DATE: November 7, 2003

In Re:

SSN: ----------

Applicant for Security Clearance

CR Case No. 02-02434

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Juan J. Rivera, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was convicted of driving an automobile while under the influence of alcohol on three occasions between April 1996 and July 2000. He attended an alcohol abuse program on at least one occasion, and failed to disclose that treatment in the Security Clearance Application he submitted on January 2, 2001. Applicant has failed to mitigate the security concerns that arise from his alcohol consumption and personal conduct. Clearance is denied.

STATEMENT OF THE CASE

On April 11, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find that 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 answer to the SOR, requested a hearing, and admitted some, but not all the SOR allegations.

The case was assigned to another administrative judge on July 14, 2003, and reassigned to me on August 14, 2003 because of caseload concerns. A notice of hearing was issued on August 20, 2003,[(2)] scheduling the hearing for September 3, 2003. The hearing was conducted as scheduled. The government submitted eight documentary exhibits that were marked as Government Exhibits (GE) 1-8 and admitted into the record. Applicant did not object to GE 1-7. His objection to GE 8 was overruled. The Applicant testified, but did not offer any documentary exhibits. The transcript was received on September 16, 2003.

FINDINGS OF FACT

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

Applicant is a 36-year-old man, never married, who is employed by a defense contractor. He graduated form college in May 1993 and was awarded a bachelor of arts degree with a major in psychology. Applicant has worked at seven different jobs, ranging in duration from approximately one and

one-half months to three years, since he graduated from college. He has also been unemployed on two occasions, once for three months and another time for six months. He has also had seven different residences during that period.

Applicant was charged with Operating a Motor Vehicle While Intoxicated (OWI) and Speeding (58 mph in a 45 mph zone) on April 20, 1996. Applicant's blood alcohol concentration (BAC) was 0.126 when he was arrested. He pled guilty to the offense of OWI and was sentenced to serve 120 days in jail (suspended) and fined $685.00.[(3)] The Speeding charge was dismissed.

Applicant was charged with OWI 2nd on April 19, 1997. He refused to submit to a Breathalyzer at the time of his arrest based upon advice he had previously received from a friend who is a police officer. Applicant was found guilty of this offense on June 25, 1997 and sentenced to one year of unsupervised probation, ordered to serve 240 days in custody (suspended), pay a fine of $150.00, and obtain treatment.[(4)]

Applicant was charged with Driving Under the Influence (DUI) and Speeding (84 mph in a 60 mph zone) on July 5, 2000. He again refused to submit to a Breathalyzer at the time of his arrest. Applicant entered a plea of no contest to both charges and was sentenced to serve 10 days in jail (seven days suspended), fined $250.00, and required to attend a driver improvement course. He received an additional $75.00 fine for the Speeding charge.

Applicant attended a Drinking Driver's Program in approximately February 1997. The only additional information available about this program is Applicant's testimony that it was essentially a driver's education program in which movies were shown that demonstrated the outcome of driving an automobile after consuming alcohol. He thought the program was designed to scare people into not driving an automobile after they had so much as consumed a single alcoholic beverage.

Applicant attended an alcohol abuse program beginning October 8, 1997. He was court-mandated to spend the first seven days of the program in inpatient treatment, and was released to the outpatient program on October 15, 1997. He successfully completed this program on November 4, 1997, although his prognosis was only listed as fair. The diagnostic impression of Applicant at both his admission and discharge was *Alcohol Abuse.* The assessment of Applicant during the program included an opinion that he appeared to minimize his alcohol use. The discharge plan was that Applicant was to remain abstinent, attend alcoholics anonymous (AA) meetings, and obtain a sponsor. He has not carried through with the discharge plan and indicated he was still consuming alcohol when he provided a statement to a special investigator on August 7, 2001. (GE 2)

Applicant attended a court-mandated 72-hour driver intervention program in October 2000, following his last DUI arrest. The counselor concluded that Applicant did not appear to by harmfully involved with alcohol at that time and opined that he did not appear to need further assessment or treatment.[(5)] However, significant in GE 7 is the assertion that this was Applicant's first DUI arrest. While Applicant denies he told the counselor it was his first arrest, he does admit supplying the information immediately before and after that notation. GE 7 also contains assertions that this was Applicant's first treatment and that he had never experimented with drugs.[(6)] It is apparent that Applicant intentionally misled the counselor and, as a result, the evaluation and opinions contained therein are invalid.

Applicant failed to disclose the alcohol treatment and/or counseling he received in the Security Clearance Application (SF 86) he submitted on January 2, 2001. Specifically, he answered "NO" in response to question 30: *In the last 7 years has your use of alcoholic beverages (such as liquor, beer, wine) resulted in any alcohol-related treatment or counseling (such as for alcohol abuse or alcoholism)?* His explanations that he did not disclose his attendance at the programs listed above, and most specifically the program that included a 7-day inpatient component, because he thought they were more education and assessment and thought the question was asking if he was required to do something more than was court-ordered is not credible.

The SOR also alleges that Applicant provided a false answer to SF 86 question 26: *In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25?* Applicant denied this allegation, and the only evidence presented by the government was GE 8, which states "No Charges Filed." There is no evidence in the record to indicate Applicant was arrested on the complaint made to the police that he had issued a bad check. There is a notation that he paid the check in full.

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 (DC) and Mitigating Conditions (MC) 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, pertaining to alcohol consumption, and Guideline E, pertaining to personal conduct, with their respective DC and MC, are most relevant in this case.

BURDEN OF PROOF

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.[(7)] The government has the burden of proving controverted facts.[(8)] The burden of proof in a security clearance case is something less than a preponderance of evidence[(9)], although the government is required to present substantial evidence to meet its burden of proof.[(10)] "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."[(11)] 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.[(12)] Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[(13)]

No one has a right to a security clearance[(14)] and "the clearly consistent standard indicates that

security clearance determinations should err, if they must, on the side of denials."[(15)] Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.[(16)]

CONCLUSIONS

Under Guideline G, 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.

Applicant was convicted in April 1996 and April 1997 of OWI. On each of those occasions he was court-ordered to attend some type of alcohol abuse program, the second of which required a seven-day inpatient component. The discharge plan following the second program was that Applicant was to remain abstinent, attend AA meetings and obtain a sponsor. He did none of those things.

On July 19, 2000, Applicant was convicted of DUI, his third alcohol related driving offense in slightly more than four years. Once again he was court-ordered to attend a driver intervention program. Rather than use that opportunity to address the alcohol problem that should have been obvious to him, he instead chose to provide false information to the counselor. He undoubtedly escaped the inconvenience he would have incurred of having to participate in a more substantial substance abuse program and once again being advised to attend AA meetings and obtain a sponsor. However, he also forfeited the opportunity to address the alcohol abuse problem that causes the security concern in this case. There is no evidence to suggest that he has otherwise addressed that problem.

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*; and DC 5: *Habitual or binge consumption of alcohol to the point of impaired judgment* apply in this case. I have considered all the Mitigating Conditions under Guideline G and find that none apply in this case. Guideline G is decided against Applicant.

Personal conduct under Guideline E is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Applicant's lack of candor in failing to disclose his alcohol-related treatment when he submitted the SF 86 and the testimony he provided by way of explanation severely undermine the ability to place such trust and confidence in Appellant at the present time. His false and/or misleading answers and explanations raise significant security concerns.

DC 2: *The deliberate omission, concealment, or falsification of relevant and material fact*

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 applies in this case. I have considered all the Mitigating Conditions under Guideline E and find that none apply in this case. Guideline E is decided against Applicant.

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, and the applicable disqualifying and mitigating conditions, I find that Applicant has failed to overcome the case against him and satisfy his ultimate burden of persuasion. It is not clearly consistent with the national interest to grant Applicant a security clearance.

FORMAL FINDINGS

SOR ¶ 1-Guideline G: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Subparagraph d: Against the Applicant

Subparagraph e: Against the Applicant

Subparagraph f: Against the Applicant

Subparagraph g: Against the Applicant

Subparagraph h: Against the Applicant

SOR ¶ 1-Guideline E: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: 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 Applicant.

Henry Lazzaro

Administrative Judge

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

2. Although the notice of hearing is dated August 20, 2003, it was actually prepared and faxed to the Applicant on August 19, 2003. A copy of the fax transmittal sheet is contained in the file.

3. No testimonial or documentary evidence was offered in support of the sentence alleged in the SOR. However, Applicant provided an unqualified admission to the allegations contained in SOR subparagraph 1.b., which included this sentence.

4. GE 4 lists the sentence as: "fined 150 plus cc 240 days susp 7 days treatment 1 yr unsup prob" without any punctuation. GE 6 includes the notations: "He was admitted to the START program on 10/8/97 and was transferred to the Outpatient program after he completed his required 7 days on 10/15/97" and "Clt is court-mandated to complete 7 days of IP." Accordingly, and despite Applicant's unqualified admission to SOR subparagraph 1.c., which included an assertion that Applicant served 7 days in jail, I am satisfied the sentence required him to serve 7 days in inpatient treatment as opposed to 7 days in jail.

5. GE 7

6. GE 6 discloses that Applicant used marijuana between the ages of 18 and 21.

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

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

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

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

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

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

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

14. *Egan*, 484 U.S. at 528, 531.

15. Id at 531.

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