



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



In the matter of:)	
)	
)	ISCR Case No. 06-23204
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: James F. Duffy, Esquire, Department Counsel
For Applicant: *Pro Se*

January 23, 2008

Decision

LAZZARO, Henry, Administrative Judge

Applicant failed to mitigate the security concerns caused by alcohol consumption that resulted in him being convicted of numerous alcohol-related offenses between 1982 and 2005, and his failure to disclose the 2005 offense in a security clearance application he submitted in 2006.

On June 29, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.¹ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline G (alcohol consumption) and Guideline E (personal conduct). Applicant submitted an undated response to the SOR that had been notarized on August 6, 2007. He admitted all SOR allegations except subparagraph 2.a, and provided various explanations and clarifications to many of the allegations to which he admitted. Applicant requested a clearance decision based on the written record without a hearing.

¹ This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

Department Counsel prepared a File of Relevant Material (FORM) on September 27, 2007, that was mailed to Applicant the same day with an explanation that he had 30 days from receipt of the documents to submit his objections or additional information he wished to be considered. Applicant submitted a response to the FORM that was received by DOHA on November 27, 2007. Applicant's response was forwarded to Department Counsel on November 28, 2007. Department Counsel indicated he did not object to Applicant's submission. The case was assigned to me on November 30, 2007.

Procedural Ruling

Motion to Amend SOR

Department Counsel moved to amend the last sentence of subparagraph 2.a of the SOR by deleting the letter "a" from the phrase "1.a through 1.f" and substituting therefore the letter "b." Applicant did not respond to the motion to amend. In accordance with DoD Directive 5220.6, Enclosure 3, Additional Procedural Guidance, Paragraph E3.1.17, that motion is granted and the change has been made on the face of the SOR.

Findings of Fact

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the pleadings and exhibits, I make the following findings of fact:

Applicant is a 44-year-old man who has been employed as a simulator technician at an Army base by a succession of three defense contractors since January 1984. He was married in July 1986, and that marriage ended in divorce in January 1998. He has two children from that marriage, ages 20 and 15. Applicant attended college between 1986 and 1988, but did not earn a degree.

Applicant has possessed a secret level security clearance since 1984. An SOR was issued on July 25, 2003, seeking to revoke that security clearance. The 2003 SOR alleged the same incidents as are alleged in the current SOR as subparagraphs 1.b through 1.h, as well as other allegations that are not contained in the current SOR. On December 3, 2003, a hearing was held on the 2003 SOR. The administrative judge who presided over that hearing issued a decision on March 18, 2004, in which she found for Applicant on all allegations.^{2 3}

² ISCR Case No. 02-21824 (Apr. 18, 2004)

³ "A favorable security clearance decision does not give an applicant the right to retain a security clearance regardless of subsequent events or changed circumstances. See, e.g., DISCR Case No. 86-3543 at 3 (App. Bd. Apr. 27, 1989). Accordingly, the doctrine of *res judicata* does not bar an adverse security clearance decision when an applicant has engaged in misconduct subsequent to a favorable clearance decision. DISCR Case No. 91-1436 at 4 (May 3, 1993); DISCR Case No. 91-0775 at 3 (Aug. 25, 1992)." DISCR Case No. 04-08806 at 4 (App. Bd. May 8, 2007).

Applicant was convicted of Driving Under the Influence (DUI) on December 22, 1982, placed on one-year probation, fined, and sentenced to serve 30 days in jail (suspended). In a January 1985 statement, Applicant admitted failing a breath test after he was arrested, but claimed he had only consumed a few beers. He was next convicted of DUI on June 22, 1987. This time he was sentenced to serve 11 months and 29 days confinement (all but 10 days suspended), fined and ordered to complete an alcohol program. Applicant indicated he could not remember the details of this offense in a statement he provided in April 2002. Applicant has consistently attributed these offenses, and a third alcohol-related offense that occurred overseas and is not alleged in the SOR, to youthful indiscretion.

Applicant was again charged with DUI on August 7, 1999. In his April 2002 statement, Applicant admitted he consumed six or more 12 ounce beers before he was arrested, failed a field sobriety test, and refused a breath test. The DUI charge was reduced to Reckless Driving and Applicant was sentenced to serve six months in jail (all but two days suspended), fined, ordered to complete an alcohol program, and had his driving privileges suspended. Applicant was next convicted of DUI in June 2000. He was again sentenced to serve 11 months and 29 days confinement with the sentence converted to reporting probation after he served two actual days of confinement. He was also fined and ordered to attend DUI school. In his April 2002 statement, Applicant admitted he consumed six or more beers, was drunk, and was involved in a minor auto accident before he was arrested for this offense. He again refused a breath test. Applicant attributes these offenses to the stress caused by the dissolution of his marriage.

In July 2001, Applicant was charged with driving on a revoked license and having an open container of alcohol in his vehicle. He was convicted of Failure to Exhibit a driver's license and fined. In his April 2002 statement and in his response to the July 2003 SOR, Applicant claimed the open container was in the vehicle because he had consumed a beer while packing for a camping trip and had left the empty can in the vehicle.

The above incidents were all alleged in the July 2003 SOR. In response to that SOR Applicant asserted: "I have since settled down and have had no incidents after (1.e) 2001. I have also [sic] quit drinking alcohol altogether [sic]." (Item 5) At the December 2003 hearing held on the SOR, Applicant testified he consumed alcohol after the 2001 incident, but only on weekends. (Item 6, pg. 37) He also testified he last consumed alcohol the prior summer and did not want to drink alcohol in the future. (Item 6, pg. 43)

Applicant attended a ten-hour DUI class in 1983 as a result of his 1982 conviction, and an alcohol education program in 2000 as a result of his 1999 conviction. He obtained a psychological diagnosis prior to the December 2003 hearing and presented the testimony of the psychologist at the hearing. The psychologist opined that although Applicant acknowledged past problems with alcohol abuse he did not meet the diagnostic criteria for that diagnosis at that time. That opinion was based in part on Applicant's self-report of six months of abstinence. The psychologist recommended Applicant remain abstinent in the future.

Applicant was charged with public intoxication on March 30, 2005. He was convicted of this offense on April 6, 2005, and fined \$25. Applicant provided a statement about this

offense on July 31, 2006, in which he claimed he had consumed three beers at a bar and was driving a woman home from the bar who had asked him for a ride. He stopped to buy a six pack of beer but, according to his statement, was refused service because he had left his driver's license in his car. He was confronted by police in the parking lot and assumed the clerk in the store had called them. The arresting officer observed Applicant was unsteady on his feet, had a strong odor (presumably of alcohol) about him, and could not follow instructions on at least two of the field sobriety tests that were administered at the time of his arrest.

Applicant executed and submitted a security clearance application (SF 86) on January 31, 2006. In response to question 24, inquiring about alcohol related offenses, he listed all offenses that had been adjudicated during the 2003 hearing. However, he failed to list the 2005 public intoxication conviction. Applicant claimed in his responses to the current SOR and to the FORM that the omission was unintentional because he thought he was only being asked to update contact and personal information.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the disqualifying conditions and mitigating conditions for each applicable guideline. Additionally, each clearance 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 ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline G (alcohol consumption) and Guideline E (personal conduct), with their respective disqualifying and mitigating conditions, are most relevant in this case.

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.⁴ The government has the burden of proving controverted facts.⁵ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁶ although the government is required to present substantial evidence to meet its burden of proof.⁷ "Substantial evidence is more than a scintilla, but less than a preponderance of the

⁴ ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

⁵ ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

⁶ *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

⁷ ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

evidence.”⁸ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁹ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁰

No one has a right to a security clearance¹¹ and “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹² Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.¹³

Analysis

Guideline G, Alcohol Consumption

Alcohol consumption is a security concern because 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. Those who abuse alcohol are more likely than others to engage in high risk, thoughtless, and sometimes violent behavior. Recurrent use of alcohol to the point of intoxication may affect an individual’s ability to exercise the care, judgment, and discretion necessary to protect classified information.

As alleged in the SOR, Applicant was convicted of DUI or other alcohol-related offenses in 1982, 1987, 1999, 2000 and 2001. He attended court-mandated alcohol education programs in 1983 and 2000, and obtained an independent alcohol evaluation in 2003 in preparation for the hearing on the SOR issued that year. He was obviously made aware of the security significance of the previous alcohol related offenses, and admitted to the psychologist who conducted the 2003 evaluation he felt he had an alcohol problem in the past. He was advised by that psychologist that he should remain alcohol abstinent in the future. He testified at the 2003 hearing he had not consumed alcohol for at least several months and did not want to consume alcohol in the future.

Still, Applicant was charged with yet another alcohol-related offense in 2005. While that charge itself and the fine imposed therefore are relatively minor, it must be noted the

⁸ ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

⁹ ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

¹⁰ ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

¹¹ *Egan*, 484 U.S. at 528, 531.

¹² *Id* at 531.

¹³ *Egan*, Executive Order 10865, and the Directive.

offense occurred after Applicant admittedly drove an automobile in the obviously intoxicated condition as described in the arresting officer's report. Disqualifying Condition 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* applies.

Applicant's history, at best, discloses two periods of excessive alcohol consumption, separated by a number of years, that led to multiple arrests and convictions. Those convictions were then followed by a somewhat isolated incident after Applicant was made aware of the security significance of such misconduct.¹⁴ Accordingly, I do not find Applicant's excessive alcohol consumption and resulting misconduct is infrequent, mitigated by the passage of time or unlikely to recur. Further, Applicant has neither admitted to a continuing alcohol problem nor has he taken positive steps to prevent a recurrence. Therefore, no Guideline G mitigating condition applies and Guideline G is decided against Applicant.

Guideline E, Personal Conduct

Personal conduct is always a concern because conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any failure to cooperate with the security clearance process.

Applicant's explanation for not listing his 2005 arrest and the resulting conviction in the 2006 SF 86 he submitted is not credible. A comparison of the 2006 SF 86 with the one he submitted in 2000 discloses he did much more than merely update personal and contact information. For example, a new employer is listed, a different person who knew him well is listed, all offenses adjudicated at the 2003 hearing are listed in the 2006 SF 86 as opposed to just the two that are listed in the 2000 SF86, and detailed general remarks are provided concerning the 2003 adjudication. Further, it is just not believable Applicant would have taken the time and trouble to list the somewhat detailed information contained in the 2006 SF 86 about the offenses he knew the Government was aware of while omitting the one he could not know whether or not they aware of if he thought he was only updating personal and contact information.

DC 16(a): *deliberate omission, concealment, or falsification of relevant facts from any personal security questionnaire, personal history statement, of similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities*

¹⁴ Applicant submitted proof that a number of the offenses of which he was convicted were later expunged from his arrest record and dismissed. There is no indication any of those actions were based upon determinations that Applicant did not commit the offenses of which he was charged and convicted and, thus, they do not in anyway diminish the security significance of the arrests and convictions themselves.

applies. I have considered every Guideline E mitigating condition and conclude none apply. Guideline E is decided against Applicant.

The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶6.3.6 of the Directive, the applicable disqualifying conditions, Applicant has failed to mitigate the security concerns caused by his alcohol consumption and personal conduct. He has failed to overcome the case against him or satisfy his ultimate burden of persuasion. It is not clearly consistent with the national interest to grant Applicant a security clearance.

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 G:	AGAINST APPLICANT
Subparagraphs 1.a-l:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

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.

Henry Lazzaro
Administrative Judge

