

DATE: March 26, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-24422

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Rita O'Brien, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has three DUI arrests in 16 years, and diagnoses of alcoholism and alcohol abuse, but continues to consume alcohol (beer) on a weekly basis. Applicant thinks he has control over his problem. Applicant falsified a 1991 security clearance application, and was terminated from two employment positions because of excessive absenteeism. Applicant did not mitigate the alcohol and personal conduct concerns. Clearance is denied.

STATEMENT OF THE CASE

On April 23, 2003, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons under the personnel security Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct) why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked.

In a signed and sworn Answer, dated July 15, 2003, Applicant responded to the SOR allegations. He requested a hearing. This case was assigned to me on November 12, 2003.

A Notice of Hearing was issued on November 18, 2003 setting the hearing for December 10, 2003. On that date, I convened the hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government presented 17 exhibits which were admitted into evidence. Applicant appeared and testified. Applicant requested and was granted an additional two weeks to submit additional information. Nothing was received within the two weeks time. The Government moved during the hearing to amend the SOR to add a subparagraph 2.c. concerning personal conduct of falsification of a 1991 security clearance application. The motion was granted, and

Applicant amended his Answer to deny it. I received the transcript (Tr.) of the hearing on December 18, 2003.

FINDINGS OF FACT

He admitted the allegations in subparagraphs 1.b., 1.e., 1.i, 2.a. and 2.b. Those admissions are incorporated herein as findings of fact. Applicant denied the SOR allegations in subparagraphs 1.a., 1.c., 1.d., 1.f., 1.g., and 1.h. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is 44 years old. He is married, with two children and a stepson. He is employed by a defense contractor, but currently on leave pending his security clearance approval. Meanwhile he helps a cousin in the cousin's construction business. (Tr. 34, 39, 43, 88, 89; Exhibit 1 at 1 to 6)

Applicant was diagnosed as suffering from alcohol abuse by a counselor working in an alcohol treatment program in 2002. Applicant is an alcoholic by his own admission. In 1985 Applicant was diagnosed as an alcoholic. In 1986 he was characterized as alcohol dependent. Applicant's parents were alcoholics. (Tr. 16, 50, 58, 64; Exhibits 8, 9, and 14)

Applicant joined the Navy in 1978 after growing up poor and living in public housing. Marital problems led him to start drinking and eventually to being discharged from the Navy. Applicant continues to drink alcohol. He has consumed up to 10 beers while playing sports with friends and relatives in the summer. Applicant considers himself an alcoholic and admits he will continue to drink alcohol in the future. He "cannot say no to it now". Applicant "enjoys the feeling when he is drinking alcohol. Applicant does not attend Alcoholics Anonymous, or a similar help group. He drinks only beer, and will have two or three beers with dinner. Applicant does not drink while at work, and has not had a blackout. His last drink was the Saturday prior to the hearing. Applicant thinks he has his alcohol problem under control, and really does not have a problem he cannot control. Applicant drinks only beer. (Tr. 41 to 50, 96, 97)

Applicant has three driving while intoxicated arrests and convictions. The first was in 1984 in Guam, next in 1990 in California, and then in 2000 in Kentucky. (Tr. 53)

Applicant only drank to excess until 1989. He started drinking when he was 13 years old in 1973. (Tr. 44, 52; Exhibits 2 and 7)

Applicant was injured in 1985 when he cut off part of one of his toes with a machete while cutting fruit on Guam. Applicant had been drinking with a friend when this accident occurred. The treating physician made a notation in the medical file that alcohol was involved. Applicant thought the emergency room would not give him medication because of the smell of alcohol on his breath and his person, so he drank more alcohol anyway. (Tr. 65 to 67; Exhibits 7 and 9)

Applicant was involved in a domestic disturbance with his first wife while stationed on Guam in 1985. Alcohol was involved in that incident, in which Applicant and his wife had a fight. The naval base police were called. Applicant's blood alcohol content (BAC) was registered as .115% that night. (Tr. 35 and 36; Exhibits 7 to 9)

Applicant received in-patient treatment on Guam from November to December 1985. He was diagnosed as suffering from alcoholism by that program. (Tr. 64; Exhibit 8)

In the 1990 DUI incident Applicant had a BAC of .14% when the legal limit was .08%. A bench warrant was issued due to Applicant's failure to appear. (Tr. 53)

The 2000 DUI arrest in Kentucky involved Applicant having a BAC of .183%, again in excess of the legal limit of .08%. Applicant was found guilty, fined \$500, and his driver's license was suspended for six months. Applicant's license is still suspended. (Tr. 93; Exhibit 13)

Applicant was diagnosed with alcohol abuse in February 2002. This diagnosis resulted from Applicant being enrolled in an evaluation program as part of his DUI sentence. (Tr. 58; Exhibit 14)

Applicant was terminated from a job in 1992 and again in 2000. Applicant admitted these terminations on his security

clearance application (SCA). Both terminations resulted from excessive absenteeism. Applicant explained that there were other management motivations for firing him, including an office fund for refreshments which accumulated a large surplus about which Applicant complained, upsetting the manager, who then began to enforce the punctuality rules strictly. In the later case, Applicant's car was unreliable and because of it he was late for work. Applicant also disclosed errors in the application of the company's security policy, which caused the manager to terminate him because his disclosures reflected badly on her. (Tr. 71 to 73, 100 to 104; Exhibit 1 at 10)

Applicant failed to disclose on his 1991 SCA the two DUI arrests in 1984 and 1990, and failed to disclose his alcohol treatment in the Navy in 1985. Applicant did not want to disclose this information because he feared his employer might find out about it. (Tr. 77 to 84)

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 judgement, 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 predicted upon the applicant meeting the security guidelines contained in the Directive.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines that must be carefully considered according to the pertinent Guideline in making the overall common sense determination required.

Each adjudicative decision must also include an assessment of:

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation;
- (3) how recent and frequent the behavior was;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the voluntariness of participation;
- (6) the presence or absence of rehabilitation and other pertinent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence (See Directive, Section E2.2.1. of Enclosure 2).

Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance. ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Exec. Or. 12968 § 3.1(b).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

Guideline G - Alcohol Consumption

The Concern: 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. E2.A7.1.1.

Conditions that could raise a security concern and may be disqualifying include:

- (1) Alcohol-related incidents away from work, such as driving while under the influence. E2.A7.1.2.1.
- (3) Diagnosis by a credentialed medical professional (e.g., clinical psychologist) of alcohol dependence. E2.A7.1.2.3
- (5) Habitual or binge consumption of alcohol to the point of impaired judgment. E2.A7.1.2.5
- (6) Consumption of alcohol, subsequent to a diagnosis of alcoholism by a credentialed medical professional and following completion of an alcohol rehabilitation program. E2.A7.1.2.6

Conditions that could mitigate security concerns include:

- (3) Positive changes in behavior supportive of sobriety. E2.A7.1.3.3.

Guideline E - Personal Conduct:

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying include: E2.A5.1.2.

- (2) The deliberate omission, concealment, falsification or misrepresentation 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; E2.A5.1.2.2.
- (5) A pattern of dishonesty or rule violations; E2.A5.1.2.5

(C) Conditions that could mitigate security concerns include:

None

Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. I reached conclusions which have a reasonable and logical basis in the evidence of record.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions above, I conclude the following with respect to each allegation set forth in the SOR:

Addressing the alcohol involvement under Guideline G, the Government has well established its case against this Applicant. Applicant has three DUI incidents between 1984 and 2000. The BAC for two incidents were quite high, indicating Applicant has a high tolerance for alcohol consumption. Disqualifying Condition (DC) 1 applies. Furthermore, Applicant has a diagnosis by a credentialed medical professional of alcohol abuse, so that DC 3 applies. Applicant's long and continued history of drinking alcohol to intoxicating levels, including his current consumption and belief that he has control over his alcohol problem makes DC5 applicable. Applicant continues to drink alcohol after he participated in two alcohol rehabilitation programs, and after he had a diagnosis of alcohol abuse. He continued to drink after he admitted to himself he was an alcoholic, and admitted the same at the hearing. His 1990 and 2000 DUI incidents occurred after his 1985 alcoholism diagnosis and DC 6 applies.

I do not find any Mitigating Conditions (MC) apply to Applicant. Accordingly, I conclude against Applicant on Guideline G.

Considering Paragraph 2 and Guideline E, I conclude the Government established its case. Applicant did not disclose his 1984 and 1990 DUI arrests on his 1991 SCA, as he was required to do. Therefore, DC 2 applies. DC 5 applies to his two terminations for excessive absenteeism.

There are no mitigating factors directly applicable to these facts. The absenteeism was over four years ago (the latest events), and the falsification of his SCA occurred 13 years ago. Applicant did disclose his arrests in 1991 when interviewed by the investigator as she reviewed the questions from the SCA with him. Applicant was willing to disclose the arrests to the Government, but not his employer, and cited some now vanished instructions as authority for this distinction. However, none of these elements meet the mitigating conditions criteria comprehensively. While not recent, the incidents of absenteeism show a pattern so they are not isolated. Furthermore, it is clear from the answers Applicant made at the hearing that he has a pattern of blaming other persons for his actions, so his explanations for these incidents are not persuasive. After considering all the evidence and applying the appropriate conditions from the Directive, I conclude against the Applicant on Guideline E.

FORMAL FINDINGS

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline G: Against Applicant

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: Against Applicant

Subparagraph 1.h.: Against Applicant

Subparagraph 1.i.: Against Applicant

Paragraph 2 Guideline E: Against Applicant

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

DECISION

In light of all the circumstances and facts 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.

Philip S. Howe

Administrative Judge