

DATE: August 15, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-23224

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant received a bad conduct discharge from the U.S. Navy, has been arrested four times for driving while under the influence of alcohol and twice for other serious traffic offenses, and has allowed several debts to become severely delinquent, including federal income taxes. He has failed to mitigate the security concerns that exist in this case. Clearance is denied.

STATEMENT OF THE CASE

On December 21, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was 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 security concerns under Guideline G, alcohol consumption, Guideline J, criminal conduct, Guideline F, financial considerations, and Guideline E, personal conduct.

Applicant submitted an answer to the SOR, dated February 2, 2005. DOHA notified Applicant his answer was deficient, and he thereafter submitted a second answer, dated February 23, 2005, and requested a hearing. In his first answer, Applicant admitted all SOR allegations except subparagraphs 1.e., 3.b., and 4.a. In his second answer, Applicant admitted all SOR allegations except subparagraphs 2.b., 2.c., 3.b, and 4.a. At the hearing, Applicant agreed with Department Counsel's position that the answers jointly should be read to conclude he admitted subparagraph 1.e. despite his earlier denial of that allegation.

The case was assigned to another administrative judge on April 4, 2005, and was reassigned to me on May 20, 2005, to be heard in conjunction with other hearings I had scheduled in the same region. A notice of hearing was issued on May 27, 2005, scheduling the hearing for June 14, 2005. The hearing was conducted as scheduled. The government submitted 15 documentary exhibits that were marked as Government Exhibits (GE) 1-15, and admitted into the record without objection. Applicant testified, called two witnesses to testify on his behalf, and submitted 29 documentary exhibits that were marked as Applicant's Exhibits (AE) 1-29, and admitted into the record without objection. The

transcript was received on June 28, 2005.

FINDINGS OF FACT

Applicant's admissions to SOR allegations 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 44-year-old man who has been employed by a defense contractor since February 2001, presently as a lead surveyor. He was previously employed by a different defense contractor from 1995 to 2001 as a production structural specialist. His performance appraisals, the testimony of his witnesses, and the letters of recommendation he submitted demonstrate he is considered to be a good and valued employee. They also vouch for his reputation as a responsible, honest, trustworthy, and reliable individual.

Applicant has been married since July 1985. He has a 19-year-old daughter who was born of that marriage. Applicant has a second daughter, 22 years of age, who was born out of wedlock with a different mother. Applicant also has two adult stepsons whom he raised since they were very young.

Applicant enlisted in the Navy in October 1978 when he was 17 years old. On November 14, 1984, he was taken to a special court-martial for an unauthorized absence that lasted from August 14, 1984 to October 11, 1984. He was sentenced to be reduced in rank, to forfeit \$300.00 a month for two months, and to serve 45 days in custody. On September 12, 1985, he was again taken to a special court-martial for failing to obey a lawful order and breaking restriction. He was sentenced by the second court-martial to serve 15 days in custody and to be separated from the Navy with a Bad Conduct Discharge.

Applicant began drinking to excess in 1981, and was thereafter convicted of driving under the influence (DUI) three times between September 1989 and January 1991. Each conviction resulted in the imposition of probation, fines, and jail sentences. The first of the convictions also required Applicant to attend an alcohol program and Alcoholics Anonymous (AA) meetings. The last of these three convictions again required Applicant to attend an alcohol program and to serve 365 days in jail (with 245 days being suspended).

Applicant entered into an alcohol hospitalization program that was followed by his residence for approximately eight and one-half months in a residential treatment facility. Applicant estimates he attended more than one thousand AA meetings after completion of the program, and claims not to have consumed any alcohol until the day he was again charged with DUI on February 25, 2000. He was convicted of this fourth DUI on December 13, 2000, and was sentenced on February 22, 2001 to serve 365 days in jail (360 days suspended), pay a fine of \$5,000.00 (\$4,075.00 suspended), and placed on two years probation.

Applicant attributes his falling off the wagon and drinking to excess in February 2000 to stress caused by his work at a location away from his home and support structure. He again entered into an alcohol treatment program following this conviction, and has continued attending AA meetings. Applicant has not consumed alcohol since his 2000 arrest.

In addition to the DUI convictions, Applicant was twice convicted of Driving While License Suspended (DWLS). The first DWLS offense occurred on May 6, 2000, and resulted in Applicant being sentenced to pay a fine of \$5,000.00 (\$4,750.00 suspended), to serve 365 days in jail (365 days suspended), and serve two years on probation.⁽²⁾ The second DWLS offense occurred on November 29, 2000, and resulted in Applicant being sentenced to pay a fine of \$1,000.00 (\$800.00 suspended), to serve 90 days in jail (90 days suspended), and serve one year on probation. The second DWLS arrest occurred after Applicant fled from the scene of an accident he caused by rear-ending a car stopped in traffic. Although he was charged with a hit and run offense, that charge was dismissed as part of the plea agreement to the DWLS charge.

Applicant was charged with a metropolitan trolley fare violation in June 1991. He is unsure what the offense consisted of, but thinks it may have resulted from his failing to renew an expired trolley ticket. He failed to appear in court to answer to the charge and a warrant was issued for his arrest. Although the warrant remained outstanding for many years, Applicant has now satisfied the charge by paying the fine that was owing.

Applicant failed to timely pay the fines and costs that resulted from his three 2000 arrests and convictions. As of March 2005, he owed \$1,129.44 to the county in which he was convicted of the DUI. (AE 24) Applicant testified that all three delinquent accounts were combined and this total represented the balance owing on all fines and costs that arose from the 2000 convictions.⁽³⁾ He agreed to make monthly payments of \$100.00 to satisfy the indebtedness, and as of the date of the hearing had reduced the amount owing to approximately \$700.00.

In 2001, Applicant allowed a cable television bill in the amount of \$261.00 to be delinquent and submitted for collection which he finally paid off in July 2003. In 2003, he allowed a hospital bill owing in the amount of \$337.00 to become delinquent and submitted for collection. No payment has thus far been made on that account.

The SOR alleges Applicant is indebted for delinquent federal income taxes for the year 2002 in the amount of \$5,386.24. Although not alleged, he is also delinquent on taxes owing for the years 2001 and 2003. As of September 18, 2004, the total amount owing for the three years was \$8,338.12. (AE 27) Applicant has entered into a repayment agreement with the internal revenue service whereby \$232.00 is deducted from his pay each month to be applied to repayment of the total indebtedness.

Applicant failed to disclose his first three DUI arrests in a security clearance application he submitted in April 2001. He testified the omission was due to his belief that he did not have to list them due to their having occurred so many years ago. Having viewed Applicant's appearance and demeanor, and considering the totality of his testimony, I find that explanation credible.

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 G, alcohol consumption, Guideline J, criminal conduct, Guideline F, financial considerations, and Guideline E, personal conduct 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.⁽⁴⁾ The government has the burden of proving controverted facts.⁽⁵⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁶⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽⁷⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁸⁾ 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.⁽⁹⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁰⁾

No one has a right to a security clearance⁽¹¹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹²⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹³⁾

CONCLUSIONS

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 four DUI convictions, and has received inpatient and outpatient alcohol treatment. Disqualifying Condition (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* applies. Applicant engaged in habitual and binge consumption of alcohol from 1981, when he began drinking to excess, until 1991, when he underwent intensive inpatient and residential treatment. DC 5: *Habitual or binge consumption of alcohol to the point of impaired judgment* applies. Although Applicant admits attending inpatient treatment in 2000-01, there is no evidence to support the allegation in SOR subparagraph 1.f. that he was diagnosed as alcohol dependent.

Applicant remained sober for ten years before falling off the wagon during a period of stress and being arrested for his fourth DUI. Following the 2000 DUI conviction, he once again received inpatient treatment, returned to regular attendance at AA meetings, and has remained alcohol abstinent. Mitigating Conditions (MC) 2: *The problem occurred a number of years ago and there is no indication of a recent problem* and MC 3: *Positive changes in behavior supportive of sobriety* apply. Considering the long period of sobriety between the third and fourth DUIs and the situational nature of the 2000 incident, Applicant is entitled to some consideration under MC 1: *The alcohol related incidents do not indicate a pattern*.

Applicant is once again sober and committed to remaining that way. He appears to be doing all that can be asked of him to maintain his sobriety. Having considered all evidence pertaining to Guideline G, and having weighed the disqualifying conditions against the mitigating conditions, I find Applicant has mitigated the security concern that existed because of his alcohol consumption. Guideline G is decided for Applicant.

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.

In addition to his four DUIs, Applicant committed a minor trolley fare offense in 1991 and two DWLS offenses in 2000. 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. The last offense occurred more than five years ago, and Applicant has since completed an inpatient alcohol program, now regularly attends AA meetings, and has remained alcohol free. MC 1: *The criminal behavior was not recent*; and MC 6: *There is clear evidence of successful rehabilitation* apply. Guideline J is decided for Applicant.

Under Guideline F, a security concern exists when a person has significant unpaid debts. An individual who is financially overextended is at risk of having to engage in illegal or unethical acts to generate funds to meet financial obligations. Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, or careless in their obligation to protect classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

Applicant failed to timely pay the various fines that were levied against him in connection with his 2000 criminal offenses, and only recently entered into a payment plan to satisfy those debts. He has allowed two relatively small debts to be submitted for collection and, while he satisfied one of those debts in 2003, he has done nothing to deal with the other. He is indebted for unpaid federal income taxes for tax year 2002 in the amount of \$5,386.24. Although he has now entered into a repayment plan with the IRS, those taxes will not be fully repaid for at least several years because of the addition of unpaid taxes from other years that were not alleged in the SOR. Disqualifying Condition (DC) 1: *A history of not meeting financial obligations*; and DC 3: *Inability or unwillingness to satisfy debts* apply in this case.

Applicant has begun to repay all past-due debts with the exception of a \$337.00 collection account. Accordingly, he is entitled to substantial credit under MC 6: *The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*. However, considering the lack of effort to deal with the delinquencies until recently, the relatively large debt owing to the IRS, the complete lack of attention to the one collection account, and the length of

time it is going to take him to fully resolve his overdue debts, this mitigating condition is insufficient to overcome the security concern caused by Applicant's financial considerations. Guideline F is decided against Applicant.

Under Guideline E personal conduct is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information.

Applicant has a long history of misconduct that began with two special courts-martial he was subjected to while in the Navy that resulted in him receiving a bad conduct discharge. He thereafter was convicted of several serious alcohol related driving offenses and a minor trolley fare offense within a relatively short period of time. He managed to stay out of trouble between 1991 and 2000, but then was arrested three times in nine months for serious traffic offenses. Although Applicant has not been in trouble since he was last convicted of DUI in December 2000, he still has not fully resolved any of the 2000 traffic convictions because of the fines that remain outstanding.

Applicant's misconduct has been somewhat episodic, and, at least as to the last DUI and subsequent DWLS charges, situational. While he has remained sober for more than five years, his past history does not provide any basis for confidence that he will not slip again in the future. DC 4: *Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation, or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail*; and DC 5: *A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency* apply.

Applicant's explanation for not disclosing his earlier DUI convictions is credible. Further, his rehabilitative actions since his last DUI warrant application of C 5: *The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*. However, Applicant's long history of misconduct and his 2000 relapse when he found himself in a stressful situation away from his support network do not permit finding he has successfully mitigated the security concern caused by his personal conduct. Guideline E 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, Applicant has failed to mitigate the security concern caused by his financial considerations and personal conduct. He has failed to overcome the case against him or satisfy his ultimate burden of persuasion. Guidelines F and E are decided against Applicant. It is not clearly consistent with the national interest to grant Applicant a security clearance.

FORMAL FINDINGS

SOR ¶ 1-Guideline G: For Applicant

Subparagraph a-f: For Applicant

SOR ¶ 2-Guideline J: For Applicant

Subparagraph a-d: For Applicant

SOR ¶ 3-Guideline F: Against Applicant

Subparagraph a: Against Applicant

Subparagraph b: For Applicant

Subparagraph c: Against Applicant

Subparagraph d: Against Applicant

Subparagraph e: Against Applicant

SOR ¶ 4-Guideline E: Against Applicant

Subparagraph a: For Applicant

Subparagraph b: Against Applicant

Subparagraph c: Against Applicant

Subparagraph d: Against 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. Clearance is denied.

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. Although Applicant denied this offense and testified he was in court on the date alleged, the information contained in GE 5 conclusively establishes he was convicted and sentenced as alleged.
3. Although the record is unclear, it appears the debt listed in SOR subparagraph 3.d. arises from the conviction listed in SOR subparagraph 1.d., and the arrests listed in SOR subparagraphs 2.c. and 2.d. occurred in the same county as the arrest listed in SOR subparagraph 1.d. (see: GE 7, page 4) Accordingly, Applicant's testimony that the three delinquencies had been combined for collection is credible.
4. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
5. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
6. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
7. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
8. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
9. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
10. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
11. *Egan*, 484 U.S. at 528, 531.
12. *Id* at 531.
13. *Egan*, Executive Order 10865, and the Directive.