

DATE: June 8, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-01803

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esq., Department Counsel

Lynette Andresen, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 40-year-old corporate chief executive officer who had eight arrests for various

offenses over a 19 year period. Most charges were dismissed or not prosecuted, or Applicant pled guilty to lesser included offenses. Applicant's driving under the influence charges were pled to or resulted in a jury-trial conviction. The last offense was three years ago. Applicant does not have an alcohol problem. Applicant mitigated the criminal conduct and alcohol consumption security concerns. Clearance is granted.

STATEMENT OF THE CASE

On April 30, 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 J (Criminal Conduct) and Guideline G (Alcohol Consumption) 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 notarized statement, but undated, Applicant responded to the SOR allegations. That answer was received by DOHA on June 16, 2003. He requested a hearing. This case was assigned to me on January 12, 2004.

A Notice of Hearing was issued on January 20, 2004 setting the hearing for February 5, 2004. 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 eight exhibits by stipulation with Applicant, which then were admitted into evidence. The

Government questioned the Applicant. Applicant appeared and testified, and offered four exhibits, all of which were admitted into evidence. I received the transcript (Tr.) of the hearing on February 17, 2004.

FINDINGS OF FACT

Applicant admitted the allegations in subparagraphs 1.a through 1.h. Applicant denied the allegation in subparagraph 1.i. Applicant denied the allegations of Paragraph 2 of the SOR at the hearing, but the Government then stated those allegations were mitigated and it was not going to proceed at the hearing on them (Tr. 15, 16). Those admissions are incorporated herein as findings of fact. 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 a 40-year-old chief executive officer of a computer services company that does business with defense contractors. The company has 15 employees. Applicant is married and has four children. While Applicant admitted all the substantive allegations in the SOR, he repeatedly stated he had no specific recollection of any of the incidents. Applicant had seven incidents involving arrests between 1985 and 2001. (Tr. 22, 24, 34, 40, 42, 45)

Applicant, while serving in the U.S. Army in 1985, was arrested and charged with aggravated assault and communicating a threat to another serviceman. Applicant was an E-4 who pointed a .22 caliber weapon at the other enlisted person. He was convicted at a summary court-martial of transmitting a provocative gesture, and fined \$100. The summary court-martial acquitted him of the assault charge (subparagraph 1.a.). (Tr. 28)

In 1987, Applicant was stopped at an airport by police officers after disembarking, searched and arrested for aggravated trafficking in drugs. One of Applicant's brothers was arrested at the same time. The brother had a drug problem, and was found guilty of the offense. Applicant, meanwhile, was found guilty upon his plea of attempted drug use. The Court fined him \$100 and the time served in jail (subparagraph 1.b.). (Tr. 29-32; Exhibit 2 at 4 to 6, Exhibit 4)

In 1989, Applicant was arrested and charged with fraud involving stolen credit cards, fraudulent use of a credit card, resisting a police officer without violence, and forgery. The first two charges were dropped, and the second two were nolle prosequi by the local prosecutor in 1991 (subparagraph 1.c.). (Tr. 25, 27, 28; Exhibit 3 at 1, Exhibit 5)

In March 1990, Applicant was arrested on a charge of battery on his pregnant wife. The charges were later dropped by the prosecutor and a "No Information" filed by the prosecutor on March 22, 1990 (subparagraph 1.d.). (Tr. 33, 34, 66; Exhibit 3 at 2, Exhibit 5)

In December 1992, Applicant was arrested in his home state for operating a motor vehicle while intoxicated (OMVI). He pled guilty to an amended charge of reckless operation of motor vehicle on May 20, 1993. The Court fined him \$100 and court costs. Applicant had been drinking, but the car was stopped beside the road and his keys were in the ignition. The Court found there was no probable cause for the police to stop Applicant's car, and therefore, the Court reduced the punishment. Applicant's driver's license was suspended from March 1993 to March 1994 (subparagraphs 1.e. and 1.f.). (Tr. 18, 35, 37, 39; Exhibit 2 at 6, Exhibit 6)

In April 1995, Applicant was arrested in his home community for OMVI, changing lanes without safety, and a seat belt violation. In July 1995 Applicant pled guilty to the alcohol and driving offense, was sentenced to three days in jail (suspended), fined \$300 plus court costs, and ordered to attend an alcohol education program. Applicant's driver's license was suspended again, but the Court granted him work-related driving privileges (subparagraph 1.g.). (Tr. 18, 39 to 41; Exhibit 2 at 6 and 7, Exhibit 7)

Applicant was arrested in 2001 for driving under the influence of alcohol (DUI), marked lane violations, and persistent disorderly conduct while under arrest. That last charge was later dismissed. Applicant pled not guilty to the remaining charges, had a jury trial, and was found guilty in May 2002. His sentence was 180 days in jail, with 150 days suspended. Of those 30 days, Applicant served 10 days in jail and 20 days of monitored (electronic ankle monitor) house arrest. He was placed on probation for two years, which he completed successfully and from which he was discharged on December 30, 2003. Applicant was fined \$500 plus court costs of \$490. He was referred to an alcohol education program. Applicant's driver's license was again suspended, this time for two years from November 29, 2001. Applicant was ordered to use an ignition interlock device on any personally owned car he drove. The Court granted him a work-

related restricted driving permit by an order dated January 16, 2003. Applicant's drivers license suspension was terminated by court order on March 13, 2003. During the period of his license suspension, Applicant drove his company owned car without the ignition interlock and the DUI license plate designation. Applicant did not have to use those devices if he drove the company vehicle, pursuant to the court order and permission from his probation officer (subparagraphs 1.h. and 1.i.). (Tr. 18, 44-55, 61; Exhibit 2 at 7 to 10, Exhibit 3 at 3, Exhibit 8, Exhibits B, C, and D)

Applicant submitted an alcohol evaluation by a credentialed professional stating Applicant does not have "an ongoing alcohol or drug problem." Applicant does not drink and drive now. He drinks alcohol at business functions, but is careful to be moderate and not drive. (Tr. 19, 67; Exhibit A)

In 2003 Applicant was arrested by the police on a domestic battery charge brought against him by his stepfather. These charges were later dismissed as untrue. This arrest was admitted at the hearing, but was not charged in the SOR. (Tr. 56-59)

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 J - Criminal Conduct

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. E2.A10.1.1.

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

- (1) Allegations or admissions of criminal conduct, regardless of whether the person was formally charged. E2.A10.1.2.1.
- (2) A single serious crime or multiple lesser offenses. E2.A10.1.2.2.

Conditions that could mitigate security concerns include: E2.A10.1.3.

- (1) The criminal behavior was not recent. E2.A10.1.3.1.
- (5) Acquittal. E2.A10.1.3.1.
- (6) There is clear evidence of successful rehabilitation. E2.A10.1.3.6.

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.

Conditions that could mitigate security concerns include:

- (2) The problem occurred a number of years ago and there is no indication of a recent problem. E2.A7.1.3.2.
- (3) Positive changes in behavior supportive of sobriety. E2.A7.1.3.3.

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. In reaching the fair and impartial overall common sense determination required, I draw only those inferences and conclusions which have a reasonable and logical basis in the evidence of record. Likewise, I have drawn no inferences based on mere speculation or conjecture.

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:

With respect to Paragraph 1 and Guideline J, two Disqualifying Conditions (DC) in the guideline apply: DC 1 (*Allegations or admissions of criminal conduct, regardless of whether the person was formally charged*) and DC 2 (*a single serious crime or multiple lesser offenses*). Between 1985 and 2001 Applicant was arrested for eight offenses. Of those charges, he was convicted of two lesser offenses and fined small amounts, and the driving offenses resulted in convictions, the last one in 2001 after a jury trial. All the other charges were dismissed or not prosecuted, for whatever reasons. Applicant is lucky in that regard. Applicant admitted all these offenses, although he also seems forgetful about the details. These incidents would seem to be significant events in a person's life, but with Applicant they do not seem to register in his memory. Nonetheless, his admissions support the Government's allegations, as do the records submitted by the Government which show these offenses on the local police agency records. These offenses did occur. The offenses vary in severity, but show a pattern involving alcohol and anger in several of them.

The Mitigating Conditions (MC) 1 (*the criminal behavior was not recent*), MC 5 (*acquittal*), and MC 6 (*there is clear evidence of successful rehabilitation*) apply to Applicant's case. The last offense brought to court was in 2001, three years ago. The oldest offense was 19 years ago. The 2003 domestic dispute with his stepfather seems to be a false accusation against Applicant, and I give it little weight in the considerations on this guideline. Applicant was acquitted of one offense in 1985. Other charges were dismissed, because the local prosecutor for whatever reason did not have enough evidence to proceed or for other reasons did not find it prudent to proceed. Of all these charges, Applicant has only repeated the alcohol and driving offenses, and now has learned his lesson and does not drink and drive. The last non-driving offense was in 1990, and Applicant's professional development into a corporate executive and his maturity at his age, coupled with the passage of 14 years, mitigate those offenses because there is no recent similar activity or pattern. After considering the totality of circumstances and the whole person concepts of the Directive, I find for Applicant on the Guideline J allegations

Regarding Paragraph 2 and Guideline G, DC 1 (*alcohol-related incidents, such as DUI*) applies. Applicant admits his three DUI arrests and their dispositions in court.

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*) could apply. Applicant has made positive changes in his life after these incidents. Those changes support his continued sobriety. The last incident occurred three years ago, and no repeat incident has occurred. Applicant obtained an alcohol evaluation, which found he did not have a problem with alcohol or drugs. The Government conceded at the start of the hearing that this allegation was mitigated. I agree, and find for Applicant on these Guideline G allegations.

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 J: 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

Subparagraph 1.f.: For Applicant

Subparagraph 1.g.: For Applicant

Subparagraph 1.h.: For Applicant

Subparagraph 1.i.: For Applicant

Paragraph 2 Guideline G: For Applicant

Subparagraph 2.a.: For Applicant **DECISION**

In light of all the circumstances and facts 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.

Philip S. Howe

Administrative Judge