KEYWORD: Alcohol; Criminal Conduct

DIGEST: Applicant is 31 years old, unmarried, and works for a defense contractor. He has three alcohol related driving arrests between 1996 and 2004, and an arrest in 1997 and 2001 for driving while his privileges were suspended. Applicant did not mitigate the alcohol consumption and criminal conduct security concerns. Clearance is denied.

CASENO: 05-03324.h1

DATE: 03/31/2006

DATE: March 31, 2006

In re:

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

Applicant for Security Clearance

ISCR Case No. 05-03324

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Jeff A. Nagel, Esq., Department Counsel

Melvin A. Howrey, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 31 years old, unmarried, and works for a defense contractor. He has three alcohol related driving arrests between 1996 and 2004, and an arrest in 1997 and 2001 for driving while his privileges were suspended. Applicant did not mitigate the alcohol consumption and criminal conduct security concerns. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On September 27, 2005, DOHA issued a Statement of Reasons[(1)] (SOR) detailing the basis for its decision-security concerns raised under Guideline G (Alcohol Consumption) and Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on October 28, 2005. Applicant requested his case be decided on the written record in lieu of a hearing.

On November 23, 2005, Department Counsel submitted the Department's written case. A complete copy of the file of relevant material (FORM) was provided to the Applicant. He was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation by January 7, 2006. Applicant requested an extension of time to file his response, it was granted, and he filed a response to the FORM on January 31, 2006. The case was assigned to me on February 17, 2006.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated here as findings of fact. After a complete and thorough review of the evidence in the record, and full consideration of that evidence, I make the following additional findings of

fact:

Applicant is 31 years old, unmarried, and works for a defense contractor in the engineering career field. His employer promoted him several times and he has the opportunity for further promotions based on his work performance. (Response)

On June 11, 1996, Applicant was on spring break from college. He and his father went to a bar. From 6 p.m. until several hours later Applicant and his father each drank six beers and six "shots" of liquor. Considering his father too impaired for driving, Applicant drove home. Within a few blocks of the bar the police stopped Applicant for driving under the influence of alcohol (DUI). His blood alcohol content (BAC) was .21%, over that state's legal limit. After spending two or three nights in jail, Applicant was convicted of some lesser charged, fined, and ordered to attend an alcohol awareness class, which he never did because it was not offered in the other state where he attended college. That requirement was removed from the court order. (Items 3-8)

On March 18, 1998 Applicant and others went to a co-worker's party ata local bar. From 7 p.m. until about 11 p.m. Applicant drank at least five beers. In the course of driving later that night, Applicant was stopped by the local police and arrested for driving under the influence of alcohol. His BAC was .11%. He was charged with a first offense DUI, found guilty, and sentenced to four days in jail, 56 hours of community service, and 18 months of "alert driving classes." He successfully completed these requirements. (Items 3-8)

On February 14, 2004, having relocated to another state for his work, he attended a party at a co-worker's house. He drank 10 to 12 beers between 9 p.m. and 1:30 a.m. Leaving the party, he was arrested by the local police. His BAC this time was .16%. He was charged with DUI, DUI per se, driving while ability impaired, wrong lane usage, and an expired license plate. In return for his plea of guilty to the driving while ability impaired charge, the local prosecutor dismissed all the other charges against Applicant. His sentence was probation with an alcohol evaluation and supervision for 18 months, 64 hours of community service, a $25 donation to the Victims Compensation Fund, $300 fine, 20 days of work release, and other fines and costs totaling $411. Applicant claims the stress from the move also contributed to this incident. As part of his court sentence, he attended a "level II" alcohol program from April to June 2004. The evaluation by a "certified counselor" was that Applicant "is not dependent or abuses alcohol." The prognosis is described as "Excellent. Subject is clear, intelligent, and aware he made a mistake." According to the report, the level II education program consisted of "a cognitive behavioral program to prevent a relapse, recidivism from alcohol abuse. The class also consisted of laws and penalties, negative emotions, anger and communication skills, alcohol and other drug education, a self diagnosis, stress and emotional well being, and building healthy relationships." A certified counselor is not a credentialed medical professional as defined in the Directive, nor is that position a licensed clinical social worker as required in the Directive, nor has Applicant presented any evidence that the certified counselor in 2004 met either requirement. (Items 3-8, Response)

Applicant started drinking alcohol at 16 years of age. He drank at parties and with friends. He drank four to five beers per week until age 18, during which time he became intoxicated about 10 times. He estimates it took eight beers to intoxicate him. In college from 1992 to 1996 he drank four to five times per week, consuming six to ten beers each time.

He was intoxicated in college about 100 times. Applicant attributes his college drinking to "the college experience" and being a member of a social club which had liquor available frequently. From April 1997 to March 1998, he drank three to ten beers up to three times per week. He was intoxicated 10 times during that time. Then from March 1998 to February 2004 when he was arrested on his latest DUI charge, he drank three to ten beers twice per month, being intoxicated 12 times in that time. Applicant claims hehad no alcohol from February to September 2004. He offers no information concerning his alcohol use after September 2004. (Response, Items 3-8)

Applicant was charged on August 3, 1997, with driving on suspended privileges. In April 1998, he was sentenced to two days in jail and fined 4395. Also, Applicant was charged on December 26, 2001, with driving on suspended driving privileges. He was sentenced in January 2003 to one year probation and fined $381. Applicant claims his suspended driving privileges came from forgetting to pay a speeding ticket fine, and not being aware his driving privileges were suspended because he is disorganized, and busy from working and taking additional engineering classes at the same time. (Response, Items 3-7)

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 the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information with Industry*

§ 2 (Feb. 20, 1960). 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.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline that must be carefully considered in making the overall common sense determination required.

In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. Those assessments include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (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 (See Directive, Section E2.2.1. of Enclosure 2). Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

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 that 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 that disqualify, or may disqualify, the applicant from being eligible for access to classified information. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. ay 2, 1996). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance. ISCR Case No. 01-20700 at 3 (App. Bd. 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. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Exec. Or. 12968 § 3.1(b).

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:

Guideline G: Alcohol Consumption: *The Concern: 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. E2.A7.1.1*

Guideline J: Criminal Conduct: *The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness*. E2.A10.1.1

CONCLUSIONS

The Government established by substantial evidence and Applicant's admissions each of the allegations in the SOR. Applicant had three DUI arrests in an eight-year period. His September 2004 statement admits he became intoxicated when he drank at least eight beers, and his own admissions further show he drank at least that amount frequently between 1992 and 2004. His consumption in 1996 was six beer and six shots, giving him a .21 BAC. In 1998 his consumption before his arrest was five beers in four hours, giving him a .11 BAC. Finally, in 2004 consuming 10-12 beers in 4.5 hours resulted in a .16 BAC. Yet Applicant finds nothing disturbing in his total drinking pattern and three arrests for DUI. He never admits he has an alcohol problem caused by his drinking over the past 13 years or more. While Applicant focuses his response on never driving and drinking again, the Government's focus is on his alcohol consumption in all situations that could lead to questionable judgment, unreliability, failure to control impulses, and increased risk of unauthorized disclosures.

Applicant relies heavily on the October 2004 evaluation to counter his record. That level II program, from its description, was more educational than diagnostic, especially for a person like Applicant who has a long history of drinking to the point of intoxication on a regular basis. Applicant presents no persuasive evidence about his relationship with alcohol since 2004. The burden of proof is on Applicant that he does not have conditions that could cause a security concern.

The Disqualifying Conditions (DC) that apply under the Alcohol Consumption security concern are DC 1 (Alcohol-related incidents away from work, such as driving while under the influence E2A71.2.1), DC 5 (Habitual or binge consumption of alcohol to the point of impaired judgment E2.A7.1.2.5).

No Mitigating Conditions (MC) apply here. Applicant argues that MC 1, MC 3, and MC 4 should apply. But I am not persuaded they do. The alcohol related incidents do indicate a pattern, so MC 1 does not apply. Applicant argues MC 3 applies because he changed his behavior by attending classes, counseling, AA meetings and abstaining from alcohol for 23 months. Applicant forgets the burden is on him to present relevant and probative evidence of these assertions. He only attended classes and counseling because each of the three courts before which he appeared on his DUI arrests ordered him to do so, and yet he kept repeating the same alcohol related offenses between 1996 and 2004. His Alcoholics Anonymous (AA) meeting attendance assertion is not supported by any evidence showing dates, location, AA steps worked, or other objective information. It is merely a sentence on the last page of his September 2004 statement to the Government investigator that does not persuade me. His alcohol abstention is also only his unsubstantiated self-serving statement in his Response. I do not find MC 3 applies. MC 4 would apply only if all the conditions were met after a diagnosis of alcohol abuse or dependence, and Applicant asserts in the same Response he was found in 2004 not to be an abuser. He cannot have it both ways, and he certainly has not had any inpatient or outpatient rehabilitation. MC 4 clearly does not apply. Therefore, after considering the evidence presented and the Directive's adjudicative standards, I conclude this security concern against Applicant.

The Criminal Conduct security concern relates to Applicant's three DUI arrests along with his 2001 driving while

suspended offense, and his 1997 driving while suspended offense. 'Applicant admitted these offenses. DC 1 (Allegations or admissions of criminal conduct, regardless of whether the person was formally charged E2.A10.1.2.1) and DC 2 (A single serious crime or multiple lesser offenses E2.A10.1.2.2) apply.

Applicant claims he did not know he was suspended, that he was merely disorganized, forgetful, and busy with work and classes for his Master's degree. Applicant argues in his Response that MC 1, MC 4, and MC 6 should apply because the offenses occurred years ago, he did not know his license was suspended so he could not willingly commit that offense, and now he is more interested in his "legal record" so he pays his tickets on time, thus showing rehabilitation. MC 1 does not apply because all the incidents are part of a pattern extending from 1996 to 2004, so they are recent activity. MC 4 does not apply because he voluntarily drove while suspended because he did not pay the ticket fines. After carefully considering the record, I am not convinced he did not know his license was suspended. He failed to persuade me that the factors leading to his violations are not likely to recur. He knew or should have known he risked suspension of his driving privileges if he ignored the tickets. Applicant presented no evidence to excuse this behavior for the 1997 and 2001 incidents. MC 6 does not apply. He failed to provide convincing evidence of his successful rehabilitation. He has a duty to keep track of his offense and pay his debts to society. Being too busy, stressed, disorganized, or forgetful are not reasons to excuse this type of behavior, and if a person is in those conditions the Government certainly has concerns about his judgment, reliability, and trustworthiness in handling classified information. After considering all the evidence, I conclude this security concern against Applicant.

FORMAL FINDINGS

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

Paragraph 1. Guideline G: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: 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.

Philip S. Howe

Administrative Judge

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).