

DATE: December 6, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-12949

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY II

APPEARANCES

FOR GOVERNMENT

Henry Lazzaro, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The Applicant has been arrested six times between 1997 and 2000 for underage drinking, DWI, and assault. He has recently moved out on his own and is changing his lifestyle and habits. However, insufficient time has passed since his last arrest to assure further alcohol related incidents and arrests will not occur. Clearance is denied.

STATEMENT OF THE CASE

On March 15, 2002, 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 Applicant, in an undated letter received by DOHA on April 8, 2002, answered the SOR and requested a hearing. The case was assigned to me on May 17, 2002. A Notice of Hearing was issued on August 15, 2002, scheduling the hearing which was held on August 28, 2002.

The Government's case consisted of nine exhibits (Gov Ex). The Applicant relied on his own testimony and that of another witness. The transcript (tr.) of the hearing was received on September 6, 2002.

FINDINGS OF FACT

The SOR alleges alcohol consumption (Guideline G), criminal conduct (Guideline J), and personal conduct (Guideline E). The Applicant admits the majority of the allegations.

The Applicant is 23-years-old, has worked for a defense contractor since September 1999, and is seeking a security clearance.

Between December 1995 and December 1999, the Applicant was issued at least 24 traffic violation citations. In April 1997, the Applicant was charged with under age possession of alcohol and was fined \$50.00. In July 1997, the Applicant was arrested for Driving While Intoxicated (DWI). His blood alcohol content (BAC) was .14. He pleaded

guilty to Driving Under the Influence (DUI) and was fined \$500.00. His driver's license was suspended for six months, he was placed in unsupervised probation for one year, and order to attend a 12-week alcohol awareness class. It was recommended the Applicant attend a 12-step program (Gov Ex 5), which he chose not to do. (tr. 42)

In January 1998, the Applicant was a passenger in a vehicle which was stopped for speeding. A search of the vehicle disclosed a bag of marijuana and a pipe. The driver was charged with DUI, the Applicant and the other two occupants were charged with possession of marijuana and paraphernalia. The Applicant was found not guilty of the charges. In March 1998, he was arrested for DWI, pleaded guilty to DUI, was sentenced to 60 days in jail (suspended), fined \$500.00, placed on two years probation, and his driver's license was suspended for eight months. Additionally, he was placed on the Drinking Drivers Monitor Program and ordered to complete a 24-week outpatient alcohol counseling. He was diagnosed as an alcohol abuser. In June 1998, he was charged with public intoxication, but the charge was *nolle prosequi*.

In May 1999, he was again charged with under age possession of alcohol and after being found guilty fined \$100.00. In September 1999, he was arrested (Gov Ex 3) and charged with second degree assault and resisting arrest. After being found guilty of the assault, the resisting arrest charge was *nolle prosequi*. He was sentenced to 90 days in jail (88 days suspended) and fined \$55.00. (Gov Ex 4) He was placed on 18 months probation and the previous probation was extended to May 2001.

In March 2000, he had 12 beers before getting into an argument with his girlfriend which resulted in an assault. (Gov Ex 6) He was charged with second degree assault, disorderly conduct, and resisting arrest. After pleading guilty to disorderly conduct, he was sentenced to 30 days in jail (suspended), fined \$55.00, and ordered to have not contact with the woman.

The Applicant's alcohol problems started when he was in high school when he got in with the wrong crowd. He started using alcohol in 1993 and by 1995 he was becoming intoxicated every month or every other month. From 1995 to September 1996, the Applicant was becoming intoxicated once or twice a month. From September 1996 to June 1997, during the Applicant's senior year in high school, he was becoming intoxicated once a month and once a month he was experiencing blackouts. (2) After high school, he states he was in a dead end job. From June 1997 to 1998, he became intoxicated once a week and experienced blackouts every two months. From 1998 through September 2000, he became intoxicated once a month. (Gov Ex 9, page 4)

At age 23, the Applicant has recently--three or four months prior the hearing--moved out on his own and has a new girlfriend who has a two-year-old child. He has more responsibility, he has changed his friends, no longer associates with his former friends (tr. 53), and has changed how he spends his free time. A year or year and a half ago, the Applicant purchased a 1997 Honda, which every other weekend during the summer, he takes to car shows. In September 1999, he started his current job and has made great improvement in his life, but continues to drink. He now drinks occasionally on weekends. The Saturday night before the hearing, he had two or three beers. He has not been intoxicated in the past five or six months. He no longer drives after drinking. He now has goals, shows leadership at work, and is a better person. He acknowledges he was heading down the wrong road in the past and regrets his past conduct. (tr. 40) He now knows the route he wants to take.

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead, they 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. In making overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive as well. In that vein, the government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate the facts proven have a nexus to an Applicant's lack of security worthiness.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

Alcohol Consumption (Guideline G) The Concern: 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. E2.A7.1.1.

Conditions that could raise a security concern and may be disqualifying include:

1. Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use. (E2.A7.1.2.1.)
3. Diagnosis by a credentialed medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence. (E2.A7.1.2.3.)
5. Habitual or binge consumption of alcohol to the point of impaired judgment. (E2.A7.1.2.5.)

Conditions that could mitigate security concerns include:

None Apply.

Criminal Conduct (Guideline J) The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Conditions that could raise a security concern and may be disqualifying include:

- a. Allegations or admission of criminal conduct, regardless of whether the person was formally charged.
- b. A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

None Apply.

Personal Conduct (Guideline E) The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying also include:

1. Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances. (E2.A5.1.2.1.)

Conditions that could mitigate security concerns include:

None Apply.

BURDEN OF PROOF

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the Applicant who must remove that doubt and establish his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against the applicant.

CONCLUSIONS

The Government has satisfied its initial burden of proof under Guideline G (Alcohol Consumption). Between 1997 and 2000, the Applicant was arrested six times for underage drinking, DWI, and assault and disorderly conduct. In 1998, he was diagnosed as an alcohol abuser. Between 1995 to at least September 2000, the Applicant was drinking to the point of intoxication at least once a month and from 1995 to 1998, he was having blackouts due to his drinking. Disqualifying conditions 1, (3) 3, (4) and 5 (5) apply.

These incidents were serious, recent, and numerous. The Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's case against him. The Applicant realizes he was headed down the wrong path, now recognizes the serious consequences of excessive alcohol consumption, is making a strong effort to reform his behavior and has changed his friends and lifestyle since September 1999, when he secured his current job. These changes are positive changes in behavior (MC3-(6)), however insufficient time has passed since his last arrest--March 2000--considering the Applicant still drinks and was last intoxicated within six months prior the hearing. The Applicant appears to be on a good path to reach his goals, but it is too early to safely conclude his excessive drinking is a thing of the past. There is no evidence that he received a favorable prognosis by a credentialed medical professional after having been diagnosed as an alcohol abuser. Because the Appellant meets the disqualifying conditions and none of the mitigating conditions, the alcohol consumption is resolved against the Appellant.

The Government has satisfied its initial burden of proof under Guideline J, (Criminal Conduct). Under Guideline J, the security eligibility of an applicant is placed into question when that applicant is shown to have a history or pattern of criminal activity creating doubt about his judgment, reliability, and trustworthiness.

In 1997 and 1999, the Applicant was arrested for underage drinking. In 1997 and 1998, he was arrested for DWI and pleaded guilty to DUI. In 1999 and 2000, he was arrested for second degree assault and found guilty of assault in one instance and disorderly conduct in the other. DC a. (7) and b. (8) apply. The Applicant's change of life style and change of friends are some evidence of rehabilitation, but it is insufficient to establish "clear evidence" of successful rehabilitation. MC f. (9) does not apply. Because the Appellant meets the disqualifying conditions and none of the mitigating conditions, the criminal conduct is resolved against the Appellant. I find against the Applicant as to SOR subparagraphs 2.a and 2.c.

There is evidence the Applicant was a passenger in a car which contained a bag of marijuana and a pipe. Although charged, as were the other occupants of the vehicle, the Applicant was found not guilty of the charges. I find for the Applicant as to SOR subparagraph 2.b.

The Government has satisfied its initial burden of proof under Guideline E, (Personal Conduct). Under Guideline E, the security eligibility of an applicant is placed into question when that applicant is shown to have been involved in personal conduct which creates doubt about the person's judgment, reliability, and trustworthiness. Between 1995 and December 1999, the Applicant received at least 24 traffic citations. Sometimes traffic citations have little security significance, but 24 within a four-year period demonstrates poor judgment. Additionally, the Applicant's September 1999 assault creates doubt about the Applicant's judgment.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the 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.

The awarding of a security clearance is not a once in a life time occurrence, but is based on current disqualifying and mitigating conditions. In fairness to the Applicant, this decision should not be construed as a determination the Applicant cannot or will not at some future date attain the state of true reform and rehabilitation necessary to justify the award of a DoD security clearance. To the contrary, his mitigating evidence suggests a sound potential for positive reform and outstanding accomplishments in the defense industry.

Although the Applicant's evidence of rehabilitation is insufficient at this time, should he in the future be afforded an opportunity to reapply for a security clearance, with the passage of sufficient additional time, continued rehabilitation, and no future incidents of misconduct, he may well demonstrate persuasive evidence of his security worthiness. But that time has not yet arrived. A clearance at this time is not warranted.

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 (Guideline J): AGAINST FOR THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

Subparagraph 1.d.: Against the Applicant

Subparagraph 1.e.: Against the Applicant

Subparagraph 1.f.: For Against the Applicant

Paragraph 2 Criminal Conduct (Guideline J): AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

Subparagraph 2.b.: For the Applicant

Subparagraph 2.c.: Against the Applicant

Paragraph 3 Personal Conduct (Guideline E): AGAINST THE APPLICANT

Subparagraph 3.a.: Against the Applicant

Subparagraph 3.b.: Against the 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 the Applicant.

Claude R. Heiny

Administrative Judge

1. Required by Executive Order 10865, as amended and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 as amended.
2. A "blackout" being a state in which a person appears to be fully awake and conscious, but later has no memory of the events which had occurred. A "blackout" being different from "passing out" which occurs when a person fall sleep after having had too much to drink.
3. DC 1. Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use. (E2.A7.1.2.1.)
4. DC 3. Diagnosis by a credentialed medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence. (E2.A7.1.2.3.)
5. DC 5. Habitual or binge consumption of alcohol to the point of impaired judgment. (E2.A7.1.2.5.)
6. MC 3. Positive changes in behavior supportive of sobriety. (E2.A7.1.3.3.)
7. DC a. Allegations or admission of criminal conduct, regardless of whether the person was formally charged.

8. DC b. A single serious crime or multiple lesser offenses.

9. MC f. There is clear evidence of successful rehabilitation.