

DATE: June 30, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-29025

ECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Jason Perry, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was arrested in 1993 for Driving Under the Influence (DUI) of alcohol and convicted of Driving While Ability Impaired (DWAI). In 1997, he was arrested for DUI and pleaded guilty to DWAI. In 2003, he was arrested for DUI and pleaded guilty to DUI-Second Offense. The record evidence is insufficient to mitigate or extenuate the negative security implications stemming from Applicant's criminal conduct and alcohol consumption. Clearance is denied.

STATEMENT OF THE CASE

On September 14, 2005, 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 September 21, 2005, Applicant answered the SOR and elected to have his case decided on the written record in lieu of a hearing.

On January 4, 2006, Applicant received a complete copy of the government's file of relevant material (FORM) dated December 27, 2005. Applicant was given the opportunity to file objections and submit material in extenuation, mitigation, or refutation. On February 3, 2006, Applicant's response to the FORM was due. No response has been received. On February 23, 2005, I was assigned the case.

FINDINGS OF FACT

The SOR alleges security concerns under the Guidelines for Criminal Conduct and Alcohol Consumption. Applicant admits to the following: he was arrested in April 1993 for Driving Under the Influence (DUI) and pleaded guilty to Driving While Ability Impaired (DWAI), he was arrested in April 1997 for DUI to which he pleaded guilty, he was arrested in April 2003 for DUI to which he pleaded guilty to DUI second offense, and between 1985 and December 2003, he, at times, drank to intoxication. Those admissions are incorporated herein as findings of fact. After thorough

review of the whole record, I make the following additional findings of fact:

Applicant is 48 years old, has worked for a defense contractor since July 1978, and is seeking to obtain a security clearance.

Applicant started drinking beer in high school. In October 1977, Applicant was arrested along with two friends for felony theft after he stole a woman's billfold. He was required to complete a seven-week Alcohol Rehabilitation Class. When he dropped out of college in December 1977, his alcohol consumption increased. As of November 1982, Applicant was drinking to the point of intoxication every two weeks. In 1993, Applicant was drinking to the point of passing out and, at times, blacking out. (Item 9)

In April 1993, Applicant had been drinking beer with friends. He consumed eight to ten beers in a three-hour period. While driving home, he was stopped by the police for driving without having his lights on. His Blood Alcohol Content (BAC) was .189%. (Item 6) He was convicted of Driving While Ability Impaired (DWA). He was fined \$500, given a suspended jail sentence, placed on one year probation, ordered to perform 48 hours of public service, and required to complete 40 hours of Level II alcohol education and therapy.

For nine months during 1995 and 1996, Applicant completely abstained from drinking. This was a voluntary action on his part due to self concern. (Item 9)

In April 1997, Applicant had been drinking at a bar with some co-workers, celebrating his new job. While driving home, he was stopped and charged with speeding and DUI. His BAC was .145%. (Item 9) He pleaded guilty to the lesser charge of DWAI. He was fined \$400, sentenced to 15 days in jail, 24 months probation, required to complete 48 hours of public service. An Alcohol/Drug Driving Safety Program Evaluation and Referral Recommendation Report was completed that classified Applicant as a "problem drinker." (Item 9) The report recommended he complete 40 hours of Level II Alcohol education and therapy. A partial suspension of the jail sentence was also recommended. At that time, Applicant intended to limit his alcohol consumption to once a week.

As of December 2002, in response to written interrogatories (Item 5), Applicant was drinking one or two drinks two to four times a month. In January 2003, Applicant underwent an evaluation and substance abuse assessment at DOHA's request. (Item 8) At that time, Applicant did not meet the criteria for DSM-IV diagnosis for Substance Abuse. It was concluded that, since it had been five years since his previous DUI Applicant was able to follow his drinking habits of one to three beers twice a week without problems. The report went on to state, "However, future behavior of anyone cannot be predicted."

Three months following the assessment, in April 2003, Applicant consumed 14 beers in an eight-hour period. Driving home from the golf course at 2:00 a.m., Applicant was stopped by the police. His BAC was .189%. He pleaded guilty to DUI second offense and was sentenced to 365 days in jail (335 days suspended), 30 days electronic monitoring home detention, and a \$1,000 fine. He was required to complete level II alcohol education and therapy, perform 56 hours of public service, and placed on supervised probation for one year. Treatment consisted of one and one-half hour weekly sessions.

As of February 2004, when he completed a sworn statement (Item 6), he was drinking two to three beers once or twice a week and also drinking three to four beers once or twice during the weekend. Two to three times a year he would drink six to eight beers.

As of February 2004, Applicant's last drink was in December 2003 because his treatment program did not allow him to drink. Once the treatment program was completed, Applicant was unsure if he would return to drinking. The record fails to disclose Applicant's current pattern of alcohol consumption.

POLICIES

The Directive sets forth adjudicative guidelines to be considered when evaluating a person's eligibility to hold a security clearance. Disqualifying Conditions (DC) and Mitigating Conditions (MC) are set forth for each applicable guideline. Additionally, each 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 Section 6.3 of the Directive. The adjudicative guidelines 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. The presence or absence of a particular condition or factor for or against clearance is not determinative of a conclusion for or against an applicant. However, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, I conclude the relevant guidelines to be applied here are Criminal Conduct and Alcohol Consumption.

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. Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of an applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. The burden of proof in a security clearance case is something less than a preponderance of evidence, although the government is required to present substantial evidence to meet its burden of proof. Substantial evidence is more than a scintilla, but less than a preponderance of the evidence. 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. Once the government has met its burden, the burden shifts to an applicant to present evidence to refute, extenuate or mitigate government's case. An applicant has the ultimate burden of persuasion to obtain a favorable clearance decision. ⁽²⁾

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." A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information to be resolved in favor of protecting national security. Security clearance determinations should err, if they must, on the side of denials.

CONCLUSIONS

Under Guideline J, Criminal Conduct, 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. Willingness to abide by rules is an essential qualification for eligibility for access to the nation's secrets. A history of illegal behavior indicates an individual may be inclined to break the rules.

Applicant has been convicted three times for excessive use of alcohol while operating a motor vehicle. Because of these incidents, Disqualifying Condition (DC) 1 (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged*) and 2 (*A single serious crime or multiple lesser offenses*) apply.

In April 1993, Applicant was arrested for excessive DUI with a very high BAC of .189%. He was convicted of the lesser crime of driving while ability impaired. He had 40 hours of alcohol education and therapy, which did not prevent his arrest four years later again for DUI. His self concern over his drinking caused him to refrain from drinking for nine months in 1995 and 1996. However, his sobriety did not continue. In April 1997, his BAC was .145% when he was again arrested. He was again convicted of the lesser crime of DWAI. He was classified as a problem drinker and underwent another 40 hours of alcohol education and treatment.

Applicant second session of alcohol education and treatment was insufficient to prevent another DUI arrest six years later. In April 2003, Applicant BAC was again extremely high at was .189%.

None of the mitigating conditions (MC) apply. MC 1 (*The criminal behavior is not recent*) does not apply because his most recent arrest occurred in April 2003, which is recent criminal behavior. MC 2 (*The crime was an isolated incident*) does not apply because there were three DUI arrests and therefore, his criminal behavior was not an isolated incident.

MC 3 (*The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life*) and 4 (*The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*) do not apply because the Applicant's conduct was not the result of pressure, coercion, or an involuntary act. There was no acquittal, so MC 5 (*Acquittal*) is inapplicable. C 6 (*There is clear evidence of successful rehabilitation*) does not apply because the record does not establish clear evidence of successful rehabilitation. The record is silent as to Applicant's current pattern of alcohol use. I find against the Applicant as to criminal conduct.

A history of excessive alcohol consumption raises a security concern because of the potential for deliberate or inadvertent mishandling of classified information due to intoxication. Excessive alcohol consumption is of concern because it 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. The record evidence raises a security concern under this guideline.

Applicant has a long history of problems with alcohol. In October 1977, Applicant was arrested for felony theft for stealing a woman's billfold. Alcohol was involved in the incident or he would not have been required to complete a seven-week Alcohol Rehabilitation Class. Following the arrest, his alcohol consumption did not decrease but increased when, in December 1977, he dropped out of college. As of November 1982, he was drinking to the point of intoxication every two weeks and in 1993, Applicant was drinking to the point of passing out and blacking out.

Applicant's alcohol consumption lead to three arrests where his BAC was very high. 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.

Following his 1993, 1997, and 2003 arrests, Applicant underwent 40 hours of alcohol education and therapy. The education and therapy appear to have had little positive impact for, following the first two programs, he was again arrested for DUI. Applicant's conduct was serious, recent, frequent, and establishes a pattern. Therefore, MC 1 (*The alcohol related incidents do not indicate a pattern*) is inapplicable. He has not introduced persuasive evidence in rebuttal, explanation or mitigation sufficient to overcome the security concerns related to his drinking. There is no showing of positive changes in behavior supportive of sobriety, nor efforts to reform his behavior, change his friends, or lifestyle. MC 3 (*Positive changes in behavior supportive of sobriety*) does not apply.

His last arrest was in April 2003, which is three years ago. With his past pattern of a DUI followed by a number of years before then next DUI, it is too soon to say the problem will not recur. Of particular concern is Applicant's BAC of .189% at his most recent arrest, which is very high. Applicant did not stop drinking with his most recent April 2003 DUI, but continued to consume alcohol until at least December 2003, some seven months after his arrest. Based on the pattern of his past alcohol related conduct, his level of intoxication at his most recent arrest, and the time period since his last DUI, I find the problem to be recent. MC 2 (*The problem occurred a number of years ago and there is no indication of a recent problem*) does not apply. Applicant has a long and extensive alcohol history. Because the Applicant meets the disqualifying conditions and none of the mitigating conditions, the alcohol consumption is resolved against the Applicant.

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

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Paragraph 2 Alcohol Consumption: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against 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. 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. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15