

DATE: June 17, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-22075

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Juan J. Rivera, Esq., Department Counsel

FOR APPLICANT

Elizabeth B. Glasgow, Esq.

SYNOPSIS

Applicant used marijuana on a number of occasions when he was younger, and purchased and used marijuana with regularity between 1997 and 2000. He was arrested on August 19, 2000 after police found three marijuana cigarettes in his automobile. He was convicted of misdemeanor possession, placed on probation, ordered to attend a drug awareness program and paid a fine. He also drank as much as a case of beer a week before he was arrested. He has not consumed alcohol or controlled substances since the 2000 arrest, and is now active in narcotics anonymous and his church. Clearance is granted.

STATEMENT OF THE CASE

On June 4, 2003, 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. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline H for drug involvement. Applicant submitted an answer to the SOR on June 26, 2003, and requested a hearing. Applicant admitted the allegations contained in the SOR, except the portion of subparagraph 1.g. that alleged he failed to obtain court-mandated alcohol evaluation and treatment.

The case was assigned to another administrative judge on October 1, 2003, and a notice of hearing was issued on October 20, 2003, scheduling the hearing for November 5, 2003. The administrative judge vacated that hearing date following a conference call with Department Counsel and Applicant's attorney because there had been a misunderstanding between the parties as to a mutually agreeable hearing date. The case was thereafter reassigned to me on January 13, 2004 due to regional assignment rotations. A notice of hearing was issued on March 16, 2004, scheduling the hearing for April 5, 2004. The hearing was conducted as scheduled.

The government submitted four documentary exhibits at the hearing that were marked as Government Exhibits (GE) 1-4 and admitted into the record without an objection. Applicant testified at the hearing, called three witnesses on his behalf,

and offered 12 documentary exhibits that were marked as Applicant's Exhibits (AE) 1-7 and 9-13.⁽²⁾ Department Counsel's objection to AE 5 was overruled and that document was admitted into the record. The remaining AEs were admitted into the record without an objection. The record was held open until April 23, 2004 to give Applicant the opportunity to submit additional documentation in support of his case if he chose to do so. No additional documents were received. The transcript was received on April 14, 2004.

PROCEDURAL MATTERS

Before the introduction of evidence, Department Counsel moved to amend the SOR by striking the words "due to the fact that you failed" from the last line of subparagraph 1.g. The amendment was allowed without an objection from Applicant.

Following the presentation of all evidence, Department Counsel moved to amend the SOR to allege conduct under Guideline G, alcohol consumption. Consistent with Department of Defense Directive 5220.6, Enclosure 3 (Additional Procedural Guidance), paragraph E3.1.17, and without an objection from Applicant, the amendment was allowed as follows: *Applicant has consumed alcoholic beverages at times to excess from 1994 until about August 2000.* That amendment will be deemed to be SOR subparagraph 2.a.

FINDINGS OF FACT

Applicant's 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 44 years old, single, and has been employed as a simulator technician by various defense contractors under a series of contracts since 1996. He has possessed a security clearance since approximately 1997. He received an associate's degree in electronics in approximately 1994. The work performance appraisals he submitted covering the first two years of his employment⁽³⁾ attest to his effective working relationships and developing technical skills.⁽⁴⁾ The letter from his supervisor⁽⁵⁾ attests to his honesty, sincerity, and integrity.

Applicant smoked marijuana on a couple of occasions while he was in high school, and again on a three to four times a week basis when he was between the ages of 23 and 25, which would have been in approximately 1984-85. He quit using marijuana when he was about 25 years old, and did not use it again until he started dating a woman in approximately the Spring of 1997. He then began smoking marijuana one or two times a month on weekends, and gradually increased his use to about three to four times a month on weekends. During this time, he purchased about a half ounce of marijuana a month at a cost of about \$60.00 for his personal use and that of his friends.

In August 2000, while he was returning home from a visit at a friend's beach house, Applicant was arrested after police searched his car and discovered three marijuana cigarettes in the console. In October 2000, he pled guilty to possessing less than 20 grams of marijuana and was sentenced to serve six months probation, pay a fine and court costs totaling \$376.75, and ordered to obtain an alcohol and drug evaluation. A violation of probation petition was filed in arch 2001 because he had failed to complete the evaluation and treatment. He admitted to the violation in April 2001, and his probation was continued for six months. His probation was terminated unsuccessfully in October 2001, and he completed the treatment program in November 2001.

Applicant credibly testified his failure to complete the evaluation and treatment during the initial six months he was on probation was due to the county's delay in starting up a new program. In support of this claim, the order terminating his probation "unsuccessfully" specifically notes there was no reason for that disposition, and Applicant completed the program after the termination of his probation.

Applicant testified he considers himself an alcoholic based upon his previous consumption of as much as a case of beer in a week on a fairly regular basis. While he did not provide any more specifics about his alcohol consumption, one of his witnesses testified he began coming by her house on a regular basis in approximately 1994, and consumed alcohol with her, her husband, and other friends on weekends beginning about that time.

Applicant has not used marijuana, alcohol, or any other controlled substances since he was arrested in August 2000. He does not patronize liquor establishments, and has terminated his friendship with all persons who use controlled substances. Applicant began attending Narcotics Anonymous (NA) meetings shortly after he was arrested, and continues to attend them about twice a week. He presently leads discussion groups at the meetings twice a week, and participates in the NA business meetings in a section known as the "group conscience."

Since his arrest, Applicant has become active in his church, and, in addition to regular attendance at services, works with a church youth group consisting of fourth to sixth grade boys, teaching them about missionary work and engaging them in constructive projects. He has also obtained certification as a fitness professional, and opened a community gym at substantial personal expense, that he makes available to local youth and others for a nominal fee.

Applicant's employer, coworkers, minister, fellow churchgoers, social acquaintances, and many others in his community are aware of his prior alcohol and drug abuse.

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, 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.⁽⁶⁾ The government has the burden of proving controverted facts.⁽⁷⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁸⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽⁹⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽¹⁰⁾ 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.⁽¹¹⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹²⁾

No one has a right to a security clearance⁽¹³⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁴⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹⁵⁾

CONCLUSIONS

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 while in high school, when he was between the ages of 23 and 25, and on a fairly regular basis between Spring 1997 and his arrest in August 2000. In addition to using marijuana, he also purchased it on a regular basis between 1997 and 2000. Further, he possessed a security clearance when he used marijuana between 1997 and 2000. Disqualifying Condition (DC) 1: *Any drug abuse*; and DC 2: *Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution* apply in this case.⁽¹⁶⁾

Applicant has neither used marijuana nor consumed alcohol since he was arrested in August 2000. Instead he has become active in NA, his church, and his community. He has clearly experienced the harm and seen the error of drug abuse, and demonstrated resolve to change his life. The testimonies of his minister, a friend, and a fellow NA member, along with the letter from his supervisor all attest to his sincerity, effort, and thus far success in that endeavor. Mitigating Condition (MC) 1: *The drug involvement was not recent*; and MC 3: *A demonstrated intent not to abuse any drugs in the future* apply.

After considering the evidence of record in this case, and weighing the disqualifying conditions against the mitigating conditions, I find that 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.

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 has self-diagnosed himself as an alcoholic based upon his prior consumption of as much as a case of beer a week and the knowledge, experience, and insight he has gained from his active participation in NA. A personal assessment by someone lacking the qualifications, training, and experience to diagnose alcohol disorders cannot be accepted as definitive proof of alcohol abuse or dependence. Moreover, there is no evidence of any alcohol-related incidents at or away from work, or habitual or binge consumption to the point of impaired judgment. The government did not prove the existence of any Guideline G disqualifying condition. Assuming Applicant had a problem with alcohol, the positive lifestyle changes he has made, his almost four years of abstinence, and his continued active participation in NA would more than adequately mitigate any Guideline G concern. Guideline G is decided for Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline H: For the Applicant

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Subparagraph d: For the Applicant

Subparagraph e: For the Applicant

Subparagraph f: For the Applicant

Subparagraph g: For the Applicant

SOR ¶ 2-Guideline G: For the Applicant

Subparagraph a: For the Applicant

DECISION

In light of all 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.

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. An error occurred in the marking of the exhibits in which no exhibit was marked as AE 8.
3. AE 1-3
4. Applicant credibly testified he has not received written appraisals since 1998.
5. AE 4
6. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
7. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
8. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
9. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
10. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
11. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
12. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
13. *Egan*, 484 U.S. at 528, 531.
14. *Id* at 531.
15. *Egan*, Executive Order 10865, and the Directive.
16. DC 5: . . . *Recent drug involvement, especially following the granting of a security clearance, or an expressed intent not to discontinue use, will **almost invariably** result in an unfavorable determination* does not apply in this case based upon my finding that under the circumstances present herein Applicant's use of marijuana is not recent.