



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 09-04570

Appearances

For Government: Daniel Crowley, Esquire, Department Counsel

For Applicant: *Pro se*

May 25, 2011

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant failed to mitigate the security concerns regarding his criminal conduct and alcohol consumption. Eligibility for access to classified information is denied.

Statement of the Case

On June 10, 2010, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which 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, and recommended referral to an administrative judge to determine whether his clearance should be granted, continued, denied, or revoked.

Applicant responded to the SOR on June 30, 2010, and requested a hearing. The case was assigned to me on December 8, 2010, and was scheduled for hearing on December 15, 2010. A hearing was held on the scheduled date for the purpose of

considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At the hearing, the Government's case consisted of nine exhibits (GEs 1 through 9); Applicant relied on one witness (himself) and one exhibit (AE A). The transcript (Tr.) was received on December 22, 2010.

Procedural Issues

Before the close of the hearing, Applicant requested leave to supplement the record with documentation of the court-directed alcohol counseling he received following his 2008 alcohol-related arrest and conviction. For good cause shown, Applicant was granted seven days to supplement the record. Department Counsel was afforded two days to respond. Applicant did not supplement the record.

Summary of Pleadings

Under Guideline J, Applicant is alleged to have been arrested and charged on multiple occasions between June 1997 and October 2008 for assorted traffic-related offenses, including recurrent incidents of driving on a suspended license, careless driving, failure to appear in noticed court hearings, burglary, and alcohol-related arrests and charges.

Under Guideline G, Applicant allegedly (a) was arrested and charged with alcohol-related offenses in 2000, 2001, and 2008, and (b) consumed alcohol, at times to excess and to the point of intoxication, from approximately 1996 to at least June 2009.

In his response to the SOR, Applicant admitted some of the criminal conduct allegations, his arrests in 1998, 2000, and 2001, but denied parts of his 2004 and 2008 dispositions, his April 1999 arrest for speed racing and improper display of valid stickers, and his 1997 arrest for failure to perform duties and careless driving. Applicant admitted the alcohol-related allegations.

Findings of Fact

Applicant is a 30-year-old test vehicle operator for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Background

Applicant married in August 2004. He has two children from this marriage, ages six and four. (GE 1; Tr. 39) Applicant and his wife separated in May 2008 (Tr. 30); his divorce finalized in March 2009. (Tr. 48) He currently has joint custody of his children (Tr. 32, 35, 49-50) and pays child support for his two daughters. (Tr. 51)

Applicant enlisted in the Marine Corps in May 1999 following his high school graduation. (GE 1) He served four years of active duty and received his discharge in June 2003. (GE 1; Tr. 30)

Applicant was introduced to alcohol in high school at the age of 16. See GE 2; Tr. 29, 37. He confined most of his drinking in high school to parties and generally limited his drinking to weekly consumption. (Tr. 38) Occasionally, he consumed alcohol excessively. (GE 2; Tr. 37) He continued this pattern of drinking throughout his Marine Corps enlistment. (GE 2) On a bimonthly basis, he and several members of his Marine unit repaired to a local river to socialize and relax. (GEs 2 and 3) On these occasions, he generally consumed six to ten beers per sitting. (GE 3)

Applicant's arrest history

Between June 1997 and January 2004, Applicant was arrested on multiple occasions (seven in all) for assorted traffic and alcohol-related offenses, and burglary. Police and court records document Applicant's being cited in June 1997 for failure to perform duties of a driver and careless driving. (GE 2) Count one was reduced to careless driving and Applicant was fined and required to attend a traffic school. Count two was dismissed after the police officer failed to appear for trial. Two years later (1999) he was arrested and charged with speed racing and improper display of valid stickers. He was found guilty of speed racing and fined.

Applicant was arrested and charged in January 1998 with burglary, theft, and unlawful possession of a firearm. (GE 2) Applicant had been out with a high school friend and entered an unlocked house. (GE 3) Once inside the house, Applicant and his friend stole some guns. (GE 3). Several days later, his friend then tried selling the guns to an undercover police officer and was apprehended. (GE 3) Three days later, police came to Applicant's house looking for him. (GE 3) Once the police were inside of the house, they recovered the stolen rifles and charged Applicant with the three offenses. (GE 3) Applicant pled guilty to the charges, and the court placed him on probation for 18 months and ordered him to pay restitution. (GE 3) Because of his pending Marine enlistment, the court granted him early release from his probation. (GE 3)

In June 2000, Applicant was arrested and charged with underage consumption. He was counseled by his command in March 2001 for drinking under the legal drinking age of 21 and returned to duty. (GE 2; Tr. 43) The following year (in December 2001), he was charged with DUI and violation of a basic rule (speeding). Applicant had driven to the local river with several Marine friends and was returning to the base with his fellow Marines when he was stopped at the main gate. (GE 3) Applicant and his friends were then escorted to the Provost Marshal's office where they were detained for questioning for a few hours by military police before their release. (GE 3) When he appeared in court to answer the charges, the court placed him in a diversion program. After he failed to comply with the terms of the program, the court revoked it. Sometime in 2002, the state's department of motor vehicles revoked his driver's license. (GE 2)

Applicant was arrested again on alcohol-related charges in February 2002. Arresting officers clocked him at close to 100 miles per hour as he and another car sped by their check point. (GE 7) Arresting officers charged him with driving on a suspended license, speed racing, careless driving, and failure to appear for a hearing involving the revocation of his diversion program status. (GE 7). In their police report, they described Applicant as a participant in a high speed contest with another vehicle. (GE 7) Applicant's vehicle was inventoried by police and towed. (GE 7) In a hearing convened in December 2003, Applicant pled guilty to the charges.

When sentencing Applicant on his 2002 charges, the court combined his 2001 DUI charges with the 2002 charges and sentenced Applicant to two years formal probation, fined him \$1,000, and ordered him to complete 80 hours of community service and complete substance abuse classes. (GE 8). The sentencing court also suspended his driving privileges for one year. (GE 8)

In January 2004, Applicant was charged again with driving on a suspended license. When he appeared before the court in December 2004, the court terminated his probation, sentenced him to two days in jail, fined him, and placed him under new probation conditions. (GE 6)

In October 2008, Applicant was arrested and charged with DUI^{1st} Liquor/Drugs/Vapors and DUI 1st DUI Liquor BAC .08 or more. Applicant was the driver of a pick-up truck that was involved in an accident. The investigating officer at the scene conducted a field sobriety test on Applicant. Based on the reported observations of the investigating officer, Applicant encountered difficulty performing the test. (GE 4) The investigating officer then administered a Breathalyzer test. Test results revealed that Applicant' blood alcohol content registered a .134 blood alcohol concentration level (BAC). (GE 4)

After completing sobriety testing at the scene, the arresting officer transported Applicant back to the police station where he administered a second Breathalyzer test. On this test, Applicant's test results revealed a BAC level of .115 per cent. (GE 4) In court, Applicant pled guilty to the DUI charges and was sentenced to ten days in jail (nine suspended), fined \$1,420, and ordered to attend an alcohol counseling program. (GE 4) Additionally, the court suspended Applicant's driving privileges.

Responding to the court's imposed alcohol counseling condition, Applicant arranged for counseling sessions with a private substance abuse counselor. (Tr. 52) After completing a survey, Applicant was diagnosed and counseled by his abuse counselor over the course of eight sessions. (Tr. 53) Once he completed these eight sessions, Applicant was credited with completing the course. (Tr. 53) Applicant has never been diagnosed by any other credentialed substance abuse counselor for any alcohol issue. (Tr. 43, 51)

While Applicant assured the counselor who diagnosed him found no evidence of an alcohol problem, Applicant did not provide any documentation of the counselor's

observations, diagnosis, prognosis, and recommendations. Afforded an opportunity to provide documentation of his counselor's findings and recommendations, Applicant did not supplement the record.

Applicant's alcohol consumption history

Between 2004 and June 2009, Applicant consumed alcohol regularly, mostly at home and sometimes with his ex-wife and a friend. (GE 2) During this time, he drank to intoxication levels about twice a year. For him to become intoxicated (described as physically impaired, to include blurred vision and poor balance) he needed seven to eight drinks in a sitting, which he defined as seven to eight drinks in a single sitting. This amount of alcohol consumption in a single sitting reflects binge drinking. (GE 2) He continues to drink because he likes the taste, and because it relaxes him. (GE 2)

Beginning in January 2008, Applicant reduced his general consumption of alcohol to a weekly glass of wine with dinner and occasional beer consumption (two to three in a sitting). However, when his wife left him in May 2008, he returned to excessive drinking, mostly by himself. (Tr. 31) His drinking pattern included drinking to intoxication.

Since his October 2008 DUI incident, Applicant has continued to consume alcohol, but not excessively. (Tr. 47) He currently consumes alcohol once a month at light levels. (Tr. 34, 42) He does not believe he has an alcohol problem and intends to continue to drink at his current consumption level. (GE 2; Tr. 34, 42)

Endorsements

Applicant is well regarded by his colleagues and friends. His coworker and friend both describe him as a productive and dependable performer. (AE A)

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate security concerns." These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c)

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a)

of the revised AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following ¶ 2(a) factors:

(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 extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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.

Viewing the issues raised and evidence as a whole, the following adjudication policy concerns are pertinent herein:

Criminal Conduct

The Concern: 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, ¶ 30.

Alcohol Consumption

The Concern: 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.

Burden of Proof

Under the Directive, a decision to grant or continue an Applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and

logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove by substantial evidence any controverted facts alleged in the SOR; and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of proof shifts to the applicant for the purpose of establishing his or his security worthiness through evidence of refutation, extenuation or mitigation of the Government's case. Because Executive Order 10865 requires that all security clearances be clearly consistent with the national interest, "security-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Applicant is a dependable test vehicle operator for his defense contractor who presents with a considerable history of assorted arrests and convictions (mostly traffic and alcohol-related) over an 11-year period. Principal security issues raised in this case center on Applicant's history of arrests that include recurrent driving on a suspended license, careless driving, and alcohol-related offenses, and his continued consumption of alcohol at frequency levels that over the past four years have included binge drinking to intoxication.

Criminal arrest issues

Applicant's arrests and convictions involve numerous traffic and alcohol-related offenses, as well as an isolated burglary offense, over an 11-year period. Some of the arrests and charges involve alcohol (three between 2000 and 2008), careless driving, and driving on a suspended license. Together, they reveal some criminal disposition as a high school youth and a continuing pattern of reckless behavior throughout Applicant's early 20s and into his late 20s with his latest alcohol-related offense in 2008.

Applicable disqualifying conditions under the criminal conduct guideline include DC ¶ 31(a), "a single serious crime or multiple lesser offenses," and DC ¶ 31(c), "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecute or convicted."

Since October 2008, Applicant has not been involved in any arrest incidents and shows added growth and maturity in his professional and personal relationships. Still,

Applicant's arrest history reflects considerable poor judgment and a lack of proper respect for state driving laws. His arrests involve a series of recurrent offenses covering driving on a suspended license, speed racing, and DUIs between 1999 and 2008. While there have been several short-term breaks in his confrontations with law enforcement officers, he has never been able to demonstrate a consistent pattern of respect for state driving laws and avoidance of abusive drinking.

Applicant is entitled to partial application of MC ¶ 32(a), "so much time has elapsed since the criminal behavior happened, or it happened under unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment." However, with his recurrent record of arrests and convictions covering more than ten years, less than 27 months of elapsed time since his last DUI in October 2008, his limited counseling credits, and the absence of any documented rehabilitation showing, it is still too soon to make safe predictive assessments about Applicant's ability to maintain careful adherence to state traffic laws.

Based on his lack of any established rehabilitation program, his continued drinking (sometimes to intoxication levels), and the absence of a good, reliable track record for avoiding alcohol-related incidents (less than 27 months since his last DUI offense), Applicant may take only limited advantage of MC ¶ 32(d) of the criminal conduct guideline, "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."

Both from a consideration of the applicable guidelines, and from a whole-person perspective, it is still too soon to make safe assessments that Applicant possesses the strength of commitment and resolve to meet all of the minimum requirements under the criminal conduct guideline for continued eligibility to hold a security clearance. Based on his lack of any concerted rehabilitative steps taken to date, he fails to persuasively demonstrate he no longer presents any recurrent risk of judgment lapses associated with his prior arrests and convictions. Taking into account all of the facts and circumstances developed in the record, unfavorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a through 1.h of the SOR.

Alcohol concerns

Applicant's recurrent problems with abusive drinking and alcohol-related arrests over a 15-year period raise major concerns over his risk of recurrent alcohol abuse. On the strength of the evidence presented, two disqualifying conditions (DC) of the AGs for alcohol consumption (AG ¶ 21) may be applied: 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 incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent," and DC ¶ 22(c), "habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent."

While Applicant has never been diagnosed with any known alcohol abuse or dependence, he did attend an alcohol counseling program that included a diagnosis. Altogether, Applicant attended eight offered counseling sessions conducted by a private substance abuse counselor approved by the court. This program offered no known rehabilitative guidance, and cannot be properly assessed without some documentation of the program's content. While Applicant denies any alcohol problem, he admits to drinking to intoxication levels twice a year and provides no diagnostic insights into his disposition for alcohol.

Because of the absence of any known diagnosis or prognosis to evaluate Applicant's capacity to safely consume alcohol at any level, application of DC ¶ 22(d), "diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence," may not be employed in Applicant's circumstances. His court-approved counseling sessions are not supported by any records of counseling and treatment by a qualified substance abuse counselor. If he was diagnosed to be free of any alcohol problems (as Applicant claims) medical records should be available to verify Applicant's claims.

By contrast, were Applicant diagnosed with either alcohol abuse or dependence, some recommended abstinence or curtailing of his alcohol consumption could be reasonably expected. Depending on the diagnosis, Applicant's continued drinking at light to abusive levels could be an important consideration in determining what weight to assign to his reformed drinking claims. See ISCR Case 02-03186 (App. Bd. Feb. 16, 2006); ISCR Case 01-20579, at 5 (App. Bd. Apr. 14, 2004). Quite possibly, Applicant may be able to continue drinking without any risk of recurrent abuse. Without any counseling records to evaluate, though, there is no verifiable way to know whether he can safely drink at any level.

Considering Applicant's recurrent arrest history (with three prior alcohol-related offenses) and the limited elapse of time since Applicant's last DUI in October 2008, limited application of 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, is available to Applicant," is available to him. Partially applicable to Applicant's circumstances are MC ¶ 23(d), "the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program." Too little is known about his court-approved counseling program in 2009, however, to assign much weight to his assured completion of the program.

Faced with similar evidence of limited rehabilitation, the Appeal Board has expressed doubts about the ability to make safe, predictive judgments about an

applicant's ability to avoid abusive incidents in the future without jeopardizing the national interest. See ISCR Case No. 06-17541 (App. Bd. Jan. 14, 2008); ISCR Case No. 04-10799 (App. Bd. Nov. 9, 2007); ISCR Case No. 05-16753 at 2-3 (App. Bd. Aug. 2, 2007).

Taking into account both Applicant's history of alcohol abuse and incidents away from work and corresponding lack of solid probative evidence of rehabilitation, the applicable guidelines, and a whole-person assessment of his continued drinking following his latest DUI in 2008, it is too soon to draw firm conclusions about his commitment to avert recurrent alcohol abuse in the future.

Applicant's overall showing that his excessive drinking in the past was situational and that he can be trusted to drink responsibly and avert any recurrent problems with judgment lapses related to alcohol in the future is not sufficient to enable him to meet his mitigation burden. More time is needed for Applicant to persuade that he can drink responsibly and free of any recurrence risks. While his contributions to the Marine Corps are commendable, they are not enough to enable him to surmount recurrent risks of alcohol abuse at this time. Unfavorable conclusions warrant with respect to the allegations covered by the alcohol guideline of the SOR.

Formal Findings

In reviewing the allegations of the SOR in the context of the findings of fact, conclusions, and the factors and conditions listed above, I make the following separate formal findings with respect to Applicant's eligibility for a security clearance.

GUIDELINE J (CRIMINAL CONDUCT):	AGAINST APPLICANT
Subparagraphs 1.a through 1.h:	Against Applicant
GUIDELINE G (ALCOHOL CONSUMPTION):	AGAINST APPLICANT
Subparagraphs 2.a and 2.b:	Against Applicant

Conclusions

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 Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge

