

DATE: January 21, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-31126

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Department Counsel

FOR APPLICANT

David P. Price, Esq.

SYNOPSIS

Applicant used marijuana on a couple of occasions when he was in high school in the 1970s, and again at a high school reunion in June 2001. He underwent alcohol treatment in August 1983 and again in September 2001. He failed to disclose his 2001 marijuana use and 2001 alcohol treatment in a security clearance application (SF 86) he executed on October 2, 2001. He has failed to mitigate the security concern caused by the false answers he provided in the SF 86. Clearance is denied.

STATEMENT OF THE CASE

On April 2, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. [\(U\)](#) The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline G (alcohol consumption), Guideline H (drug involvement), and Guideline E (personal conduct). Applicant submitted an answer to the SOR that was received by DOHA on June 14, 2004, and requested a hearing. Applicant admitted both alcohol consumption allegations, and one drug involvement allegation. He denied the remaining allegations.

The case was assigned to me on September 10, 2004. A notice of hearing was issued on October 18, 2004, scheduling the hearing for November 8, 2004. The hearing was conducted as scheduled. The government submitted seven documentary exhibits that were marked as Government Exhibits (GE) 1-7. GE 1-5 and GE 7 were admitted into the record without objection. Applicant's objection to GE 6 was sustained in part, and that document was admitted into the record for the limited purpose noted in the transcript. Applicant testified, and offered seven documentary exhibits that were marked as Applicant's Exhibits (AE) 1-7, and admitted into the record without objection. The record was held open to give Applicant the opportunity to submit additional documentation in support of his case. One additional document was received, marked as AE 8, and admitted into the record without objection. The transcript was received on November 18, 2004.

FINDINGS OF FACT

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

Applicant is 47 years old, married, and has been employed by a corporation which he owns since January 2004. He was employed by a defense contractor as a senior systems analyst from January 2000 to November 2001, and then with a second contractor from November 2001 to January 2004. He now performs work for the U.S. Navy under a subcontract with the second employer.

Applicant served on active duty with the Navy from September 24, 1979, until April 1, 2000, when he retired as a Commander. Applicant received a letter of reprimand in February 1986, as the result of non judicial punishment imposed upon him pursuant to Article 15, Uniform Code of Military Justice because he was a watch officer when his ship was involved in a collision with another ship. Applicant's references and awards establish his reputation for reliability, dedication, and being possessed of sound judgment.

Applicant was married in March 1981, and widowed in September 1991. He married his current wife in October 1991. He has a daughter, age 22, and a son, age 20. Applicant graduated from high school in June 1975, and was awarded a bachelor of arts degree in April 1979. He was awarded a master of science degree in arch 1991.

Applicant smoked marijuana on a couple of occasions while he was in high school with his older siblings. He denies any other use of a controlled substance with the sole exception of smoking marijuana while at a high school reunion in June 2001. He claims a marijuana cigarette was being passed around at the reunion, he took a few puffs off the cigarette, and attributes his action to a desire to be sociable and some peer pressure.

Applicant was charged with driving while intoxicated (DWI) in 1977, convicted of reckless driving, and fined \$200.00. He was charged with driving under the influence (DUI) of alcohol in 1985 in a foreign country. He claims to have only consumed one beer before being stopped, and the charges were dismissed. Applicant was again arrested for DWI in March 2003. No information concerning the disposition of this charge is available, but Applicant was referred to an alcohol abuse program.

Applicant began drinking alcohol, first became intoxicated, and first experienced an alcohol-induced blackout when he was 12 years old. He lost control of his ability to control his alcohol consumption when he was 18 years old. In addition to the 1977 DWI, Applicant reported during an intake interview conducted in 1983, that he had been involved in four auto accidents concurrent with alcohol intoxication. He self-referred himself for impatient alcohol treatment in July 1983, although the clinical record of that treatment indicates he "expressed a lot of anger at being here and at how the program operated." (GE 7) He was diagnosed as *alcohol dependency, continuous* when he was admitted on July 25, 1983, and as *alcohol dependency, in remission* when he was discharged on August 19, 1983.

Applicant was diagnosed as suffering from Hepatitis C in June 2001, and was advised by his doctor to not drink alcohol. Shortly after the reunion where he consumed marijuana, Applicant claims to have realized his use of marijuana was stupid and testified he was frightened he would not be able to abstain from drinking alcohol without assistance. He was referred by his physician to a four-week outpatient substance abuse program that he attended from August to September 2001. Applicant was again diagnosed as alcohol dependent. Following completion of the program, Applicant refrained from consuming alcohol until December 2001, when he was informed that the results of a biopsy indicated the hepatitis condition was not as severe as he previously had thought.

Applicant was referred to another alcohol outpatient program following his 2003 DWI arrest. He was admitted to that program in June 2003 and discharged in September 2003. Applicant demonstrated good attendance with good clinical response during treatment as exhibited by him attending all required alcoholics anonymous (AA) meetings. His diagnosis at discharge, made by a licensed clinical social worker, was adjustment disorder with anxiety, and alcohol abuse.

Applicant first attended AA meetings on an about weekly basis in 1983, as part of the alcohol treatment program he was

in at the time. He attended AA meetings twice weekly for about six to eight months in 2001, as part of the alcohol abuse program he was enrolled in at that time. Applicant last attended AA meetings in the fall of 2003, again as part of the alcohol treatment program he was participating in at the time.

Applicant last consumed alcohol in April 2004, when he drank some champagne to celebrate his wife's birthday. He has abstained completely since that day because his hepatitis condition has worsened, and he will be undergoing a 48-week medical treatment program that may effectively be negated if he consumes alcohol while receiving the treatment.

Applicant submitted and executed a security clearance application (SF 86) on October 2, 2001. He answered "No" to question 27: *Your Use of Illegal Drugs and Drug Activity - Illegal Use of Drugs - Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example marijuana. . . .* and question 30: *Your Use of Alcohol - 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). . . .* Because Applicant used marijuana in June 2001, and participated in alcohol-related treatment from August to September 2001, both answers were false.

Applicant submitted a personnel security questionnaire (DD 396) on August 4, 1986, and answered "No" to 20a: *Have you ever used . . . cannabis . . . ?* He submitted another DD 396 on October 1, 1991, and answered "No" to a question⁽²⁾ asking: *Have you ever tried or used or possessed . . . cannabis (to include marijuana or hashish) . . . ?* Applicant, having used marijuana while in high school, answered both questions falsely. Applicant provided a statement to the Defense Investigative Service (DIS) on January 17, 1992, in which he claimed to have begun drinking while in college, and in which he described his drinking as moderate. As he revealed during the course of alcohol treatment in 1983, he actually began drinking when he was 12 years old, and he felt he had lost control of his drinking by the time he was 18 years old.

Applicant testified the false answers he certified as true in the 2001 SF 86 resulted from an interactive process in which he began providing his security manager information to be inputted into the SF 86 in June 2001 that continued until October 2001. Thus, he claims, when he provided the answer to question 27 it was true because he did not use marijuana until later that month. While not explicitly stated, the same justification apparently is Applicant's explanation for the false answer to question 30. He further testified that by October his boss was inquiring if the SF 86 was finished, and from the company's perspective it was a rush to get the form submitted. Accordingly, he had the SF 86 printed, and signed it without reviewing it carefully. Considering Applicant's appearance and demeanor while testifying, the content of his testimony, his many years' experience possessing a security clearance, the multiple applications he previously submitted and the answers he provided in those applications, the recency of the events in question, and the obvious security significance of the questions, Applicant's explanations are not credible.

Applicant has held a security clearance since he first was commissioned in the Navy. He maintained that clearance while working as a systems analyst for his first civilian employer. He received an oral warning on June 18, 2001 from that employer for a security violation after classified material was found not to be properly safeguarded while in his custody. Applicant's testimony that he had been given a large number of documents and was unaware that some of them were classified is credible under the circumstances.

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 H, pertaining to drug involvement, and 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.⁽³⁾ The government has the burden of proving controverted facts.⁽⁴⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁵⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽⁶⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁷⁾ 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.⁽⁸⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁹⁾

No one has a right to a security clearance⁽¹⁰⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹¹⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹²⁾

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's only SOR alleged alcohol-related offense occurred in 1985. The only SOR alleged treatment and diagnosis of alcohol dependence, and which was admitted by Applicant, occurred in 2001. Applicant credibly testified he was not intoxicated when he was charged with DUI in 1985. There is no information about the qualifications of the individual who made the diagnosis of alcohol dependence in 2001. Accordingly, no disqualifying condition applies to the alleged conduct under Guideline G.

However, the evidence established Applicant's problem with alcohol goes well beyond the limited allegations. He began consuming alcohol when he was 12 years old, and experienced an alcohol-induced blackout at that same age. He lost his ability to control his alcohol consumption when he was 18 years old, was first charged with an alcohol related offense in 1977, and was involved in four auto accidents concurrent with alcohol intoxication sometime before 1983. He self-referred himself to an alcohol abuse program in 1983, and he was referred to an outpatient alcohol program in 2003, following another arrest for DWI. He was diagnosed as alcohol abusive when discharged from that program. He last consumed alcohol in April 2004.

Although Applicant clearly has an alcohol problem, it is one he has recognized, and for the most part successfully dealt with over the years. With the exception of the 2003 DWI arrest, he has not been involved in any alcohol-related incidents for more than 20 years. Two of the three treatment programs Applicant entered were of his own volition when he recognized his alcohol consumption might cause him either personal or health problems. His current health problems appear to have convincingly demonstrated to Applicant that he is literally tempting death if he drinks alcohol in the future. Under the somewhat unique circumstances that exist here, Applicant has successfully mitigated the security concern that arises from his alcohol consumption, whether or not alleged. Guideline G is decided for Applicant.

Under Guideline H illegal drug involvement raises questions about an individual's willingness or ability to protect classified information. Involvement with or use of an illegal drug indicates unwillingness or inability to abide by the law. Cleared employees must respect regulations whether they agree with them or not. If they do not respect the rules on illegal substances, they may not respect the rules designed to protect classified information.

Applicant used marijuana twice while in high school, and again in June 2001. He possessed a security clearance when he used marijuana 2001. Disqualifying Condition (DC) 1: *Any drug abuse*; applies in this case. Mitigating Condition (MC) 1: *The drug involvement was not recent*; MC 2: *The drug involvement was an isolated or aberrational event*; and MC 3: *A demonstrated intent not to abuse any drugs in the future* also apply. After considering the evidence of record in

this case, and weighing the disqualifying conditions against the mitigating conditions, I find Applicant has mitigated the security concerns caused by his drug involvement. He has overcome the case against him and satisfied his ultimate burden of persuasion on this issue. Guideline H is decided for 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 explanation for the security violation alleged in the SOR is credible. However, Applicant deliberately provided false answers in the SF 86 he submitted. As previously noted, his explanations for providing those false answers are not credible. His conduct in providing false information severely undermines the ability to place trust and confidence in him, and raises significant security concerns. Disqualifying Condition (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* applies in this case.

I have considered all Mitigating Conditions (MC) under Guideline E and none apply. I have specifically considered MC 2: *The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*; and MC 3: *The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts* and conclude that neither applies. Applicant on multiple occasions denied using marijuana in security clearance applications he submitted. Further, he did not readily disclose his recent use of marijuana when questioned on February 11, 2002, instead stating: "I did not recall the use of marijuana in Jun 01. It was only after I was pressed about the matter did it come to mind." 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 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: For the Applicant

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

SOR ¶ 2-Guideline H: For the Applicant

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

SOR ¶ 3-Guideline E: For the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph 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 Applicant. Clearance is denied.

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. The specific question number is not included in the copy of the form offered in evidence by Department Counsel, but the question is found on the last page of GE 3.
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
5. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
10. *Egan*, 484 U.S. at 528, 531.
11. *Id* at 531.
12. *Egan*, Executive Order 10865, and the Directive.