

DATE: September 22, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-16760

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Juan R. Rivera, Esq., Department Counsel

FOR APPLICANT

Robert j. Dautrich, Esq.

SYNOPSIS

Applicant was arrested twice for possessing alcohol as a minor and once for driving while intoxicated. He also drank to the point of passing out on his 21st birthday. Applicant made positive changes in his behavior supportive of sobriety and has been diagnosed as not being alcohol dependent. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 9 April 2003, DOHA issued a Statement of Reasons (SOR) under the applicable Executive Order⁽¹⁾ and Department of Defense Directive⁽²⁾ detailing the basis for its decision-failure to meet the alcohol consumption (Guideline G) personnel security guideline of the Directive. Applicant answered the SOR in writing on 30 April 2003 and elected to have a hearing before an administrative judge. The case was assigned to me on 30 June 2003. On 21 August 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. DOHA received the transcript (Tr.) of the proceeding on 2 September 2003.

FINDINGS OF FACT

Applicant is 26 years old. Ex. 1 at 1. He started drinking alcohol when he was 15. Tr. 32; Ex. 4 at 5. Applicant was arrested for, and convicted of, possessing alcohol as a minor; once in 1997 and again in 1998. See Tr. 9. He pled guilty on the summons, but appealed the case because of the sentence. In a trial de novo, Applicant was found guilty, but his sentence was reduced. Answer; Ex. 4 at 2. On his 21st birthday, his friends took him out drinking. He became very intoxicated. When they dropped him off at his apartment, he became ill and may have passed out. Tr. 31, 51. On 21 June 2002, Applicant was arrested for driving while intoxicated (DWI). In August 2002, Applicant pled guilty to, and was convicted of, DWI. Ex. 3; Tr. 37. His sentence included a restriction on his driver's license and attendance at a substance abuse education program. Exs. A, B. The program was approximately 12 weeks long and included identification of the triggers to Applicant's drinking. Tr. 38, 45. Applicant's triggers are going out to bars with his friends. Tr. 45.

Applicant abstained from alcohol for approximately two weeks after he was arrested for DWI. Tr. 60-61. He does not believe he has an alcohol abuse problem. Tr. 59. He continues to drink, although not as much and not as often as he did before the DWI. Tr. 38. He is now in a relationship with a woman who drinks sparingly, and he does not go out with his friends as much or drink much when he does. Tr. 44-45.

Applicant's supervisor considers him an excellent employee and has noted a new maturity since the DWI conviction.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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.* 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." Exec. Or. 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.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

CONCLUSIONS

In the SOR, DOHA alleged Applicant consumed alcohol to the point of intoxication from 1992-2002 and experienced a blackout in September 1998 (¶1.a.), was arrested for, and convicted of, DWI in 2002 (¶1.b.), arrested for, and convicted of possessing alcohol as a minor in 1998 (¶ 1.c.), arrested for, and convicted of purchasing and possessing alcohol as a minor in 1997 (¶ 1.d.), and cited for, and convicted of, possessing alcohol as a minor in 1996 (¶ 1.e.). The excessive consumption of alcohol 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. Directive ¶ E2.A7.1.1.

Department counsel conceded that the SOR is in error in alleging three incidents of possessing alcohol as a minor. It appears that ¶ 1.c. and 1.d. represent the same incident. Applicant was convicted in a misdemeanor court, appealed, and was given a trial de novo, at which he was convicted but received a lighter sentence. Tr. 9-10.

The Government established by substantial evidence that Applicant was convicted twice of being a minor in possession of alcohol, drank to the point of blacking out on his 21st birthday, and more recently was convicted of driving while intoxicated. It is a disqualifying condition for Applicant's to have alcohol-related incidents away from work, such as

DWI. DC 1. While Applicant's two convictions for possessing alcohol as a minor are alcohol related, they do not evidence the excessive alcohol consumption that is the basis for the Guideline G security concern.

The evidence also tends to establish that Applicant was involved in "binge consumption of alcohol to the point of impaired judgment" (DC 5) when he drank to the point of blacking out on his 21st birthday. "Binge drinking is defined as 'the consumption of five or more drinks in a row on at least one occasion.'" Dept. Health & Human Services and SAMHSA, *National Clearinghouse for Alcohol and Drug Information*, <http://www.health.org/govpubs/phd627/binge.aspx> (accessed September 18, 2003). Applicant admitted having 10 mixed drinks that evening. Tr. 51.

In ISCR Case No. 02-15358 (A.J. Feb. 20, 2003), the administrative judge concluded that the applicant was involved in binge drinking. The applicant in that case had been arrested for DWI twice, once after consuming five mixed drinks at a restaurant and on another occasion after having 10 mixed drinks in an evening while he was at home. On appeal, the Appeal Board held "[t]here is insufficient record evidence to support a finding that Applicant engaged in 'habitual or binge consumption of alcohol' within the meaning of Alcohol Consumption Disqualifying Condition 5 (Directive, Enclosure 2, E2.A7.1.2.5)." ISCR Case No. 02-15358 at 7 (App. Bd. Jul. 22, 2003). They did not define binge drinking nor did they explain why this did not amount to binge drinking.

Whether drinking 10 mixed drinks to the point of blacking out is binge drinking is not important for this case. That incident and Applicant's continuing to drink during his alcohol counseling program are of concern. Nevertheless, there is no requirement that even an alcohol dependent applicant completely abstain from consuming alcoholic beverages, *see* ISCR Case No. 96-0869, 1997 DOHA LEXIS 665 *10 (App. Bd. Sep. 11, 1997), and the evidence of record supports a conclusion Applicant is not alcohol dependent. A licensed clinical social worker has attributed Applicant's problems with alcohol to "moving through adolescence into young adulthood." Ex. A; *see* Ex. B. The issue is whether an applicant's consumption of alcohol, both past and present, is such that it may lead to the exercise of questionable judgment and failure to control his impulses such as to increase the risk of unauthorized disclosure of classified information.

Applicant's alcohol-related incidents do not represent a pattern. MC 1. Applicant clearly understands the seriousness of his position--another alcohol-related incident would cost him his security clearance and probably his job. Tr. 27, 60-66; Exs. A, B. He has matured, made positive changes in his behavior supportive of sobriety (MC 3) such as reducing the amount of alcohol he consumes and the number of times he does so. Applicant's counselor has given him high marks for his maturity and interest in understanding the triggers that caused his problems, believes Applicant "does not present as having a propensity for alcohol or substance abuse related issues," and concludes that Applicant's "prognosis is good for continued awareness and self-control." Ex. B at 2. Under the circumstances, finding is for Applicant.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline G: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest

to grant or continue a security clearance for Applicant. Clearance is granted.

James A. Young

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, Defense Industrial Personnel Security Clearance Review Program (Jan. 2, 1992), as amended and modified.