

DATE: January 16, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-21551

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

John T. Richards, Esq.

SYNOPSIS

Between the ages of 19 and 27, Applicant had several alcohol-related incidents away from work and was a scofflaw. Applicant is now 33 years old, has made peace with the justice system and has not been in trouble with the law for almost seven years. The evidence is insufficient to establish Applicant deliberately falsified his security clearance application with regard to whether his use of alcoholic beverages had resulted in any "alcohol-related treatment or counseling." 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 10 July 2003, under the applicable Executive Order ⁽¹⁾ and Department of Defense Directive, ⁽²⁾ DOHA issued a Statement of Reasons (SOR), detailing the basis for its decision-security concerns raised under Guideline G (Alcohol Consumption), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on 5 August 2003 and elected to have a hearing before an administrative judge. The case was originally assigned to another administrative judge, but was transferred to me on 14 November 2003. On 10 December 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the transcript (Tr.) of the proceeding on 30 December 2003.

FINDINGS OF FACT

Applicant, a 33-year-old network engineer for a defense contractor, is married and has a one-year-old child.

Applicant began drinking when he was about 19 years old. In 1991, when he was 21, Applicant was arrested, and charged with driving under the influence (DUI), after drinking nine or ten beers over a five-hour period. Applicant pled guilty to and was convicted of DUI. He was fined \$700, placed on five years' unsupervised probation, had his driver's

license suspended for six months and was ordered to attend a three-month alcohol awareness program. Ex. 3 at 3.

In the fall of 1992, Applicant was arrested for driving under the influence of alcohol (DUIA). He was convicted and sentenced to confinement for 365 days (363 days' suspended), a fine of \$1,500, placed on five years' unsupervised probation, had his license suspended for six months, and was ordered to attend classes at an alcohol awareness school for 18 months. Applicant failed to complete the program because he transferred from a job on the west coast to one on the east coast. Ex. 3 at 2.

In November 1993, Applicant was ticketed for having headlights that were broken or at an improper height and driving on a suspended license. Applicant pled guilty to driving on a suspended or revoked driver's license and ordered to pay a fine of \$915. In July 1994, a warrant was issued for Applicant's arrest because he failed to pay the fine, the citation processing fee, and the crime victim fund. Ex. 7 at 5.

In August 1994, the district attorney charged Applicant with driving with a suspended or revoked license, being a habitual traffic offender, violating the basic speed law, and driving without a valid license in his possession. Applicant failed to appear on 27 June 1995 and a warrant was issued for his arrest on 20 August 1995.

In December 1994, Applicant was cited for allowing a minor to possess alcohol and willfully violating a promise to appear. Applicant failed to appear and a warrant was issued for his arrest.

In February 1997, Applicant was arrested on the east coast for being drunk in public. On 17 April 1997, Applicant pled not guilty, but was convicted, and fined approximately \$25.

In March 1997, Applicant was arrested and charged with driving with a blood alcohol content in excess of the 0.08 percent minimum. On 6 May 1997, Applicant pled guilty, was sentenced to 30 days in jail (suspended), license suspension for 12 months, fined \$200 plus court costs, and referred to the state alcohol safety action program. Answer.

In 1997, Applicant returned to the west coast. On 13 August of that year, he appeared in court concerning his November 1993 arrest. He paid his fine and his probation was reinstated. On 20 August 1997, Applicant pled guilty to driving with a suspended or revoked license stemming from his August 1994 arrest, The other charges were dismissed. Applicant was ordered to perform public service and pay a fine of \$811.

Applicant is a talented worker who has the respect of his employer. Ex. C.

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

Guideline G-Alcohol Consumption

In the SOR, DOHA alleged Applicant was convicted in 1997 of driving with a blood alcohol content in excess of the maximum permitted (¶ 1.a.); convicted of drunk in public in 1997 (¶ 1.b.); convicted of driving under the influence (DUI) in 1992 (¶ 1.c.); convicted of DUI in 1991 (¶ 1.d.); and attended a DUI program from September 1997 through March 1999 (¶ 1.e.). 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. Directive ¶ E2.A7.1.1.

The Government established by substantial evidence and Applicant's admissions all the allegations contained in the SOR ¶ 1. Applicant's alcohol-related incidents away from work raise a security concern under Guideline G. DC E2.A7.1.2.1. In mitigation, Applicant established that the problem occurred some years ago-the last incident was in early 1997-and there has been no indication of a recent problem. MC E2.A7.1.3.2. Applicant has matured and shown positive changes in his behavior supportive of sobriety. MC E2.A7.1.3.3. He is now 33 years old and has become a husband and father. Although it took Applicant considerably longer than most, he appears to have changed his life style. Applicant understands that another alcohol-related incident will cost him his security clearance. After carefully considering all of the evidence, I am convinced Applicant does not represent a security risk under Guideline G.

Guideline J-Criminal Conduct

In the SOR, DOHA alleged Applicant was arrested in December 1994 and charged with allowing a minor to possess alcohol and willful ly violating a promise to appear (¶ 2.a.); arrested in August 1994 and charged with driving with a suspended or revoked license, habitual traffic offender (¶ 2.b.); in November 1993 charged with broken or improper height for headlights; driver's license suspended or revoked, and failure to appear (¶ 2.c.); convicted in 1997 of driving with a blood alcohol content in excess of the maximum permitted (¶ 2.d.); convicted of drunk in public in 1997 (¶ 2.e.); convicted of DUI in 1992 (¶ 2.f); convicted of DUI in 1991 (¶ 2.g.). A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1.

The Government established by substantial evidence and Applicant's admissions each of the allegations contained in SOR ¶ 2. Applicant was a scofflaw. His contempt for the law is obvious by the number of incidents with the law and the short time period over which they occurred. Applicant admits committing a series of criminal offenses. DC E2.A10.1.2.1.; E2.A10.1.2.2. However, Applicant's criminal behavior is not recent-it was almost seven years since the latest incident. MC E2.A10.1.3.1. He has matured and put his criminal past behind him. In 1997, he took responsibility for his criminal activities and made peace with the justice system. I conclude Applicant has demonstrated clear evidence of successful rehabilitation. MC E2.A10.1.3.6. I find for Applicant.

Guideline E-Personal Conduct

In the SOR, DOHA alleged Applicant falsified his SCA by answering "no" to question 30 about receiving alcohol-related treatment in the previous seven years (¶ 3.a.). Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

The Government failed to establish Applicant falsified his SCA by answering "no" to question 30 on the SCA. Question 30 asks if, in the previous seven years, "your use of alcoholic beverages . . . resulted in any alcohol-related treatment or counseling (such as for alcohol abuse or alcoholism)?" Applicant admitted attending three separate alcohol awareness programs. It is unclear from the evidence that any of these programs involved treatment or counseling, as opposed to education. Furthermore, even if one could argue that they did involve treatment and counseling, I find Applicant's testimony that he thought he was answering the question truthfully because the programs were educational as opposed to counseling credible. I find 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

Paragraph 2. Guideline J: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: For Applicant

Subparagraph 2.d.: For Applicant

Subparagraph 2.e.: For Applicant

Subparagraph 2.f.: For Applicant

Subparagraph 2.g.: For Applicant

Paragraph 3. Guideline E: FOR APPLICANT

Subparagraph 3.a.: 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.