KEYWORD: Alcohol; Personal Conduct; Criminal Conduct

DIGEST: Eight years ago, Applicant, then a married NCO, he had a sexual relationship with an airman in his unit for which he received non judicial punishment. Three and a half years ago, he was arrested due to noise violation. In 2005, he was arrested for actual physical control of a motor vehicle while under the influence of alcohol. The record evidence is sufficient to mitigate or extenuate the negative security implications stemming Applicant's conduct. Clearance is granted.

CASENO: 06-24473.h1

DATE: 09/26/2007

DATE: September 26, 2007

In re:	)	
	)	
----------	)	ISCR Case No. 06-24473
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

DECISION OF ADMINISTRATIVE JUDGE
CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT
Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT
Pro Se

SYNOPSIS

Eight years ago, Applicant, then a married NCO, he had a sexual relationship with an airman in his unit for which he received non judicial punishment. Three and a half years ago, he was arrested due to noise violation. In 2005, he was arrested for actual physical control of a motor

vehicle while under the influence of alcohol. The record evidence is sufficient to mitigate or extenuate the negative security implications stemming Applicant's conduct. Clearance is granted.

STATEMENT OF THE CASE

On January 30, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating that DOHA could not make the preliminary affirmative finding[1] it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR set forth reasons why a security clearance could not be granted or continued due to alcohol consumption, personal conduct, and criminal conduct security concerns.

On June 16, 2007, Applicant answered the SOR and requested a hearing. On July 23, 2007, I was assigned the case. On August 11, 2007, a Notice of Hearing was issued for the hearing held on August 30, 2007. At the hearing, the Government presented three exhibits (Gov Ex 1-3). Applicant testified and submitted six exhibits (App Ex A-F). On September 12, 2007, DOHA received the transcript (Tr.). The record was kept open to allow Applicant to submit additional documents, which were received on September 10, 2007. Department Counsel having no objections, the documents were admitted into evidence as App Ex G.

FINDINGS OF FACT

The SOR alleges security concerns for alcohol consumption, personal conduct, and criminal conduct. Applicant admitted he was arrested in October 2005 and charged with actual physical control (ACP) of a motor vehicle while under the influence of alcohol, for which he received a two-year deferred sentence, paid a $200 fine, and performed 20 hours of community service. Applicant admits he was arrested in January 2004 for noise violation and received a fine. The admissions are incorporated herein as findings of fact. After a thorough review of the record, I make the following findings of fact.

Applicant is a 44-year-old lead analyst and assistant equipment control officer, who has worked for a defense contractor since December 2005 and is seeking to obtain a security clearance. Applicant is regarded by those who know him as a selfless, likeable person, honest, hard working, professional, organized, efficient, competent, dependable, and security conscious. Numerous coworkers and acquaintances mention Applicant's dedication. (App Ex G) Applicant's girlfriend believes him to be honest, kind, gentle, an excellent parent, a role-model for her son, and an honorable man. She says Applicant had made mistakes, but never denied making them. Once mistakes were made, Applicant made the necessary changes not to compromise the positive aspects in his life. (App Ex G) Applicant's ex-wife states he is a hard working, good person, a great father, and a productive member of society who has already been punished for his mistakes.

Applicant entered the Air Force in May 1984. In May 1999, he was a staff sergeant with 15 years in the Air Force. Applicant's work performance was outstanding. (App Ex C) Applicant and

[1]Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

his wife were experiencing marital problems. His wife had told him she wanted a divorce and, in April 1999, she had returned to England, her home, taking their daughter with her. (Tr. 38)

Applicant met a 22-year-old female airman who was just arriving at her first duty assignment and was joining Applicant's unit. She showed him attention while he was showing her around the base, took her to softball practice, showed her around the area, and acted in place of her sponsor. (Tr. 39, 44) The airman was in an introductory course, but was scheduled to come to Applicant's shop, which would have made him her supervisor. (Tr. 65) The Air Force has rules against unprofessional relationships. An NCO should not have a relationship, in particular a sexual relationship, with an airman under their supervision.

On a Friday night two weeks after the met, in May 1999, exactly 15 years to the day on which he had entered the service, the woman asked Applicant to come over and bring some alcohol with him. (Tr. 45) Applicant and the woman were drinking Jack Daniels and coke and she began drinking directly from the bottle. Applicant attempted to stop her from doing so. (Tr. 71) The two started to have sexual relations. She continued to drink heavily to the point she passed out. At that time, Applicant stopped having sex. Applicant and the woman had had sexual relations on two prior occasions. (Tr. 87)

Applicant spent the night. When they woke together the next morning, Applicant asked if she remembered what had happened the previous night. She said no, at which time, Applicant told her what occurred to which she was in disbelief and stated she could not believe it had happened again. (Tr. 46) She expressed she had drunk too much and slept with a married captain at tech school. The woman and Applicant then went out to breakfast. Later that day, in the afternoon, the woman called him, and asked him to come over. When he arrived, she proceeded to take a shower. (Tr. 88) They then talked about dinner, went to dinner, and the woman paid for dinner. The following day, the woman accused Applicant of rape.

In August 1999, following a three-month investigation by the Office of Special Investigation (OSI), Applicant received punishment under Article 15 of the Uniformed Code of Military Justice (UCMJ) not for rape, but for violation of Article 92, (failure to obey an order or regulation), and violation of Article 134, the general article, (for acts prejudice to good order and discipline in the armed forces and/or a breach of custom of the service). The OSI could not state the sexual relations were not consensual. He was reduced in grade from E-5 to E-4 and forfeited $500 per month for two months which was suspended. He was also reprimanded for engaging in sexual intercourse with someone under his direct supervision aggravated by the fact Applicant was married at the time.

In May 2000, Applicant's commander denied his reenlistment application. (App Ex B) The action was appealed and in October 2000, the Director of Personnel directed Applicant be allowed to reenlist. The Director had reviewed the matter and was convinced the reenlistment denial was not warranted. (App Ex C) Applicant stayed on active duty and in October 2002 was promoted to E-5. (App Ex F) In April 2004, Applicant completed 20 years of service and received an honorable discharge. He was prevented from remaining in the Air Force longer due to his rank. In order to remain on active duty after 20 years an individual must be at or above the grade of E-6.

In January 2004, Applicant was in his apartment with a friend listening to music. An off-duty city police officer came by to tell Applicant to turn off his music. The officer was a resident of and employed by the apartment complex as a security officer, for which the officer received his

apartment free of charge or at a reduced rate. (Tr. 33) Applicant and the officer got into a discussion about whether the music should be simply turned down or turned off. Applicant expressed his willingness to turn down the music, but could not be required to turn off the music in his own apartment. (Tr. 34) Applicant turned down the music in the officer's presence and shut the patio door, which had been opened.

A coworker, a service member, present at the time, (App Ex g) states Applicant complied with everything asked of him by the off-duty officer except turning the music off. Five or ten minutes later, three on-duty police officers arrived. After being let into the apartment, the three tackled Applicant, handcuffed him, and arrested Applicant for noise violation. (Tr.35App Ex G) When his friend asked if throwing him to the ground and handcuffing Applicant was necessary, the service member was told to shut up and stay out of it or he too would be arrested. Applicant spent the remainder of the night in jail.

Applicant has learned to do what the police say. If told by someone in authority to do something, even if he feels the officer is in the wrong, he will comply. (Tr. 96, 97) In the future, if told to turn off the music he will. Applicant was scheduled to leave the Air Force and the state, which influenced his decision to plead "no contest" to the charge. Additionally, he was told that after six months "it would no longer exist." (Tr. 36, Gov Ex 1) Applicant no longer lives in an apartment complex.

In October 2005, Applicant was working as a warehouse receiving coordinator on the 3:30 to midnight shift Monday through Friday. Occasionally, he was required to work Saturdays as well. The previous night he left work at midnight and was back at work at 5:00 a.m. He was able to get three hours of sleep. After work on Saturday, he went home and tried to nap, but could not. He took some energy pills he used when he worked out and went to a roadhouse and drank beer. Even though he had been drinking, the energy pills gave him the misconception he was all right to drive. (Tr. 41) When he left, he was rolling his motorcycle out of the parking lot when stopped by the police. He could not get the engine started. Applicant's Blood Alcohol Content (BAC) was .22%. He was arrested for Actual Physical Control (ACP) of a motorized vehicle while under the influence, a misdemeanor. Applicant was never arrested for Aggravated Driving Under the Influence (DUI).

Applicant was fined $200, sentenced to 20 hours of community service, required to undergo alcohol assessment, and to attend a Victim Impact Panel (VIP). His sentence was deferred for two years. At the alcohol evaluation, the counselor said Applicant did not have an alcohol problem nor was he an alcoholic. (Tr. 57) In March 2006, a Department of Public Safety hearing was conducted and found there was not sufficient evidence to revoke Applicant's driver's license. (Tr. 37, App Ex G) In May 2006, Applicant completed VIP and in July 2006, he completed his required 20 hours of community service. (App Ex G)

The deferred sentence ends in February or March 2008. (Tr. 56-57) Applicant is not on probation nor is he seeing a probation officer. (Tr. 80) A deferred sentence is made before a judgment or finding of guilt. The sentence is deferred for a period of time upon certain conditions that must be satisfied. If Applicant complies with all court orders, the court will dismiss the case and the charge will not appear on his record. If successfully completed, the case will be dismissed, and the record of a plea expunged from the record.

Applicant acknowledged spending two days in jail was a "big wake-up call." (Tr. 43) He recognizes his arrest was a good thing. It caused him to consider the path he was on. He realizes the danger to himself and others by his actions that evening. He re-evaluated his role as a father, did not want to be in jail again, and decided he needed to spend his free time differently. He has since become involved in a new relationship. He states he will not allow himself or others to be in such a situation in the future. (Tr. 94) No recent alcohol related incidents appear in the record.

In March 2006, Applicant completed an Electronic Questionnaires for Investigations Processing (e-QIP). Applicant listed his 2004 noise violation arrest and his 2005 APC arrest on his e-QIP. However, he answered "no" to question 23 which asked if during the previous seven years he had been subject to disciplinary proceedings under the UCMJ. Applicant had received an Article 15 in August 1999, which was six and a half years earlier. Applicant thought the event and Article 15 had occurred more than seven years prior. He miscalculated in determining the seven-year period. The event had occurred two months before the end of the seven-year period and the Article 15 occurred five months before the period ended.

In May 1984, Applicant first consumed alcohol. He was drinking during the incident in May 1999 resulting in the Article 15. He was drinking prior to his January 2004 and October 2005 arrests. Applicant continues to drink and imposes a three-beer limit on himself if he is going to drive his motorcycle or vehicle. (Tr. 61) He drinks on most, but not every weekend. (Tr.82) In the past month he has probably had ten drinks. (Tr. 82)

POLICIES

The Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, dated August 2006, sets forth Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in Section 6.3 of the Directive. The adjudicative guidelines are to be applied by administrative judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. The presence or absence of a particular condition or factor for or against clearance is not determinative of a conclusion for or against an applicant. However, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, I conclude the relevant guidelines to be applied here are Guideline G, alcohol consumption, Guideline E, personal conduct, and Guideline J, criminal conduct.

BURDEN OF PROOF

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant. Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, an applicant from being eligible for access to classified information. The burden of proof in a security clearance case is something less than a preponderance of evidence, although the government is required to present substantial evidence to meet its burden of proof. Substantial evidence is more than a scintilla, but

less than a preponderance of the evidence. All that is required is proof of facts and circumstances which 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. Additionally, the government must prove controverted facts alleged in the SOR. Once the government has met its burden, the burden shifts to an applicant to present evidence to refute, extenuate or mitigate the government's case. Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[2]

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of protecting national security. Security clearance determinations should err, if they must, on the side of denials.

CONCLUSIONS

The Government satisfied its initial burden of proof under alcohol consumption. As stated in paragraph 21 of the Adjudicative Guidelines the concern is that excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and can raise questions about an individual's reliability and trustworthiness. Disqualifying Condition (DC) 22(a) "alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other criminal incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent" applies.

Applicant had been drinking prior to the event in May 1999 and prior to his arrest in 2004 for noise violation. However, his drinking was not the cause of the problems. His drinking prior to the 2005 APC was the cause of the problem. The APC was an alcohol-related incident. Applicant had little sleep the night before, went out drinking, drank too much, and took some energy pills gave him the feeling he as okay to drive. As he was leaving, he could not get his motorcycle started and was arrested for actual physical control. Based on his BAC at the time, it was a good thing he could not start his motorcycle.

Even though Applicant was arrested, he believes this was for the best because it caused him to consider the path he was on. He realizes the danger he could have put himself or others in that evening by his drinking and driving. He evaluated his life and decided he would never allow himself or others to be in such a position. The conduct has not repeated itself. Applicant's alcohol use was evaluated and the counselor stated he did not believe Applicant had an alcohol problem or was an alcoholic. Mitigating Condition (MC) 23(a) "so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment" applies.

[2] ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15

Criminal activity creates doubt about a person's judgment, reliability and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations. In 1999, Applicant received an Article 15 for having sexual relations with an airman in his unit. In 2004, he was arrested for noise violation, and in 2005 for APC. DC 31(a) "a single serious crime or multiple lesser offenses" applies. Applicant's APC sentence was deferred and does not end for another six months. DC 31(d) "individual is currently on parole or probation" does not apply because a deferred sentence is not parole or probation. The deferred sentence is made before a finding or judgment of guilty has been made.

Eight years ago, Applicant and his wife were undergoing marital problems. His wife wanted a divorce and returned to England. A younger woman showed him attention and Applicant and the woman had sexual relations. A man in the midst of marital problems can be affected by the attention of a younger woman. But when the person is a married NCO and the woman an airman in his unit, it violates Air Force regulations and is prejudicial to good order and discipline in the armed forces. It is their positions in the military that caused the problem. Applicant acknowledges he should not have had relations with this woman, even consensual relations. His conduct was a mistake, but was not rape. A woman who is raped is unlikely to have breakfast with her rapist and then call him that afternoon, invites him to dinner, and then pay for dinner. She was 22 years old, drank too much and did something she later regretted, which was unfortunate.

Applicant acted inappropriately, was punished, and went on to complete twenty years of honorable service. MC 32(a) "so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not case doubt on the individual's reliability, trustworthiness, or good judgment" applies. The incident occurred eight years ago and Applicant was sufficiently punished for his inappropriate conduct. Enough time has passed that the conduct no longer cases doubt on his reliability, trustworthiness, or good judgment.

In 2004, an apartment security guard told him to turn off the music in his apartment. Instead of complying, Applicant discussed the difference between turning down the music and tuning it off. A witness stated Applicant did everything to comply with the requests short of turning off the music completely. Shortly thereafter, three on-duty officers arrive, tackle Applicant, handcuff him, and arrest him for noise violation. This appears to be an over reaction by the city police for the office was having loud music and he had turned it down. This was a learning experience for Applicant. In the future, Applicant will comply with all police directions. This reaction by the city police does not raise a security concern. MC 32(a) applies because it does not cause doubt on Applicant's reliability, trustworthiness, or good judgment.

In 2005, Applicant was arrested for APC and his sentence deferred until early 2008. Applicant completed his court directed alcohol evaluation, paid the fine, and completed his community service. He has complied with the court orders. There is no indication Applicant was additionally ordered to obey the law. Even if he had been ordered to obey the law, this does not impose an additional requirement for all citizens are required to obey the law and can be called to account for their actions if they fail to do so.

Should Applicant complete the deferment period, the case and all charges will be dismissed. Applicant's acknowledges his actions were wrong and the conduct has not been repeated. Spending two days in jail caused him to reevaluate his role as a father and consider the path he was on. He does not want to return to jail again and has changed the way he spends his free time. He realizes

the danger to himself and other that drinking and driving poses and will not allow himself or others to be in such a situation in the future.

The allegation of falsification under Guideline E, personal conduct is unfounded. The Government has shown Applicant's answer to questions 23 on his e-QIP was incorrect, but this does not prove the Applicant deliberately failed to disclose information about his Article 15. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government when applying for a security clearance is a security concern. But every inaccurate statement is not a falsification. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully.

The question asks about disciplinary proceedings under the UCMJ during the previous seven years. Applicant completed his e-QIP in March 2006 and reported his 2004 noise violation arrest and his 2005 ACP arrest. He did not report the Article 15. The conduct resulting in the Article 15 occurred in May 1999, two months inside the seven-year window contemplated by the question. His Article 15 was received in August 1999, five months before the period being in question was to expire. The Applicant says he miscalculated the seven year period and denied intentional falsification. I found Applicant's explanation plausible. After hearing his testimony, observing his demeanor, and evaluating all the evidence of record, I found his testimony credible on the falsification issue. I am satisfied he did not intentionally falsify his SF 86.

In reaching my conclusions, the "whole person" must be considered and the events cannot be handled piecemeal. Therefore, I have also considered: the nature, extent, and seriousness of the conduct; Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

Applicant made three serious mistakes during the last eight years, none of which are likely to repeat themselves. Since he is no longer in the service, having sexual relations with someone junior in grade in his unit cannot repeat itself. He will never again be involved with a subordinate. When directed to take action by a police officer, even an off-duty police officer, Applicant will comply. Applicant understands the danger he put himself and other in when he attempted to drive after drinking and will not commit that misconduct again. I find for Applicant as to alcohol consumption, personal conduct, and criminal conduct.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7, of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 Alcohol Consumption: FOR APPLICANT

Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant

Paragraph 2 Personal Conduct:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3 Criminal Conduct:	FOR APPLICANT
Subparagraph 3.a:	For Applicant
Subparagraph 3.b:	For Applicant
Subparagraph 3.c:	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 or continue a security clearance for Applicant. Clearance is granted.

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Claude R. Heiny
Administrative Judge