

DATE: October 26, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-10150

ECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Jr., Esq., Department Counsel

FOR APPLICANT

Mary Anne Sedey, Esq.

SYNOPSIS

Applicant is 43 years old, married, with one son. He is a well-regarded engineer with his

defense contractor employer for whom he has worked for 20 years. Applicant had an alcohol-related driving offense in 1992, and another in 1999. Applicant did not disclose his education program as part of the court disposition for each offense because it was not alcohol treatment or education. Applicant mitigated the alcohol consumption and personal conduct security concerns. Clearance is granted.

STATEMENT OF THE CASE

On October 21, 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 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 15, 2003, Applicant responded to the SOR allegations. He requested a hearing. This case was assigned to me January 30, 2004.

A Notice of Hearing was issued June 1, 2004, setting the hearing for June 16, 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. Applicant submitted six exhibits. I received the transcript (Tr.) of the hearing June 28, 2004.

FINDINGS OF FACT

Applicant admitted the allegations in Paragraph 1 the SOR, and denied Paragraph 2. 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 43 years old, married for ten years, with a four-month-old son. He is an engineer with a defense contractor. He has worked for the same company for 20 years. Applicant has good character and an excellent work ethic. He received many certificates of recognition and appreciation from his employer for his work over the past 20 years. (Tr. 13 to 31; Exhibits A and D)

Applicant received two tickets and dispositions for driving while intoxicated offenses (DWI) in his home state. The first offense was in 1992. The charge was reduced to careless-imprudent driving by the court after Applicant completed the education requirements imposed by the court. Applicant was fined \$362 and imposition of the sentence was suspended. The second offense occurred in 1999. Applicant successfully completed the Substance Abuse Traffic Offenders Program (SATOP) level II program. The SATOP program Applicant attended included an education component and discussions by the participants of their experiences with alcohol. Three persons presented this weekend intervention program (WIP). There was no one-on-one evaluation of any of the program participants. A description of the WIP states it is designed "to heighten the offender's awareness of the negative consequences of alcohol/drug usage in their lives" and referral to additional programs may occur after the WIP program conclusion (Exhibit B at 3 and 4). The rules of the SATOP program explain in greater detail the hierarchical structure of the SATOP program, and the WIP is the second level education component occurring after the second DUI offense. Applicant disclosed both DUI offenses on his security clearance application (SCA). Applicant has not driven after drinking alcohol since the 1999 incident. Applicant has substantially reduced his alcohol intake since 1999, realizing another DUI would be his third and would result in him going to jail. Applicant drank in college from about 1979, and then drank frequently until his arrest in 1999, but now drinks only once or twice a month with a dinner and family members, attested to by his wife. (Tr 31 to 50, 74 to 78; Exhibits 1, 4, B, E and F)

A clinical psychologist trained in alcohol and drug abuse evaluation examined Applicant at his request. The clinical psychologist administered various tests and conducted an evaluation. She concluded Applicant had no psychological problem, no substance disorders, did not fit the criteria for alcohol dependence or substance abuse. Applicant took full responsibility for his behavior in 1992 and 1999. The test scores were valid and reliable. Applicant was not malingering. The clinical psychologist saw no evidence Applicant was a functioning alcoholic. The clinical psychologist submitted a written report encompassing all of her evaluation results. I found this testimony to be very credible and persuasive in its thoroughness and professionalism based on the clinical psychologist's experience. (Tr. 55 to 73; Exhibit C)

Applicant did not disclose his SATOP participation on his SCA in response to Question 30 concerning Applicant's use of alcohol. Applicant interpreted the SATOP program to be an educational program, not a treatment or counseling program as contemplated by Question 30. The SATOP program rules and program description show the SATOP WIP is an education program, not a treatment or counseling program. (Tr. 47; Exhibits B, E and F)

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.

Conditions that could mitigate security concerns include:

- (2) The problem occurred a number of years ago and there is no indication of a current problem. E2.A7.1.2.1.
- (3) Positive changes in behavior supportive of sobriety. E2.A7.1.3.4.

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, or falsification 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.

Conditions that could mitigate security concerns include:

None

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. 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 well established its case against Applicant. Applicant had DUI arrests in 1992 and 1999. Disqualifying Condition (DC) 1 applies.

I conclude Mitigating Conditions (MC) 2 and MC 3 apply to Applicant. Applicant's DUI arrests were twelve and five years ago, respectively, and have not been repeated. Applicant presented persuasive and credible testimony and documentary evidence from a clinical psychologist who is experienced in substance abuse evaluations and treatment. She found no abuse or psychological problems with Applicant. Applicant has substantially reduced his alcohol consumption since 1999, and knows he faces more severe consequences if he drives drunk again. His family now occupies his time, and especially the time he takes caring for his new son. These are positive changes in support of sobriety. Applicant does not have an alcohol problem. Accordingly, I conclude for Applicant on Guideline G.

Considering Paragraph 2 and Guideline E, I conclude the Government did established its case. Proof Applicant omitted this information from his SCA shifted the burden to Applicant to explain the omissions sufficiently to negate a finding of knowing and deliberate falsification. *See* ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004). Applicant did not disclose his 1999 WIP education program on his SCA. But he did not consider it, nor did anyone tell him, it was a treatment our counseling program. The regulatory information presented by Applicant, observing his demeanor at the

hearing, and listening to his explanation, I conclude his non-disclosure was reasonable and supported by the regulations establishing the program. His answer to Question 30 of the SCA was reasonable and not a deliberate falsification. Therefore, I do not apply any DC, nor do any MC apply. For these reasons, I conclude for Applicant on Guideline E.

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: For Applicant

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Paragraph 2 Guideline E: 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