement that he did not think about his two criminal arrests in the 1970s is not credible. His conduct in both situations led to serious consequences, which a reasonable person would recall. During his interview with the investigator, he denied any other arrests besides the 1982 felony and 1992 DUI. He acknowledged his 1970 and 1976 arrests only after being shown the Federal Bureau of Investigation's criminal justice information sheet. He deliberately avoided identifying additional arrests which would show a pattern of alcohol arrests. He has not mitigated or overcome the government's security concerns under Guideline E. The government places a high degree of trust in those to whom it grants a security clearance. His drinking and untruthfulness brings into question his trustworthiness and reliability. 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

Paragraph 2, Guideline J (Criminal Conduct): AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Paragraph 3, Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraph 3.a: 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 denied.

Mary E. Henry

Administrative Judge

1. Item 5 (Response to SOR, dated September 20, 2005) at 1-2.

2. *Id.*

3. Item 6 (Applicant's security clearance application, dated May 16, 2002) at 4.

4. *Id.*

5. *Id.* at 1.

6. *Id.* at 5.

7. *Id.* at 7.

8. *Id.* at 6.

9. Item 7 (Applicant's signed statement, dated May 9, 2002) at 2.

10. *Id.*; Item 8 (United States Department of Justice, Federal Bureau of Investigation, Criminal Justice Information sheet, dated October 17, 2001) at 2; Item 11 (Court documents related to 1970 arrest) at 1.

11. Item 11, *supra* note 10, at 1.

12. *Id.* at 2.

13. *Id.*

14. Item 7, *supra* note 9, at 2; Item 8, *supra* note 10, at 2.

15. Item 8, *supra* note 10, at 2.

16. Item 7, *supra* note 9, at 1; Item 9 (Police report on this incident, dated February 7, 1982) at 1.

17. *Id.*

18. Item 9, *supra* note 16, at 1.

19. *Id.* at 1-2.

20. Item 8, *supra* note 10, at 2; Item 7, *supra* note 9, at 1.

21. Item 7, *supra* note 9, at 1.

22. *Id.*; Item 10 (Court Sentencing Order, dated October 15, 1982) at 1.

23. Item 7, *supra* note 9, at 1-2.

24. *Id.* at 2.

25. *Id.*; Item 8, *supra* note 10, at 3.

26. Item 8, *supra* note 10, at 3.

27. *Id.*; Item 7, *supra* note 9, at 2.
28. Item 7, *supra* note 9, at 2.
29. *Id.*
30. *Id.*
31. Item 5, *supra* note 1, at 3.
32. Item 6, *supra* note 3, at 9.
33. *Id.*
34. Item 7, *supra* note 9, at 2.
35. *Id.*
36. *Id.*
37. Directive, Enclosure 2, ¶ E2.2.1.1. through E2.2.1.9.
38. ISCR Case No. 96-0277 (July 11, 1997) at 2.
39. ISCR Case No. 97-0016 (App. Bd., December 31, 1997) at 3; Directive, Enclosure 3, ¶ E3.1.14.
40. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).
41. ISCR Case No. 94-1075 (App. Bd., August 10, 1995) at 3-4; Directive, Enclosure 3, ¶ E3.1.15.
42. ISCR Case No. 93-1390 (App. Bd. Decision and Reversal Order, January 27, 1995) at 7-8; Directive, Enclosure 3, ¶ E3.1.15.
43. *Egan*, 484 U.S. at 531.
44. *Id.*
45. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
46. Executive Order No. 10865 § 7.