

DATE: June 2, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-06456

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Jonathan Beyer, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The Applicant was arrested in 1994 for driving under the influence and in 1997 for drunken driving. He failed to list his arrests on his security clearance application. The alcohol concerns have been mitigated. However, the record evidence is insufficient to mitigate or extenuate the negative security implications stemming from the falsification of his application. Clearance is denied.

STATEMENT OF THE CASE

On October 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. On December 23, 2002, the Applicant answered the SOR and requested a hearing. The case was assigned to me on February 18, 2003. A Notice of Hearing was issued on arch 27, 2003, scheduling the hearing, which was held on May 1, 2003.

The Government's case consisted of five exhibits (Gov Ex). The Applicant relied on his own testimony and nine exhibits (App Ex). Following the hearing, an additional document was received indicating the Applicant had been named Sailor of the Month, provisions having been made for its submission following the hearing. Department Counsel (DC) having no objection to its admission, the submission was admitted as applicant's exhibit I. The transcript (Tr.) of the hearing was received on May 9, 2003.

The SOR alleges excessive alcohol consumption (Guideline G) and personal conduct (Guideline E). The Applicant admits two alcohol related arrests and denies he falsified material facts on his Security Clearance Application, SF 86.

FINDINGS OF FACT

The Applicant is 43-years-old, has worked for a defense contractor since May 1999, and is seeking to obtain a security

clearance. The Applicant served honorably in the U.S. Army from 1978 to 1999 retiring at the rank of E-8 (Gov Ex 3). In 1994, the Applicant went on post to get medicine for his daughter. The Applicant was stopped after failing to stop at a stop sign. When a strong odor of alcohol was detected, he was given a Blood Alcohol Test (BAT). His blood alcohol content (BAC) was .16%. In U.S. Magistrate Court, the Applicant pleaded guilty to Driving Under the Influence (DUI) of alcohol, was fined \$600.00, \$25.00 cost, and order to attend DUI school. (Gov Ex 5) He completed a week long alcohol, drug, and abuse program.

Following his first DUI, the Applicant states he no longer drank alcohol socially. (Tr. 39) In 1997, the Applicant was suffering from a bad cold, went home, prepared himself a hot rum toddy, but did not drink it, drank three-fourths of a bottle of over the counter cold medicine, and fell asleep. (Tr. 38) He was scheduled to report later that evening to deploy with his unit. He was called and had to return to post to get a document from a safe for a unit that was deploying 30 minutes before his unit. He was stopped when he failed to stop for a red light. After a strong odor of alcohol was detected, the Applicant was giving a Breath Analysis Test and then a BAT. The Commander's Report of Disciplinary or Administrative Action (Gov Ex 4, MP Report page 2) indicates the BAC was .18%. The Applicant admits the level of alcohol was above the level to legally operate a vehicle. (Tr. 58)

Another individual in the car at the time of the arrest, stated the Applicant did not appear to be under the influence of alcohol. (App Ex A) Following the incident various individuals submitted character statements indicating the Applicant was mission focused, self-sacrificing, optimistic, selfless, self-motivated, a very professional, superb, outstanding, productive soldier. (App Exs B, C, D, G, H and I)

The Commander, after reviewing the evidence and the Applicant's response imposed non judicial punishment under Article 15 (Art. 15) of the Uniform Code of Military Justice (UCMJ) for violation of Article 111, drunken driving. The Applicant's punishment was forfeiture of \$250.00 pay per month for two months. His punishment was suspended. Additionally, his driver's license was suspended and he was required to attend a week long alcohol, drug, and abuse program, which he did. (Gov Ex 4, Tr. 44)

In December 2000, the Applicant completed his SF 86. This was the first time he ever completed a security questionnaire on the computer. He would complete portions of the SF 86 between calls at work. Question 24 (Gov Ex 1, p 7) asked if he had ever been charged with or convicted of any offenses related to alcohol. The Applicant states his answered "no" to the question was an oversight or typo. The following question, Question 25, asked the Applicant if, during the previous seven years, he had any disciplinary proceedings under the Uniform Code of Military Justice including non-judicial actions. Although the Applicant had a 1997 Art. 15 for the alcohol related driving arrest, he answered "no" to the question.

Question 26, asked if the Applicant had been arrested, charged or convicted of any offense during the previous seven years not listed in questions 21, 22, 23, 24, or 25. Again the Applicant answered "no." Block 43, General Remarks, asked the Applicant if he had any additional remarks to enter on his application, which he left blank. Nowhere on this application did he list either of his arrests.

The Applicant explained both arrests in detail in a signed, sworn statement given in May 2002. (Gov Ex 2) In 2000, the Applicant received his bachelor's degree. In May 2003, the Applicant will get his Master's degree in Education. He is currently doing intern teaching eight hours a day plus working a full time job, and has total responsibility for raising his 13-year-old daughter while his wife is deployed overseas with the U.S. Army.

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. 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.)
2. Alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job. (E2.A7.1.2.2.)

Conditions that could mitigate security concerns include:

2. The problem occurred a number of years ago and there is no indication of a recent problem. (E2.A7.1.3.2.)

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. The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

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 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 Guideline G (Alcohol Consumption). Between 1994 and 1997, the Applicant was arrested twice, once for DUI and once for drunken driving. Both arrests occurred on post. The first arrest occurred when he went to retrieve some medicine for his daughter and the second arrest when he was going to retrieve material from his safe for a deploying unit. Disqualifying Conditions (DC) 1, [\(2\)](#) and 2-[\(3\)](#) apply.

The Applicant no longer drinks alcohol, has not been intoxicated since October 1997, and has been sober for more than five and one half years. Sufficient time has passed to show there is no indication of a recent problem. Mitigating condition (MC) 2-[\(4\)](#) applies. I find for the Applicant as to SOR subparagraph 1.a. and 1.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. 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.

In December 2000, the Applicant completed his security clearance application and failed to list his 1994 and 1997 alcohol related arrests. Question 24 specifically asked about being charged with or convicted of any alcohol related offenses. Question 25 asked about his military disciplinary record to include non-judicial punishment. Question 26 asked about any arrests, charges, or conviction of any offenses not previously listed. The Applicant answered "no" to all three questions. Block 43 provided the opportunity to provide relevant information, which the Applicant left blank. Because the Applicant provided false information, DC 2-[\(5\)](#) applies.

None of the mitigating factors apply. MC 2-[\(6\)](#) does not apply because the falsification was not an isolated incident because he failed to respond correctly to three questions on his application. The application was completed in December 2000, approximately two and a half years ago and yet is recent. The individual did subsequently provide correct information in a sworn statement given approximately 18 months later. There is no evidence he provided this information voluntarily before being asked about his arrests or in response to questioning by the Defense Security Service special agent.

The Applicant stated his "no" answer to the question 24 was an oversight, a mistake, or a typo. I find the Applicant's statement to be unpersuasive. There were three different questions which called for the Applicant to reveal his alcohol related arrests. Because he had an alcohol arrest which resulted in non-judicial punishment under Art. 15, he should have answered "yes" to questions 24 and 25. And if these questions were answered "no," then question 26 should have been answered "yes." The Applicant's statement he was at work answering telephones and sending out messages and completing the application in bits and pieces, a little at a time, does not mitigate his conduct. After the entire SF 86 was completed, the Applicant was required to verify that all of the entries were true, complete, and accurate to the best of his knowledge and belief and his signature on the document attests to his having done so. I find against the Applicant as to

SOR subparagraph 2.a.

The awarding of a security clearance is not a once in a life time occurrence, but is based on applying the factors, both disqualifying and mitigating, as set forth in the directive, to the evidence presented. Under the Applicant's current circumstances a clearance is not recommended, but should the Applicant be afforded an opportunity to reapply for a security clearance in the future, he may well demonstrate persuasive evidence of his security worthiness. A clearance at this time is not warranted. Additionally, this determination does not question the Applicant's patriotism and should not be seen as such.

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 Guideline G (Alcohol): FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

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

Subparagraph 2.a.: 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. Clearance is 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. Alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job. (E2.A7.1.2.2.)
4. MC 2. The problem occurred a number of years ago and there is no indication of a recent problem. (E2.A7.1.3.2.)
5. 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.)
6. MC 2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct

information voluntarily. (E2.A5.1.3.2.)