

DATE: March 31, 2004

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 02-32950

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Marc Curry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was convicted of driving an automobile while intoxicated in February 1984 and again in September 1993. He has remained sober and not received any traffic citations since the 1993 conviction. Applicant has mitigated the security concerns that arose from his alcohol consumption. Clearance is granted.

STATEMENT OF THE CASE

On September 25, 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 G, alcohol consumption, and Guideline E, personal conduct. Applicant submitted an answer to the SOR that was received by DOHA on October 15, 2003, and requested a hearing. Applicant admitted some, but not all, SOR allegations.

The case was assigned to me on November 21, 2003. A notice of hearing was issued on January 14, 2004, scheduling the hearing for January 29, 2004. Applicant was unprepared to proceed on the scheduled hearing date, having received insufficient advance notice of the hearing date, and the hearing was cancelled. A new notice of hearing was issued on January 30, 2004, rescheduling the hearing for February 20, 2004. The hearing was conducted as rescheduled. The government submitted three documentary exhibits that were marked as Government Exhibits (GE) 1-3 and admitted into the record without an objection. The Applicant testified and submitted eight documentary exhibits that were marked as Applicant's Exhibits (AE) 1-8. AE 1-7 were admitted into the record without an objection. Upon being questioned, Applicant conceded that AE 8 was irrelevant and that document was not admitted into the record. The transcript was received February 26, 2004.

PROCEDURAL MATTERS

Department Counsel conceded prior to the hearing that the SOR allegations contained in subparagraphs 1.b., and 2.a., were mitigated based upon his pre hearing review of AE 1. That document does establish those allegations have been mitigated. During the hearing, Department Counsel conceded that SOR subparagraph 2.b. had also been mitigated, and there was no Guideline E security concern. Subparagraph 2.b. alleged that Applicant had answered "No" to question 24 in GE 1, although a review of that document discloses he actually answered "Yes" and listed one of his two alcohol

driving offenses. Department Counsel conceded the disclosure of the one arrest evidenced that there was no intent on the part of Applicant to falsify GE 1. I fully concur with Department Counsel's analysis of the evidence and his concessions, and will not further discuss the Guideline E allegations in this opinion.

FINDINGS OF FACT

Applicant's partial admissions to the 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 55 years old and has been employed as a test truck driver for a defense contractor since March 2002. He previously was self-employed as a truck driver from May 1998 to March 2002. Prior to that he was employed as a carpenter from May 1993 to May 1998. He was first married in June 1971, but that marriage ended in divorce in February 1981. He has been married to his present wife since March 1982. They have three children, ages 19, 15 and 10. His oldest child is a student at an Ivy League college, and the other two children live at home with Applicant and his wife, in a residence they have occupied since 1989.

Applicant was convicted of Driving Under the Influence of Alcohol (DUI) on February 22, 1984.⁽²⁾ A fine was imposed upon him based upon this conviction. (GE 2) Additionally, his driving privileges were suspended, but the suspension was withdrawn on July 31, 1984. (AE 1)

Applicant was convicted of Driving/Attempting to Drive While Intoxicated (DWI) on September 17, 1993. (AE 1) He was required to attend alcohol and victim's awareness classes and Alcoholics Anonymous (AA) meetings as a result of this conviction. (GE 2) He successfully completed the classes and attended approximately two AA meetings a week for one year. Once again his driving privileges were suspended and that suspension was withdrawn on May 19, 1994. (AE 1) Additionally, Applicant had an alcohol restriction placed on his license that prevented him from being in a vehicle with a person who had been drinking alcohol or himself transporting alcohol in a vehicle. That restriction on his license was removed on January 21, 1997. (AE 1)

Having considered Applicant's appearance, demeanor, and the substance of his testimony, I find his explanations concerning his alcohol consumption to be totally credible. He has not been intoxicated since his conviction for DWI in 1993. He does still drink beer, but no other type of liquor, and in recent time has not been in a tavern. He at times consumes as much as six beers per week, generally in the summer months when he is doing yard work and such around his house. He also will go weeks without consuming any alcohol. He has not operated a motor vehicle after consuming alcohol since the 1993 conviction. He was working at a boy scout event on July 4, 2002, consumed only a couple of beers during the day, and did not become intoxicated.

Applicant submitted letters of recommendation from supervisors at his place of employment, a memorandum of appreciation, and certificates of achievement and training completion that all attest to his dependability, trustworthiness, and overall excellent employment reputation. He has been issued a commercial driver's license, and has not received a traffic ticket since his 1993 DWI conviction.

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, pertaining to alcohol consumption, and Guideline E, pertaining to 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.⁽³⁾ The government has the burden of proving controverted facts.⁽⁴⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁵⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽⁶⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁷⁾ 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.⁽⁸⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁹⁾

No one has a right to a security clearance⁽¹⁰⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹¹⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹²⁾

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 twice been convicted of alcohol related driving offenses that resulted in the suspension of his driving privileges and mandated his attendance at AA meetings and alcohol and victim's awareness classes. 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 in this case.

Applicant's two convictions occurred almost ten years apart, and the last conviction was in September 1993. Since the last conviction he has maintained sobriety at all times and has not received a single traffic citation. Mitigating Conditions (MC) 1: *The alcohol related incidents do not indicate a pattern*; 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 in this case. Guideline G is decided for Applicant.

Personal conduct under Guideline E 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. As indicated previously, Department Counsel, having considered all the evidence, properly conceded there were no Guideline E issues in this case. I fully concur with his assessment of the evidence. Guideline E is decided for 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 overcome the case against him and satisfied his ultimate burden of persuasion. It is clearly consistent with the national interest to grant Applicant a security clearance.

FORMAL FINDINGS

SOR ¶ 1-Guideline G: For the Applicant

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Subparagraph d: For the Applicant

SOR ¶ 2 Guideline E: For the Applicant

Subparagraph a: For the Applicant

Subparagraph b: 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. Various dates are alleged in the SOR and exhibits concerning Applicant's alcohol-related driving offenses. AE 1 is a certified copy of his driving record and is the source of all dates relied upon by me in this decision. The date of the first conviction is covered by a motor vehicle administration stamp, but can be read if the document is held up to a light. My determination that convictions occurred is based upon the assignment of points in the far right hand column of that document.

3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
5. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
10. *Egan*, 484 U.S. at 528, 531.
11. *Id* at 531.
12. *Egan*, Executive Order 10865, and the Directive.