

SYNOPSIS

Applicant is a 51-year-old engineer employed by a defense contractor. He was convicted and sentenced for driving under the influence of alcohol (DUI) in 1991, 1992, and 2004, in three different states. Within a month of his latest DUI arrest, he was arrested for riding a bicycle under the influence, and has resumed alcohol consumption, at times to the point of intoxication. Applicant submitted no evidence in extenuation or mitigation of these admitted facts, and failed to meet his burden to mitigate security concerns raised by his alcohol consumption and criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

Applicant applied for a security clearance on August 31, 2005, in conjunction with his employment by a defense contractor as a staff engineer. On February 6, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended. The SOR detailed reasons, under Guideline G (Alcohol Consumption), and Guideline J (Criminal Conduct), of the revised adjudicative guidelines (AG),¹ why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant a security clearance for Applicant, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant responded to the SOR allegations in a notarized letter dated April 6, 2007, admitting the truth of all of the allegations, and elected to have his case decided on the written record in lieu of a hearing.² Applicant did not submit any matters for consideration in extenuation or mitigation. At first, the case was mistakenly processed as though Applicant had requested a hearing. When contacted by Department Counsel to confirm availability for a proposed hearing date, this error was discovered.

Department Counsel submitted the government's written case on June 7, 2007. A complete copy of the file of relevant material (FORM)³ was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant signed the document acknowledging receipt of his copy of the FORM on June 20, 2007, and returned it to DOHA. Applicant was informed he should respond within 30 days of receipt of the FORM.

Applicant did not respond further to the FORM, made no objection to consideration of any

¹*Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (August 2006) as implemented by Under Secretary of Defense Memorandum of Aug. 30, 2006 for use in adjudication of all cases in which an SOR had not been issued by Sept 1, 2006. These revised AG replaced those found in enclosure 2 of the Directive, which is pending revision to incorporate them. Copies of the applicable AG were provided to Applicant with the SOR.

²Item 3 (Applicant's letter response to SOR dated Apr. 6, 2007).

³The government submitted five items in support of the allegations.

evidence submitted by Department Counsel, and offered no evidence in extenuation or mitigation. In the absence of any response, the case was forwarded on July 27, 2007 for consideration by an administrative judge. The case was assigned to me on August 2, 2007.

FINDINGS OF FACT

Applicant admitted the truth of every factual allegation set forth in the SOR pertaining to alcohol consumption under Guideline G (subparagraphs 1.a through 1.f), and by reference to the allegations of criminal conduct under Guideline J (subparagraph 2.a). Those admissions are incorporated herein as findings of fact. After complete and thorough review of the evidence in the record, and upon due consideration of same, the following findings of fact are made:

Applicant is a 51-year-old engineer employed by a defense contractor. He has never been married and has no children. He never served in the military and this is his first application for a security clearance. He holds a master's degree in engineering from a major national university.

Applicant has consumed alcohol, at times to excess and to the point of intoxication, from approximately 1990 to at least August 2006. (SOR ¶ 1.a.) He was arrested on or about February 1, 1991, and charged with Driving Under the Influence. He was found guilty, fined approximately \$700, and ordered to attend alcohol education classes. (SOR ¶ 1.b.) He was arrested on or about October 1, 1992, in a different state, and charged with Driving Under the Influence. He was found guilty, fined approximately \$700, sentenced to 30 days house arrest, ordered to attend weekly alcohol classes, and his driver's license was restricted for one year. (SOR ¶ 1.c.)

Applicant was arrested on or about June 22, 2004, in a third state to which he had moved, and charged with (1) Driving Under the Influence and (2) Driving Under the Influence with Blood Alcohol Content .08% or Higher (.19%). He pled no contest to count 2 and count 1 was dismissed. He was sentenced to three-years probation, which will not expire until August 19, 2007, to serve two days in jail, ordered to attend a four-month first offenders alcohol awareness program, and fined approximately \$1,570. His driver's license was also suspended for 30 days and restricted thereafter for an additional 60 days. (SOR ¶ 1.d.)

Applicant was arrested in July 2004, and charged with Riding a Bicycle While Under the Influence of Alcohol or Drugs or Both. The district attorney rejected this case on or about September 21, 2004. (SOR ¶ 1.e.) He resumed his use of alcohol in the Spring of 2005 and continued until at least August 2006. (SOR ¶ 1.f.) As noted above, Applicant provided no evidence in extenuation or mitigation of his admitted conduct. He reported on his Security Clearance Application that he has not undergone any alcohol-related treatment or counseling in the seven years preceding its submission.⁴

POLICIES

The revised AG that replaced Enclosure 2 of the Directive set forth adjudicative guidelines

⁴Item 4 at question 30.

which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into disqualifying conditions (DC) that may raise security concerns, and mitigating conditions (MC) that may reduce or negate security concerns. Applicable DCs and MCs under AG G: Alcohol Consumption, and AG J: Criminal Conduct, must be considered in deciding whether to grant, continue, deny or revoke an individual's eligibility for access to classified information. Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, are set forth and discussed in the conclusions section below.

An administrative judge need not view the adjudicative guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are intended to be applied in conjunction with the factors set forth in the Adjudicative Process provision of the Directive,⁵ to assist the administrative judge in reaching fair and impartial, common sense decisions.

The entire decision-making process is a conscientious scrutiny of a number of variables known as the "whole person concept." All available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider, in addition to the applicable guidelines, are: (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.

Protection of the national security is the paramount consideration, so the final decision in each case must be arrived at by applying the standard that issuance of a clearance must be clearly consistent with the interests of national security. Any doubt as to whether access to classified information is clearly consistent with national security must be resolved in favor of the national security.⁶ In reaching this decision, only those conclusions that are reasonable, logical and based on the evidence contained in the record were drawn, and no inferences were grounded on mere speculation or conjecture.

In the decision-making process, facts must be established by "substantial evidence."⁷ The burden of producing evidence initially falls on the government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. "Department Counsel is

⁵AG ¶ 2.

⁶*Id.*, at ¶¶ 2(b), 2(c).

⁷"Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

responsible for presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted.”⁸ “The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and [Applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision.”⁹ Once it has met its initial burden of production, the burden of persuasion (including any burden to disprove a mitigating condition) never shifts to the government.¹⁰

A person seeking access to classified information seeks to enter a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Section 7 of Executive Order 10865 specifically provides that any adverse industrial security clearance decision shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned,” so the decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, the following conclusions are derived with respect to each allegation set forth in the SOR:

Guideline G: Alcohol Consumption

“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.”¹¹ The SOR alleged, and Appellant admitted to, three DUI arrests and convictions, in three different states. His most recent DUI involved a BAC of .19% (almost 2.5 times the legal limit), in June 2004. Within a month after that last DUI arrest, he was arrested for riding a bicycle while under the influence of alcohol and/or drugs. He also admitted drinking to excess and the point of intoxication at times from 1990 to August 2006, and resuming alcohol consumption after his two most recent arrests.

⁸Directive ¶ E3.1.14.

⁹Directive ¶ E3.1.15.

¹⁰ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005); “The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant’s past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15.” ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

¹¹AG ¶ 21.

This conduct raises security concerns under alcohol consumption disqualifying condition (AC 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”). It also raises security concerns under AC 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”). There is insufficient evidence in the FORM concerning the nature and extent of Applicant’s court-ordered alcohol education classes following each of his three DUI convictions to find that security concerns are raised under AC DCs 22(d), (e), (f), or (g).

Applicant submitted no evidence tending to establish any alcohol consumption mitigating condition, and, after considering each of them, none is supported by the evidence in the FORM. Accordingly, Applicant has not met his burden to rebut, explain, extenuate, or mitigate the facts he admitted, which raise alcohol consumption security concerns.

Guideline J: Criminal Conduct

“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.”¹² Applicant admitted to four alcohol-related crimes, for three of which he was convicted and sentenced, over a 13-year period.

Criminal conduct disqualifying condition (CC DC) 31(a) (“a single serious crime or multiple lesser offenses”) applies. Appellant admitted to, and was convicted of, three DUI offenses, the most recent of which involved a BAC of .19%. CC DC 31 (c) (“allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted”) also applies to raise security concerns from his admitted arrest for riding a bicycle under the influence less than a month after his 2004 DUI arrest, even though the district attorney chose not to prosecute that offense. This incident indicates an ongoing unwillingness or inability to conform to legal obligations. CC DC 31(d) (“individual is currently on parole or probation”) also applies, as Appellant remains on probation from his 2004 DUI conviction. No other CC DC applies.

Applicant submitted no evidence tending to establish any criminal conduct mitigating condition, and, after considering each of them, none is supported by the evidence in the FORM. Accordingly, Applicant has not met his burden to rebut, explain, extenuate, or mitigate the facts he admitted, which raise criminal conduct security concerns.

Whole Person Analysis

Applicant submitted neither evidence nor other information from which any mitigating condition or circumstance might be applied to lessen the security concerns raised by his pattern of alcohol-related criminal offenses and ongoing alcohol consumption. The record gives every indication that recurrence of this conduct is likely, and he submitted nothing to support a contrary conclusion. Applicant is a mature and educated individual who is accountable for his choices, and who did not alleviate security concerns in the face of his burden to do so. For the reasons stated,

¹²AG ¶ 30.

Applicant has not demonstrated that it is clearly consistent with the interests of national security to grant him access to classified information.

FORMAL FINDINGS

Formal Findings For or Against Applicant on the allegations set forth in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1, Guideline G:	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
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

DECISION

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 a security clearance for Applicant. Clearance is denied.

David M. White
Administrative Judge