

DATE: September 9, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-17532

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Department Counsel

FOR APPLICANT

S. Thomas Overstreet, Esq.

SYNOPSIS

In February 1994, the Applicant pleaded guilty to Driving While Intoxicated (DWI). In 1999, he was arrested and pleaded no contest to DWI. In May 1999, he took a prescription drug and consumed rum to the point of intoxication, which resulted in hospitalization. In July 1999, when he completed his security clearance questionnaire (SF 86) he failed to indicate there were charges pending against him and failed to list his 1999 alcohol related arrest. The record evidence is insufficient to mitigate or extenuate the negative security implications stemming from his use of alcohol and his falsification of his SF 86. Clearance is denied.

STATEMENT OF THE CASE

On May 30, 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 it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. ^(U) On July 12, 2002, the Applicant answered the SOR and requested a hearing. A hearing in this matter was set for October 24, 2002. A continuance of this hearing was granted. In January 2003, Notice of Hearing was issued setting a hearing for February 5, 2003. The Applicant failed to appear at the hearing, although his attorney was present. On February 24, 2003, the undersigned was assigned this case. On 17 June 2003, a Notice of Hearing was issued setting a hearing date of July 1, 2003.

On June 27, 2003, Applicant's counsel made a motion to vacate the hearing and requested the matter be decided administratively upon documents and written arguments. Department Counsel (DC) having no objection to the motion, the hearing was canceled. On July 3, 2003, an Order to Provide Documents and Argument was issued allowing until July 25, 2003 for the production of documents and arguments. On July 11, 2003, DC's File a Relevant Material (FORM), which included documents and argument. On July 18, 2003 Applicant's exhibits and argument were received. The Government's case consisted of 12 exhibits (Gov Item). The Applicant relied on eight exhibits (App Ex).

FINDINGS OF FACT

The SOR alleges excessive alcohol consumption (Guideline G) and personal conduct (Guideline E). The Applicant admits he used alcohol, and admits being intoxicated as a teenager on one or two occasions, admits pleading guilty to driving while intoxicated in February 1994 with a blood-alcohol content (BAC) of .16, admits to pleading "no contest" to driving under the influence of alcohol in April 1999 with a BAC of .19, and admits he made a mistake by failing to list his 1999 alcohol related arrest and his SF 86. These 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 additional findings of fact.

The Applicant is 45-years-old, has worked for a defense contractor since April 1992, and is seeking to maintain a security clearance. The Applicant presented some of his work evaluations between March 1993 and July 2000, which indicate his duty performance has been "excellent" or "usually exceeds requirements." (App Ex 2e.) Coworkers like him, trust him, believe him to be loyal, and to be an extremely skilled technician. (App Ex. 2f., 2g., 2h.)

In February 1994, the Applicant--then age 37--was stopped by the state police for swerving, and given a field sobriety test which he failed. After pleading guilty to driving while intoxicated with a BAC of .16 and improper lane change, he was sentenced to 90 days in jail (suspended), fined \$300.00, and \$140.00 court costs. He had to attend driving under the influence (DUI) school for three hours each Saturday morning for five weeks. In February 1994, the Applicant was evaluated for alcohol/drugs. In 1994, he was treated for alcohol abuse "one time" and successfully completed treatment. The Applicant last attended "one day of outpatient treatment" in 1994. (Gov Item 8, page 7) In his response to the SOR, the Applicant says he was evaluated, but never treated at this facility. (Gov Item 3)

In April 1999, the Applicant was charged with DWI second offense and having an open container. His BAC at the time was .19. In March 2000, the Applicant pleaded no contest to driving under the influence, which was to be treated as a first conviction. He was fined \$500.00, \$199.00 court costs, and one year unsupervised probation. Even though the Applicant had attended DUI classes three times a week, two hours each class, for a period of six weeks prior his court appearance, he was ordered to attend DWI school following his no contest plea.

On July 6, 1999, the Applicant was interviewed as part of a substance abuse evaluation and give a diagnosis of "alcohol abuse." Following the evaluation, intensive outpatient treatment, intensive outpatient aftercare treatment, and individual counseling sessions was recommended. The Applicant attended 20 sessions, including aftercare group sessions, in October, November, and December 1999, and January 2000. (Gov Item 8, App Ex 2b.)

In May 1999, the Applicant consumed rum to the point of intoxication. His intoxication coupled with prescription drug use resulted in his admission to a university medical center. The type of injury listed on the employers' first report of injury or illness lists the illness as attempted suicide by prescription drug overdose. The medical records indicate the overdose was an accidental overdose of a prescription drug (Gov Item 9) and lists the reason for hospitalization as "ingestion error." (App Ex 2a)

In July 1999, the Applicant completed his Security Clearance Application (SF 86). Question 23 asked the Applicant if there were any current criminal charges pending against him to which he answered "no." In question 24 he was asked about his police record concerning alcohol offenses. He indicated he had been arrested in 1994 for DWI, but failed to indicate his April 1999 alcohol related arrest. The Applicant stated he failed to list his April 1999 arrest because it was not a conviction, he hoped that his employer would not find out about it, and did not want his second DUI arrest to affect his employment. (Gov Item 5) Question 30 asked him if, during the prior seven-year, his use of alcohol had resulted in any alcohol related treatment or counseling. He answered "no" to the question.

In November 1999, the Applicant made a sworn statement (Gov Item 5) in which he said he had been drinking a glass of wine with dinner approximately three times a week for the prior 10 years. In June 2000, the Applicant stated that he was drinking wine with dinner three times a week. (Gov Item 6)

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. The government has the burden of proving any controverted fact(s) alleged in the SOR, and the facts must 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.

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.)

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:

2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities. (E2.A5.1.2.2.)

Conditions that could mitigate security concerns include:

None Apply.

BURDEN OF PROOF

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." 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." *Id.* 484 U.S. at 527. The President has restricted eligibility for access to classified information to "United States citizens . . . whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Executive Order 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional

history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, at 531. All that is required is proof of facts and circumstances which indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, then the applicant has the ultimate burden of establishing 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.

Security clearances are granted only when "it is clearly consistent with the national interest to do so." *See Executive Orders 10865 § 2 and 12968 § 3.1(b)*. "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2" The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." *See Egan*, at 531. Doubts are to be resolved against the applicant.

CONCLUSIONS

The Government has satisfied its initial burden of proof under Alcohol Consumption (Guideline G). In February 1994, the Applicant was arrested and pleaded guilty to DWI. In 1999, he was arrested and pleaded no contest to DWI. In May 1999, he took a prescription drug and consumed rum to the point of intoxication, which resulted in his hospitalization. Disqualifying condition 1 ⁽²⁾ applies.

The Applicant was involved in three incidents of intoxication--two of which resulted in arrests and the other hospitalization. This indicates the conduct was serious and does form a pattern. Due to the serious nature of these incidents, the problem is considered recent with the most recent intoxication having occurred approximately four years prior the FORM. The Applicant has not stopped drinking, but still drinks wine three times a week with dinner, a habit he has engaged in for more than 10 years, a habit he was engaging in when the three previously listed intoxications occurred. There is no showing he has made any effort to reform his behavior, change his friends, or lifestyle since May 1999. The Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's case against him.

Although diagnosed as "alcohol abuse," the record is insufficient to show the diagnosis was made by a credentialed medical professional (e.g., physician, clinical psychologist, or psychiatrist) or by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program. Mitigating Condition 4 does not apply because 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 Applicant meets the disqualifying conditions and none of the mitigating conditions, his alcohol consumption is resolved against the Applicant. I find against the Applicant as to SOR subparagraphs 1.a., 1.b. 1.d., and 1.e.

In February 1994, the Applicant was evaluated for alcohol/drugs as stated in the substance abuse evaluation, (Gov Item 8, App Ex 2b) I do not find undergoing an evaluation to be treatment. I find for the Applicant as to SOR subparagraph 1.c.

In July 1999, the Applicant underwent a substance abuse evaluation which recommended he have intensive outpatient treatment, intensive outpatient aftercare treatment, and individual counseling sessions following a diagnosis of alcohol abuse. He attended 20 treatment sessions, including aftercare group sessions, in October, November, and December 1999, and January 2000. I will not find against the Applicant because he went to treatment. I find for the Applicant as to SOR subparagraph 1.f.

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. Complete honesty and candor

on the part of applicants for access to classified information is essential to make an accurate and meaningful security clearance determination. Without all the relevant and material facts, a clearance decision is susceptible to error, thus jeopardizing the nation's security. The nature of Applicant's actions, in providing false information to multiple questions on his July 1999 SF 86 poses a serious potential risk to the nation's security precautions.

The Applicant answered "no" when asked about pending criminal charges. He had been arrested in April 1999 and the plea and disposition agreement was signed in March 2000. Therefore, charges were pending when the Applicant completed his questionnaire. When asked about his alcohol related offenses he listed a 1994 DWI, but not the April 1999 DWI arrest which had occurred three months prior. His argument that he failed to list the arrest because it was not final is unpersuasive. Both questions ask about being "charged" with an offense. It is clear, the Applicant did not want his second DUI to affect his employment and failed to list it for this reason. Because of the Applicant's deliberate omission, concealment, or falsification of relevant and material facts on his security questionnaires, Disqualifying Condition (DC) 2-[\(3\)](#) applies.

None of the mitigating conditions apply to his false answers to questions 23 and 24. His alcohol related arrest was pertinent to a determination of judgment, trustworthiness, or reliability. The falsifications were not an isolated incident because he gave false answers to two different questions. There is no showing the Applicant make a prompt, good-faith effort to correct the falsification before being confronted with the facts. There is no indication his omissions were caused by improper or inadequate advice from an authorized personnel or based on advice from legal counsel. Because of the serious nature of his falsifications, I find against the Applicant as to SOR subparagraphs 2.a., and 2.b.

The Applicant was evaluated on July 6, 1999 and completed his SF 86 two days later on July 8, 1999. Treatment was recommended, but there is no showing that any of the recommended treatment occurred prior to the Applicant completing the SF 86 as alleged in SOR subparagraph 2.c. In February 1994, the Applicant was evaluated for alcohol/drugs and, according to the substance abuse evaluation, he was treated for alcohol abuse "one time" and successfully completed treatment. The discussion of this treatment is vague. Additionally, the alleged 1994 treatment was not alleged as treatment under SOR subparagraph 2.c. I find for the Applicant as to SOR subparagraph 2.c.

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.

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 (Guideline G): AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: Against the Applicant

Subparagraph 1.e.: Against the Applicant

Subparagraph 1.f.: For the Applicant

Paragraph 2 Personal Conduct (Guideline E): AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

Subparagraph 2.b.: Against the Applicant

Subparagraph 2.c.: For 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. Clearance denied.

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. 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.)
3. DC 2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities. (E2.A5.1.2.2.)