

DATE: November 6, 2003

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 02-21121

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esquire, Department Counsel

FOR APPLICANT

Mr. David R. Conner, Personal Representative

SYNOPSIS

Applicant has a lengthy history of alcohol abuse and related criminal conduct, including two possession of marijuana and several alcohol related driving convictions. He has twice been ordered to attend alcohol abuse programs and has had his driving privileges restricted on three occasions. He has failed to mitigate the security concerns that arise from his alcohol consumption and criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

On March 18, 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 J, criminal conduct, and Guideline G, alcohol consumption. Applicant submitted an answer to the SOR on April 11, 2003, requested a hearing, and admitted every allegation in the SOR.

The case was assigned to another administrative judge on June 12, 2003 and reassigned to me the same day because of caseload concerns. A notice of hearing was issued on July 16, 2003, scheduling the hearing for August 7, 2003. The hearing was conducted as scheduled. The government submitted eleven documentary exhibits at the hearing that were marked as Government Exhibits (GE) 1-11 and admitted into the record without an objection. The Applicant testified at the hearing, called one witness to testify on his behalf, and submitted four exhibits that were marked as Applicant's Exhibits (AE) 1-4, and admitted into the record without an objection. The transcript was received on August 15, 2003.

PROCEDURAL ISSUES

Applicant submitted an undated ⁽²⁾ written request seeking a continuance in which he acknowledged receipt of the notice of hearing. He cited as justification for his request the fact that he had not received material he had sought from the Defense Security Service. I conducted a pre hearing telephonic conference with Applicant and Department Counsel

on August 4, 2003, and denied the request for a continuance. I also informed Applicant that if he had not received the requested material by the time of the hearing and still felt it necessary to obtain and possibly submit that material following the hearing I would hold the record open to give him additional time to submit, through Department Counsel, whatever documents he wanted me to consider.

During the hearing it became clear that some allegations in the present SOR had previously been alleged in a previously issued SOR and considered by another administrative judge who granted Applicant a security clearance. Applicant still had not received the requested material and the record was held open to allow him the further opportunity to obtain and submit those documents. Department Counsel graciously agreed to assist Applicant with his efforts to obtain the requested documents. I subsequently received the Transcript of Proceedings in DISCR OSD Case No. 92-0973, [\(3\)](#) Determination of Administrative Judge in DISCR OSD Case No. 92-0973 [\(4\)](#) a pleading entitled *Praecipe* signed by Department Counsel and a pleading entitled *Joint Motion to Take Administrative Notice of DISCR OSD Case No. 92-0973* by Department Counsel, Applicant, and Applicant's personal representative. At the request of all parties, I have taken administrative notice of so much of the reported proceedings in DISCR OSD Case No. 92-0973 as are contained in JE 1 and JE2.

FINDINGS OF FACT

Applicant's admissions to the allegations contained in the SOR 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 34-year-old single man who is employed by a defense contractor as a sheet metal mechanic. He has worked for this same employer since June 1988. Applicant married in March 1997, separated from his wife in January 2001, and obtained a divorce in February 2002. He was granted custody of the sole child born of the marriage, a daughter who is 6-years-old.

Applicant was charged with Involuntary Manslaughter in March 1986. This arrest resulted from an automobile incident in which Applicant was driving a car, swerved to avoid another vehicle, and rolled his car over in a ditch. Both he and his passenger were ejected from the vehicle and injured. The passenger died of his injuries. Applicant denies using alcohol or drugs prior to this accident and insists it was caused by the other driver who fled the scene of the accident. The only evidence establishing the disposition of this offense is Applicant's testimony and statement in GE 2 that he was found "not innocent."

Applicant was charged with Driving While Under the Influence (DWI) in April 1988. He was convicted of this offense on February 23, 1989, fined \$350.00 and ordered to attend an alcohol abuse program which he successfully completed. He was assessed as a Level II-Potential Problem drinker by the program on arch 14, 1989. Applicant's driving privileges were also suspended for six months as a result of this conviction.

Applicant was charged with Operating a Motor Vehicle While Under the Influence of Alcohol (DUI) and Reckless Driving on January 6, 1990. He was convicted of DUI, fined \$500.00, and sentenced to 60 days jail (55 days suspended). His driving privileges were suspended for three years. Applicant's blood alcohol concentration (BAC) at the time of this arrest was 0.15. The Reckless Driving charge was dismissed.

Applicant was charged with Possession of Cocaine and Possession of Marijuana on January 6, 1990. He pled guilty to Possession of Marijuana charge and was fined \$1,000.00. The Possession of Cocaine charge was nolle prossed.

Applicant was charged with Possession of Drug Paraphernalia, Possession of Marijuana, and Driving While Impaired/Excessive Speed on June 18, 1990. He was convicted of Possession of Marijuana and Operating a Motor Vehicle at a Speed that was Greater than was Reasonable and Prudent [\(5\)](#) and sentenced to 30 days jail (suspended for three years on condition he pay a fine of \$100.00). The drug paraphernalia charge was dismissed.

Applicant was charged with Domestic Assault on April 6, 1996 as a result of an incident with his then girlfriend and later wife. According to Applicant she pointed a firearm at him, he called the police, and the police arrested him. No other information about the circumstances surrounding this incident are of record. The charge was dismissed on June 24,

1997.

Applicant was charged with Assault and Battery of a Family Member on August 13, 2000 as a result of an incident with his wife (the same woman involved in the April 6, 1996 incident). According to Applicant his wife attacked him and scratched his arms drawing blood. He went to a police station to file a complaint against her, she showed up at the station with their child, and, after he left without filing a complaint, she had a warrant issued for his arrest. The charges were dismissed, according to Applicant after he showed the judge pictures of his injuries.

Applicant's last arrest occurred on May 28, 2001 when he was charged with DWI and Possession of Marijuana. Applicant claims that after he viewed an internet website on which his then estranged wife was pictured with his daughter advertising for single men he went to her house to retrieve their daughter for a prearranged visit. The wife refused to relinquish the daughter to his custody and he was then confronted by the wife's boyfriend. Because he was upset, he purchased a six-pack of beer, consumed it over the course of one and a half hours and was stopped by the police as he was driving home. The police searched his jacket, which he had worn earlier that day while fishing, and discovered marijuana in a pocket. Applicant testified the jacket was old and he was unaware there was marijuana in the pocket. Applicant's BAC was 0.10 at the time of his arrest. He was convicted of the DUI, fined, ordered to attend an alcohol abuse program, and had his driving privileges restricted for one year. The marijuana charge was nolle prossed.

Applicant entered the alcohol abuse program on October 4, 2001 and was discharged on March 16, 2002. A substance abuse screening inventory was completed while he was involved with the program disclosing he has a high probability of having a substance dependence disorder.⁽⁶⁾ He was diagnosed as alcohol dependent when he was discharged.⁽⁷⁾

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chiefs 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 J, pertaining to criminal conduct, and Guideline G, pertaining to alcohol consumption, 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.⁽⁸⁾ The government has the burden of proving controverted facts.⁽⁹⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽¹⁰⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽¹¹⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽¹²⁾ 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.⁽¹³⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁴⁾

No one has a right to a security clearance⁽¹⁵⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁶⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹⁷⁾

CONCLUSIONS

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's 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, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling

classified information.

The only evidence of record concerning the 1986 manslaughter arrest is Applicant's testimony that he lost control of the vehicle he was driving when another vehicle suddenly pulled in front of him and that he was found "not innocent." The only evidence of record concerning the 1996 and 2000 domestic violence incidents is that Applicant was arrested, the charges were dismissed, and his testimony that he was the victim in both cases. The testimony he provided at the hearing and the information he provided in GE 1 and GE 2, have sufficiently clarified the otherwise unqualified admissions he made in his response to the SOR so as to discredit those admissions. I find the government has failed to establish a prima facie case as to the allegations contained in subparagraphs 1.b., 1.c., and 1.h. of the SOR.

Applicant committed and was convicted of two drug and two alcohol related offenses between April 1988 and August 1990. Additional drug and alcohol related offenses that arose from Applicant's January 6, 1990 and June 18, 1990 arrests were either dismissed or nolle prossed. He committed yet another alcohol related offense on May 28, 2001. The government has established its case against Applicant under Guideline J as alleged in subparagraphs 1.a., and 1.d. through 1.g. DC 1: *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*; and DC 2: *A single serious crime or multiple lesser offenses* apply in this case.

I have considered all the Mitigating Conditions under Guideline J. Although two years has passed since Applicant's arrest, his criminal conduct has spanned thirteen years. Further, he was diagnosed as a Level II-Potential Problem drinker by a substance abuse program on March 14, 1989, as having an alcohol handicap by a mental health center on August 2, 1990, and being alcohol dependent when he was discharged from a substance abuse program on March 6, 2002, indicating the substance abuse problem that led to his many arrests has not been fully resolved. As will be more fully discussed below, I do not find Applicant's testimony that he no longer drinks alcohol to be credible. Accordingly, I specifically find that MC 1: *The criminal behavior was not recent*; MC 2: *The crime was an isolated incident*; or MC 6: *There is clear evidence of successful rehabilitation* do not apply in this case. The remaining Mitigating Conditions have no applicability to the facts herein. Guideline J is decided against Applicant.

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 of alcohol related driving offenses in 1989, 1990 and 2001, and was diagnosed as having some degree of alcohol abuse problem in each of those years. The government has established its case against Applicant under Guideline G as alleged in subparagraphs 2.a., 2.b. and 2.d. through 2.h. For the reasons discussed in footnote 5, I find the government has not established its case against Applicant as alleged in subparagraph 2.c. 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.

Applicant testified that he had not consumed alcohol at anytime between 1990 and his arrest on May 28, 2001, and that he has not consumed any alcohol since the May 28, 2001 arrest. However, in a statement he provided on April 16, 1992 (GE 2), Applicant stated "I do not believe I have a drinking problem. My future intentions are to continue at my current rate of consumption to socialize." He continued on in that statement to assert "I don't necessarily plan to continue to drink on a monthly bases [sic]. Just on occassion [sic]." Applicant testified on March 31, 1993 he drank alcohol on an infrequent basis. (JE 2, page 107) The final report from the alcohol abuse program he attended in 2001 indicates he has remained abstinent from alcohol since October 2001. (GE 11) Further the closing discharge from that treatment program diagnosed him as alcohol dependent. (GE 11)

I have considered Applicant's appearance and demeanor while testifying, as well as the substance of his testimony, and do not find his testimony that he has not consumed alcohol since his last arrest, or that he did not consume alcohol between 1990 and May 2001 to be credible. Additionally, Applicant was recommended to continue attending alcoholics anonymous meetings following completion of the last alcohol abuse treatment program, but has not done so on anything

more than an occasional basis, indicating he feels more comfortable discussing matters with his father than with strangers. I have considered all the mitigating Conditions under Guideline G and do not find that any apply in this case. Guideline G 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 J: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Subparagraph d: Against the Applicant

Subparagraph e: Against the Applicant

Subparagraph f: Against the Applicant

Subparagraph g: Against the Applicant

Subparagraph h: For the Applicant

SOR ¶ 1-Guideline G: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: For 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

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. The envelope containing the request for a continuance was post-marked July 28, 2003.
3. Marked as Joint Exhibit (JE) 1.
4. Marked as JE 2.
5. Applicant provided an unqualified admission to subparagraph 1.d. which contained an assertion that he was convicted of Driving While Impaired, and also indicated in GE 2 that he was convicted of DUI. However the court records that are contained in GE 5 disclose he actually entered a plea of guilty to the offense of Operating a Motor Vehicle at a Speed that was Greater than was Reasonable and Prudent.
6. GE 11
7. The closing discharge contained in GE 11 shows an Axis I diagnosis of 303.90. Axis I refers to clinical disorders and 303.90 is a diagnosis of alcohol dependence. See: *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR)*.
8. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
9. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
10. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
11. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
12. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
13. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
14. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
15. *Egan*, 484 U.S. at 528, 531.
16. *Id* at 531.
17. *Egan*, Executive Order 10865, and the Directive.