

KEYWORD: Criminal Conduct; Alcohol

DIGEST: Applicant is 37 years old and has worked as a design engineer for a defense contractor since 2005. In 2000 and 2003, he had convictions for driving under the influence (DUI) of alcohol. In both instances, his driver's license was suspended. In 2004, he was convicted of driving on a suspended license. He served 40 days in jail for that offense. He was on probation from 2004 through January 2007 and did not consume alcohol during this period. He now has an occasional drink. Applicant has mitigated the criminal conduct and alcohol consumption security concerns. Clearance is granted.

CASENO: 06-26394.h1

DATE: 09/28/2007

DATE: September 28, 2007

In re:)	
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-----)	ISCR Case No. 06-26394
SSN: -----)	
)	
Applicant for Security Clearance)	

**DECISION OF ADMINISTRATIVE JUDGE
JACQUELINE T. WILLIAMS**

APPEARANCES

FOR GOVERNMENT

Francisco Mendez, Esq., Department Counsel

FOR APPLICANT

Joseph P. Smith, III, Esq.

SYNOPSIS

Applicant is 37 years old and has worked as a design engineer for a defense contractor since 2005. In 2000 and 2003, he had convictions for driving under the influence (DUI) of alcohol. In both instances, his driver's license was suspended. In 2004, he was convicted of driving on a suspended license. He served 40 days in jail for that offense. He was on probation from 2004 through January 2007 and did not consume alcohol during this period. He now has an occasional drink. Applicant has mitigated the criminal conduct and alcohol consumption security concerns. Clearance is granted.

STATEMENT OF THE CASE

On August 23, 2005, Applicant executed a Security Clearance Application (SF 86).¹ The Defense Office of Hearings and Appeals (DOHA) declined to grant a security clearance, and issued a Statement of Reasons (SOR)² on May 2, 2007, detailing the basis for its decision—security concerns raised under Guideline J (Criminal Conduct) and Guideline G (Alcohol Consumption) of the revised Adjudicative Guidelines (AG) issued on December 29, 2005, and implemented by the Department of Defense for SORs issued after September 1, 2006. The revised guidelines were provided to Applicant when the SOR was issued.

Applicant responded to the SOR allegations and requested a hearing. Department Counsel indicated the Government was ready to proceed on June 21, 2007. The case was assigned to me on June 22, 2007. A Notice of Hearing was issued on July 11, 2007, scheduling the hearing for August 1, 2007. On July 19, 2007, Applicant's attorney moved for a continuance of the hearing to a date to be determined later. The motion was granted without objection. On July 20, 2007, an Amended Notice of Hearing was issued, scheduling the hearing for August 8, 2007. The hearing was conducted as scheduled. At the hearing, the Government submitted exhibits 1-3, and Applicant submitted exhibits A-B. All exhibits were admitted into the record without objection. The transcript (Tr.) was received on August 22, 2007.

FINDINGS OF FACT

Applicant admitted all the factual allegations. 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 findings of fact:

Applicant is 37 years old and has worked as a design engineer for a defense contractor since 2005. He served in the Navy from 1993 to 1997, spending the majority of time in the Persian Gulf. He received an honorable discharge. In September 2006, Applicant received a bachelor of science degree in criminal justice and graduated *magna cum laude*. His first marriage ended in divorce. He remarried in July 2006. He held security clearances in the past.

One evening in October 2000, upon leaving a nightclub after having numerous drinks, Applicant was pulled over by the police for failure to turn on his headlights. Applicant was arrested and eventually convicted for DUI. He was sentenced to five days in jail, fined \$1,000, placed on probation for one year, and his driver's license was suspended for one year.

In November 2003, Applicant was out drinking with a friend. His friend needed a ride to the airport. While driving a friend to the airport, he was pulled over by the police for not having a front license plate and given a Breathalyzer test. Applicant was arrested and eventually convicted for DUI.

¹Ex. 1 (Security Clearance Application, signed on August 23, 2005).

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

He was sentenced to 90 days in jail but 88 days were suspended, fined \$650, ordered to attend counseling and alcohol support classes, and his driver's license was suspended for three years.

Approximately nine weeks into his court-ordered counseling, he was given a Breathalyzer and blew a .001 or .01, which was in violation of the program's rules. He had an alcoholic drink the night before.³ He subsequently completed the court-ordered counseling.

In August 2004, Applicant was charged with driving after his license was suspended and eluding the police. The charge for eluding the police was *nolle prosequi*,⁴ dismissed. He was sentenced to 90 days in jail but served 40 days due to good behavior, fined \$1,000, ordered to attend alcohol counseling with a physician, and his driver's license was suspended for one year. He completed the court-ordered counseling.

Applicant's wife and two other witnesses testified on his behalf. All three have security clearances and unequivocally support Applicant's application for a security clearance. One witness has known Applicant since 1998 and they have both a professional and personal relationship.⁵ He has seen positive changes in Applicant's lifestyle since Applicant's incarceration. He believes that Applicant's incarceration "put the fear of God in him. It changed his life."⁶ Another witness also works with Applicant and has known him for a little more than two years and in fact hired Applicant.⁷ When Applicant was hired, this witness was aware of his arrests for DUI and driving on a suspended license.⁸ Applicant was hired because he already held a security clearance.⁹ Applicant's wife knew him two years before they dated.¹⁰ She stated that between the time he got out of jail in 2004 and the end of his probation in January 2007, he did not drink alcohol.¹¹ He did not drink

³Tr. 66.

⁴Under the law in the state in which Applicant was arrested, the prosecutor requests that a case be *nolle prosequi*.

⁵Tr. 17.

⁶*Id.* at 22.

⁷*Id.* at 33-34.

⁸*Id.* at 35.

⁹*Id.* at 34.

¹⁰*Id.* at 42.

¹¹*Id.* at 47.

alcohol at their wedding.¹² When they go out now, he is the designated driver.¹³ She believes that his time in jail changed his perspective for the better about drinking and driving.¹⁴

Applicant abstained from alcohol from the time he got out of jail in 2004, until his probation ended in January 2007. In his Answer, Applicant stated this about himself:

I have traveled on official business with the [government agency] to over 83 cities through the world and never once put myself in a position to hurt my fellow Americans and never would. I have never been an individual who would ever jeopardize the government's interests, my country or the individuals I work with.

Applicant has amended his drinking behavior and has the occasional drink, but he no longer drives if he has been drinking. He is usually the designated driving when he and his wife go out.

POLICIES

“[N]o one has a ‘right’ to a security clearance.”¹⁵ 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.”¹⁶ The President 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 with the national interest to do so.”¹⁷ An applicant has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance. The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.¹⁸ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.¹⁹ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant. It is merely an indication that the applicant has not

¹²*Id.* at 48.

¹³*Id.* at 49-50.

¹⁴*Id.* at 50.

¹⁵*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

¹⁶*Id.* at 527.

¹⁷Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960).

¹⁸ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

¹⁹*Id.*; Directive, ¶ E2.2.2.

met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.²⁰

The revised Adjudicative Guidelines set forth potentially disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the adjudicative process factors listed in listed in the Directive and AG ¶ 2(a).

CONCLUSIONS

I have carefully considered all facts in evidence and the legal standards, and I reach the following conclusions.

Criminal Conduct

Criminal conduct under Guideline J may be a security concern because “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.” (AG ¶ 31)

In 2000, Applicant was arrested for DUI and sentenced to five days in jail, fined \$1,000, placed on probation for a year, and his driver’s license was suspended for a year. In 2003, he was arrested for DUI. He spent two days in jail, fined \$650, ordered to attend counseling and alcohol support classes, and his driver’s license was suspended for three years. Approximately nine weeks into his court-ordered counseling and alcohol support classes, he was given a Breathalyzer and blew a .001 or .01, which was in violation of the program’s rules. Moreover, in 2004, he was charged and convicted of driving after forfeiting his driver’s license. He served 40 days in jail, was fined \$1,000, ordered to attend alcohol counseling with a physician, and his driver’s license was suspended for one year. Consequently, Criminal Conduct Disqualifying Conditions ¶ 31(a) (*a single serious crime or multiple lesser offenses*) and ¶ 32(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*) apply.

Various factors can mitigate criminal conduct. In 2000, Applicant was convicted for DUI, jailed, fined, and placed on probation for one year. In 2003, he was again convicted for DUI, fined, incarcerated, ordered to attend alcohol counsel, and his driver’s license was suspended for three years. In 2004, he was charged with driving after his license was suspended. He was jailed for 40 days, fined, ordered to attend counseling, and his driver’s license was suspended. His probation ends in October 2008. While in counseling, he violated the program’s rules by drinking alcohol the night before. His behavior has changed because he no longer drinks. He has been alcohol-free since May 2006 and as a result, he has not participated in any other criminal activities. Criminal Conduct Mitigating Condition ¶ 32(d) (*there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement*) applies.

²⁰Exec. Or. 10865 § 7.

Alcohol Consumption

Alcohol consumption is always a security concern because “excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual’s reliability and trustworthiness.” (AG ¶ 21)

In 2000 and 2003, Applicant was arrested and convicted for DUI. In 2000, he served five days in jail, was placed on probation for a year, and his driver’s license was suspended for a year. In the 2003 DUI offense, he spent two days in jail, was ordered to attend counseling and alcohol support classes, and his driver’s license was suspended for three years. Moreover, while attending the court-ordered counseling and alcohol support classes, he failed a Breathalyzer test. Consequently, Alcohol Consumption Disqualifying Conditions AG ¶ 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 incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent*) and AG ¶ 22(g) (*failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence*) applies.

Various factors can mitigate alcohol consumption. From 2000 through 2004, Applicant was breaking the law, getting to trouble, and drinking to excess as evidenced by his DUIs and evidenced by driving with a suspended license. Applicant spent about 40 days in jail. His incarceration, which to him was a lengthy period of time, changed his perspective on how alcohol could influence his life. He remained alcohol-free while on probation. He now has an occasional drink. Based on those facts, Alcohol Consumption Mitigating Conditions, AG ¶ 23(b) (*the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser)*) applies.

I have considered all of the evidence in the case. I have also considered the “whole person” concept in evaluating Applicant’s risk and vulnerability in protecting our national interests. Since his incarceration in 2004, Applicant has modified his behavior toward alcohol consumption. Enough time has elapsed for Applicant to show that he is unwilling to be incarcerated for any length of time. Thus, he is no longer excessively drinking alcohol. For the reasons stated, I conclude Applicant is suitable 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 J (Criminal Conduct):

FOR APPLICANT

Subparagraph 1.a:

For Applicant

Subparagraph 1.b:

For Applicant

Subparagraph 1.c:

For Applicant

Paragraph 2. Guideline G (Alcohol Consumption):

FOR APPLICANT

Subparagraph 2.a:

For Applicant

Subparagraph 2.b:

For Applicant

DECISION

In light of all of the circumstances in the case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Jacqueline T. Williams
Administrative Judge