

DATE: February 24, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-08444

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has failed to successfully mitigate the security concerns raised by his history of criminal conduct and excessive alcohol consumption. As a college student, he had three alcohol-related incidents leading to his arrest for several criminal offenses during the period January 2001 to September 2002. The arrests led to convictions for three criminal offenses. Although it appears he has matured somewhat and he is no longer the heavy drinker he once was, Applicant has failed to present sufficient evidence of reform and rehabilitation to show that he has truly changed his ways for the better. Clearance is denied.

STATEMENT OF THE CASE

On May 3, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant.⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline J for criminal conduct and Guideline G for alcohol consumption. Applicant responded to the SOR on May 27, 2004, requested a hearing, and he admitted all the factual allegations in the SOR, although he qualified his admission to subparagraph 1.a.

Department Counsel indicated he was ready to proceed on August 16, 2004. On August 18, 2004, this case was assigned to me to conduct a hearing. On August 23, 2004, a notice of hearing was issued scheduling the hearing for September 15, 2004. Applicant appeared without counsel and the hearing took place as scheduled. The transcript was received September 23, 2004. Issuing a decision in this case was delayed due a heavy caseload.

FINDINGS OF FACT

After a thorough review of the record evidence as a whole, I make the following findings of fact:

Applicant is a 27-year-old never married man and a native-born U.S. citizen. He is employed as an analyst. He has worked at this company since June 2002, initially as a summer intern, then a part-time employee, and now a full-time

employee. He was hired full-time in January 2003 after his graduation from college in December 2002. He was promoted to the company's professional staff in January 2004. He is seeking to obtain a security clearance for the first time. The background investigation in this case revealed Applicant has a history of excessive alcohol consumption and three incidents of alcohol-related criminal conduct.

The first alcohol-related incident stemmed from a New Year's Eve party and his arrest on January 1, 2001. After a family dispute with his brother and his brother's girlfriend at a party, Applicant returned to his parents' home to remove personal items and bring them to his own residence. This incident took place at about 1:00 or 2:00 a.m. when Applicant was intoxicated and still angry from the argument. His parents decided he should not be driving a car in his condition. When Applicant did not respond to his mother's request, his father confronted him and attempted to take the car keys away from Applicant. This led to a scuffle between the two men and the father fell backwards striking his head on a door jam cutting his head and causing a fair amount of bleeding. The father then subdued Applicant. In the meantime, Applicant's mother was quite scared by her son's behavior and called 911.

The police arrived and Applicant was arrested, but did not go peacefully. The criminal complaints filed by the police officers indicate that Applicant spit on the officers as he was escorted to and placed in the police car. Applicant admits in his sworn statement (Exhibit 2) that he was very angry and spit on every police officer he passed by. The father was taken to a medical facility where he received 27 stitches for the head wound. As a result of this incident, Applicant was charged with obstruction of justice (a misdemeanor), maliciously wounding or injury to his father (a class 3 felony), three counts of assault (all misdemeanors), and one count of assault upon a police officer (a class 6 felony). Applicant was released from jail after posting a bond.

The charge involving Applicant's father was disposed of in juvenile and domestic relations court as opposed to state criminal court. On or about January 22, 2001, the charge was reduced to assault and battery, to which Applicant pleaded guilty to and was found guilty. The court sentenced Applicant to pay a \$250.00 fine and imposed a jail sentence of 12 months with 12 months suspended. The court also required Applicant to attend mental health and substance abuse counseling.

The remaining offenses were still on the docket in the criminal court and, as a condition of his bond, Applicant was not allowed to travel outside of the state. On February 9, 2001, through his public defender, Applicant moved the court to modify the bond's conditions to allow him to travel to New Orleans, Louisiana, from February 21, 2001, to March 1, 2001. As the motion was unopposed, the court granted it.

The second alcohol-related incident took place on or about February 26, 2001, while Applicant was attending Mardi Gras. Applicant was there with friends and they were drinking heavily. After leaving a bar, Applicant approached a mounted police officer. Applicant maintains he only wanted to pet the horse, but the police officer told him to get away in no uncertain terms. What happened next is slightly unclear, but Applicant ended up being arrested for the offenses of public intoxication and cruelty to animals. Applicant denies touching the horse. He appeared before a local magistrate and pleaded not guilty. He retained an attorney to represent him, and the attorney subsequently told Applicant the charges were dismissed and the record expunged. Neither Applicant nor Department Counsel produced any police or court records on this incident, and so, the precise disposition of the charges is uncertain.

After the Mardi Gras incident, Applicant returned to his home state to face the remaining charges in criminal court. On or about March 5, 2001, Applicant pleaded guilty to and was found guilty of obstructing justice. The court ordered a *nolle prosequi* ⁽²⁾

on the prosecution's motion for the remaining four charges. The court sentenced Applicant to a jail sentence of 12 months with 6 months suspended, and the court placed Applicant on supervised probation for 12 months. His confinement was delayed until June 1, 2001, to allow him to finish the school year. Applicant served about three months in jail on a work-release program, and he resumed college in the fall. He successfully completed his probation and his case was closed in March 2002.

The third alcohol-related incident took place in September 2002, after Applicant was working for his current employer, and after completing his security-clearance application (Exhibit 1) on June 10, 2002. On September 19, 2002, Applicant

was charged with assault and battery and drunk in public stemming from a late-night incident at a pancake house. Applicant was out drinking heavily with friends. He estimates drinking 12 to 16 beers during the evening (Exhibit 2). The group went to the pancake house to eat, and Applicant "passed out" at the table after finishing his meal. He woke up to discover his friends arguing with some other customers. A fight broke out and Applicant claims he was jumped by four or five people from the other group. Police were called, and Applicant ended up being arrested due to a complaint of a waiter who said Applicant pushed him into a table. Applicant was taken to the police station, processed, and released. On January 14, 2003, Applicant appeared in state criminal court and was convicted of assault and battery, but the drunk in public offense was *nolle prosequi*. The court sentenced Applicant to a jail sentence of 180 days with 180 days suspended. Also, the court ordered Applicant to stay out of the pancake house.

Applicant attributes the three alcohol-related incidents to heavy drinking while a college student. In his sworn statement of November 2002 (Exhibit 2), Applicant described himself as a social drinker. He graduated from high school in 1995 and started drinking alcohol in the fall of 1996 as a college student. During the period 2001-2002 while a college student, Applicant estimates he got drunk three to four times per week. His history of alcohol consumption includes blackouts. Since leaving college and starting full-time employment, Applicant has reduced his alcohol consumption. He usually limits his drinking to weekends (Friday and Saturday night). He denies drinking the night before work and he denies missing work or calling in sick due to drinking. He typically has one drink, perhaps with dinner, but may have two to three drinks (typically beer) if out on a Friday or Saturday night socializing with friends. Applicant recently took a cruise with his parents and he drank very little alcohol. This is consistent with his parents' observations that Applicant has reduced his drinking, and they have seen a positive change in the level of maturity and responsibility of Applicant.

Applicant's assistant group leader testified about Applicant's work history and performance. The witness has never suspected Applicant of being under the influence of alcohol, impaired, or hung over at work. The witness was involved in both Applicant's hiring as a full-time employee and recent promotion to a member of the professional staff. The witness is very pleased with Applicant's work performance and has trusted Applicant to interact with customers ahead of more senior employees. The witness's testimony is consistent with documentary evidence produced by Applicant that notes his professionalism, reliability, trustworthiness, and dedication to producing high quality work (Exhibits B - F).

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on 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.

BURDEN OF PROOF

The only 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⁾ There is no presumption in favor of granting or continuing access to classified information.⁽⁴⁾ The government has the burden of proving controverted facts.⁽⁵⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.⁽⁶⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽⁷⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁸⁾ Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against them.⁽⁹⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁰⁾

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹¹⁾ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

SOR paragraph 1 concerns Applicant's history of criminal conduct. 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. 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.

Here, based on the record evidence as a whole, the government established its case under Guideline J. Applicant's record includes arrests and charges stemming from three alcohol-related incidents during the period January 2001-September 2002. The result of the arrests and charges is Applicant stands convicted of the following offenses: (1) a January 2001 misdemeanor conviction for assault and battery against his father resulting in a 12-month suspended sentence to jail; (2) a March 2001 misdemeanor conviction for obstruction of justice resulting in a 12-month sentence to jail with six months suspended; and (3) a January 2003 misdemeanor conviction for assault and battery resulting in a 180-day suspended sentence to jail. Of particular concern here is that Applicant was charged with some serious crimes due to his drunken rage in January 2001. This incident should have been a loud wake-up call to Applicant, but he thereafter placed himself in situations that led to two more arrests for alcohol-related incidents-the Mardi Gras incident in February 2001 and the pancake house incident in September 2002. Given these facts and circumstances, both DC 1 [\(12\)](#) and DC 2-[\(13\)](#) apply. And these facts and circumstances are evidence of a history or pattern of illegal behavior that creates doubt about his judgment, reliability, and trustworthiness.

I have reviewed all the mitigating conditions under Guideline J and conclude none apply. In particular, neither MC 1, [\(14\)](#) MC 2-[\(15\)](#), nor MC 6-[\(16\)](#) apply in Applicant's favor. Concerning MC 1, his last arrest occurred September 19, 2002, which is about two years ago (the record closed September 15, 2004). The two charges stemming from that arrest were adjudicated January 14, 2003, and Applicant was under the 180-day suspended sentence to jail until about July 14, 2003. Given these facts and circumstances, his criminal conduct cannot be considered "not recent." Concerning MC 2, three arrests during a 19-month period and the resulting convictions cannot be viewed as an "isolated incident" or the product of momentary youthful indiscretion. And concerning MC 6, Applicant has presented some evidence of successful rehabilitation (no additional arrests and reduced drinking). But the record evidence is simply not strong enough to establish "clear" evidence of successful rehabilitation and reform. Accordingly, Guideline J is decided against Applicant.

SOR paragraph 2 concerns Applicant's history of excessive alcohol consumption. Under Guideline G, a history of excessive alcohol consumption raises a security concern because of the potential for deliberate or inadvertent mishandling of classified information due to intoxication. The concern is that excessive consumption of alcohol 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.

Based on the record evidence as a whole, the government established its case under Guideline G. Applicant engaged in excessive alcohol consumption starting in about fall 1996 to at least September 19, 2002, with negative consequences. Three arrests during a 19-month period and convictions for three misdemeanor offenses qualify as alcohol-related incidents away from work. [\(17\)](#) And Applicant's history of alcohol consumption includes many times when he drank to the point of intoxication and beyond. [\(18\)](#) Indeed, having blackouts and drinking 12 to 16 beers during a single evening is binge drinking by any rational person's definition of bingeing. These circumstances raise a security concern about Applicant's suitability for access to classified information.

I have reviewed all the mitigating conditions under the guideline and conclude Applicant receives some credit in mitigation. First, MC 1 [\(19\)](#) does not apply because three alcohol-related incidents during a 19-month period indicates a pattern. Second, MC 2-[\(20\)](#) does not apply because the alcohol-related incidents are relatively recent. His last arrest occurred in September 2002, which is only about two years ago (the record closed September 2004). And third, Applicant receives some credit under MC 3-[\(21\)](#) because he has made positive changes by reducing his alcohol consumption. But the credit is limited because Applicant's track record in this regard is limited.

In my view, a key question about alcohol use is how it affects an applicant's judgment and ability to control his behavior. How an applicant behaves under the influence of alcohol is just as important as how much or how often an applicant drinks and whether an applicant is diagnosed as an alcohol abuser or alcohol dependent. Based on his three arrests for alcohol-related incidents during a 19-month period, we know alcohol use greatly affected Applicant's judgment and ability to control his behavior. His drunken rage in January 2001 resulted in injury to his father as well as Applicant serving jail time. He exercised poor judgment by going to Mardi Gras when he was pending criminal charges. He exercised poor judgment by getting drunk and putting himself in a situation where he was arrested at Mardi Gras. And he exercised poor judgment by drinking 12 to 16 beers and then putting himself in a situation at the pancake house where he was arrested for the third time in September 2002, after completing his security-clearance application a few months earlier. Until Applicant can demonstrate a long-term track record (perhaps three to five years) of using alcohol in a mature and responsible manner, doubt remains about his fitness for access to classified information. To sum up, Applicant's problems linked to excessive alcohol consumption are not clearly in the past, and so, he has not successfully mitigated the security concern. Accordingly, Guideline G is decided for Applicant.

To conclude, Applicant has not met his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching my decision, I have considered the record evidence as a whole, the whole-person concept, the clearly-consistent standard, and the appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

SOR ¶ 1-Guideline J: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

SOR ¶ 2-Guideline G: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the 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.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

2. According to a comprehensive guide to legal style and usage, "[t]he phrase *nolle prosequi* (lit., 'not to wish to prosecute') denotes either (1) the legal notice of abandonment of suit, or (2) a docket entry showing that the plaintiff or the prosecution has relinquished the action." In addition, "[n]olle prosequi is only a noun in England, but has two verb forms in the U.S., *nol-pros* and *nolle pros*. The term means 'to abandon a suit or have it dismissed by a *nolle prosequi*.' E.g., 'That plaintiff was arrested but never tried, and the charges against him were *nolle prossed*.'" Bryan A. Garner, *A Dictionary of Modern Legal Usage* 591 (2nd ed., Oxford University Press 1995).

3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

4. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.

5. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

6. *Department of 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. E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.

13. E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

14. E2.A10.1.3.1. The criminal behavior was not recent.

15. E2.A10.1.3.2. The crime was an isolated incident.

16. E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

17. E2.A7.1.2.1. 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.

18. E2.A7.1.2.5. Habitual or binge consumption of alcohol to the point of intoxication.

19. E2.A7.1.3.1. The alcohol-related incidents do not indicate a pattern.

20. E2.A7.1.3.2. The problem occurred a number of years ago and there is no indication of a recent problem.

21. E2.A7.1.3.3. Positive changes in behavior supportive of sobriety.