DATE: June 4, 2004

In re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 03-07011

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Marc Curry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 25 years old. He has two alcohol-related driving arrests. He was convicted in state court, and received non-judicial punishment for the military incident. Applicant does not consume alcohol at present. Applicant did not disclose the military-related incidents and alcohol treatment, allegedly upon the advice of his supervisor. Applicant did not mitigate the alcohol consumption and personal conduct security concerns. Clearance is denied.

STATEMENT OF THE CASE

On October 15, 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 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 November 14, 2003, Applicant responded to the SOR allegations. He requested a hearing. This case was assigned to me on January 12 , 2004.

DOHA issued a Notice of Hearing on January 20, 2004, setting the hearing for February 4, 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 four exhibits which were admitted into evidence. Applicant appeared and testified. I received the transcript (Tr.) on February 13, 2004.

FINDINGS OF FACT

Applicant admitted the allegations in the SOR. Those admissions are incorporated herein as findings of fact. At the commencement of the hearing, the Government withdrew paragraph 2.b. (Tr. 6). 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 25 years old. He works for a defense contractor as the initial reviewer of the security clearance applications filed electronically by applicants for their security clearance. Following graduation from high school in 1997, he enlisted in the U.S. Marines for four years. (Exhibit 1 at 1; Tr. 18, 32, 35, 36)

On August 15, 1999, while on active duty, Applicant was apprehended by the security police at his Marine base for driving while under the influence of alcohol (DUI). He blew a .07, under the minimum .10 blood alcohol content (BAC), and received non-judicial punishment under Article 15 of the Uniform Code of ilitary Justice (UCMJ). Applicant was required to attend the military alcohol treatment and awareness program at the naval hospital attached to his military base. Anyone who was convicted of a DUI on a military base attended that course of instruction on the effects of alcohol. He attended the course from January 6, 2000, to January 26, 2000, and successfully completed it. Applicant was evaluated on September 20, 1999, with "Alcohol Dependence", which evaluation was prior to Applicant's admission into the treatment program in January 2000. The evaluators or treating personnel are not identified by name or title on the completion report submitted to Applicant's commander, but the report states the diagnosis was confirmed by a credential provider on September 24, 1999. The treatment program was located at a U.S. Navy Hospital's alcohol treatment facility. (Tr. 15 to 20; Exhibit 2 at 1, Exhibit 3 at 1 and 2)

Applicant was arrested in his home state on May 26, 2001 for operating a motor vehicle while intoxicated. He had a BAC of .15 that night. He pled guilty to DUI and was fined $750, his license was suspended for 180 days, and sentenced to 60 days in jail, with 57 days suspended if he attended a three-day alcohol "alcohol school" in lieu of serving the three days in jail which were not suspended. Applicant did attend that program and successfully completed it. (Tr. 22 to 26, 32, 33; Exhibit 2 at 2, Exhibit 4)

Applicant only drinks socially now, which he started to do in November 2003. If Applicant goes bowling with friends from work, he may drink one beer after the game. He regrets the past incidents and attributes them to being young. On Saturday nights until November 2003 Applicant would consume six to eight beers. He does not drive after this consumption. (Tr. 16, 27 to 29)

Applicant did not list his 1999 non-judicial punishment on his security clearance application (SCA) in answer to Question 23 (Police record). He was told by his civilian supervisor at his employer's work site that he need not list any military activities because his military records would be examined by the defense investigators. Applicant did not identify that supervisor, but did state he was no longer employed at the work site. Applicant also did not list his 2000 Marine Corps alcohol program participation in answer to Question 25 (Alcohol use). (Tr. 30 to 32)

Applicant did not list on the SCA he filed in September 2001 the use of marijuana five times from 1995 to 1997 in response to Question 24. Applicant listed it on his military SCA he completed in 1998. Applicant again assumed this military record would also be pulled and examined by the investigator, based upon what he stated his supervisor in 2001 told him. (Answer; Exhibit 1 at 4, Exhibit 2 at 2; Tr. 31, 34)

Applicant has a good work history and is highly regarded by his colleagues and his manager. He plays softball and bowls on the company teams. (Tr. 44 to 55)

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 he 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:

(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.

(4) Following diagnosis of alcohol dependence, the individual has successfully completed utpatient rehabilitation along with aftercare requirements, participates frequently in meetings of Alcoholics Anonymous or a similar organization, has abstained from alcohol for a period of at least 12 months, and received a favorable prognosis by a credentialed medical professional or licensed clinical social worker who is staff member of a recognized alcohol treatment program.

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:

(2) The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily. E2.A5.1.3.2.

(4) The omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided. E2.A5.1.3.4.

Under 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 established its allegations against Applicant that he had a DUI incident in 1999 while on a Marine Corps base, and in 2001 in his home state. The

Government also established by these two events Applicant drank to excess on those dates, and that he drank to excess and possibly intoxication on the Saturdays on which he drank six to eight beers. However, there is no evidence that those beers were consumed within a short period of time or that Applicant did anything to indicate he was intoxicated. Therefore, I conclude Applicant was intoxicated on the two occasions on which he was arrested because to do otherwise would be to engage in speculation about Applicant's conduct. Obviously, Applicant did continue to consume alcohol after he was successfully discharged from the Marine Corps alcohol treatment facility in 2000. That facility did not identify the credentials of the person who made a diagnosis of alcohol dependence on Applicant before he entered the treatment facility, but the official government document states the provider was credentialed, and the program was conducted at a Naval Hospital's alcohol treatment facility. Therefore, I conclude Disqualifying Conditions (DC) 1 (alcohol-related incidents away from work, such as DUI), DC 3 (diagnosis by a credentialed medical provider of alcohol dependence), and DC 6 (consumption of alcohol, subsequent to a diagnosis of alcoholism by a credentialed medical professional and following completion of an alcohol rehabilitation program) apply because of the two DUI incidents and his continued drinking alcohol to some degree until November 2003.

The Mitigating Conditions (MC) 2 and 3 apply. These incidents were five and three years ago. Applicant has not engaged in that type of behavior, or had any alcohol-related incidents, since that time. In fact, he testified he does not drink alcohol since he stopped drinking in 2003. Applicant testified he now spends time working out at the gym to focus on those activities instead of drinking with friends. These changes in his life are positive supportive of sobriety. However, Applicant has not been abstinent from alcohol for at least 12 months continuously since he was diagnosed as alcohol dependent in the alcohol treatment program at the Naval Hospital. Nor does have a favorable prognosis from a credentialed medical provider or licensed clinical social worker who is a staff member of a recognized alcohol treatment program following his diagnosis of alcohol dependence. Upon this evidence, I conclude the MC 2 and 3 do not outweigh the DC upon these facts. Therefore, I conclude Guideline F against Applicant.

Considering Paragraph 2 and Guideline E, I conclude the Government established its case on the non-disclosure of five incidents of marijuana use from 1995 to 1997, and the alcohol treatment program in 2000 (subparagraphs 2.b. and 2.c). Applicant admitted these allegations.

However, regarding the Article 15 non-disclosure, the conviction alleged in subparagraph 2.a. of the SOR was actually non-judicial punishment under Article 15 of the UCMJ. That action is not a conviction for the purposes of the SCA, I conclude, because under the UCMJ it is not considered judicial action by its terms and purpose, and therefore, there is no conviction to report. In fact, Question 23 (e) specifically asks for Article 15 information and the Government did not allege Applicant failed to disclose his 1999 Article 15.

In subparagraph 2.c. Applicant did not disclose his alcohol treatment program participation while in the U.S. Marine. Applicant testified that his supervisor told him not to include the military information on his SCA because the military record would be pulled and reviewed in the normal course of the evaluation of his SCA. Applicant obviously relied upon that advice. But the burden is upon the Applicant to submit evidence to support the application of MC to his case. He merely asserted that this unnamed supervisor three years ago told him not to list his military information which would fall within the scope of any of the questions, particularly Questions 24 and 25. The absence of this supervisor makes his statement hearsay.

While the technical rules of evidence are relaxed in these hearings, this attribution to the unidentified and long-gone supervisor is not persuasive to me. Applicant read the questions on the SCA, and could read they did not contain any exceptions for prior military service. Full disclosure is the standard, regardless of how often the questions are asked. The concern under Personal Conduct is that conduct involving questionable judgment, unreliability, lack of candor or an unwillingness to comply with rules could indicate Applicant may not properly safeguard classified information (Guideline E, E2.A5.1.1). I do not find Applicant's explanation of why he failed to disclose fully the information requested to be credible. I conclude DC 2 and 5 apply.

I cannot apply any mitigating conditions to Applicant's case. I considered them all, and in particular MC 2 and 4. I do not apply them because the falsification showed a pattern about the disclosure of relevant information from his military service, so it is not isolated. There is no authorized person identified and who testified that he gave Applicant improper or inadequate advice about completing his SCA. No other MC are remotely applicable. Therefore, I conclude Guideline

E against Applicant.

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

Paragraph 2 Guideline E: Against Applicant

Subparagraph 2.a.: For 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 clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

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Philip S. Howe

Administrative Judge