

DATE: October 26, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-11952

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esquire, Department Counsel

FOR APPLICANT

Ardella Chandler, Personal Representative

SYNOPSIS

Applicant was convicted of Driving While Intoxicated in October 1990, April 2001, and March 2002, and is presently on probation for the last offense. He was referred by his employer for an alcohol evaluation in 1998, and was thereafter recommended for inpatient treatment, which he did not obtain. He continues to consume alcohol, and was observed to be intoxicated in approximately June 2004. Applicant has failed to mitigate the security concerns that arise from his alcohol consumption. Clearance is denied.

STATEMENT OF THE CASE

On May 20, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find 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 a security concern under Guideline G, alcohol consumption. Applicant submitted an answer to the SOR, received by DOHA on June 16, 2004, requested a hearing, and admitted all SOR allegations.

The case was assigned to me on August 26, 2004. A notice of hearing was issued on September 13, 2004, scheduling the hearing for September 29, 2004. The hearing was conducted as scheduled. The government submitted nine documentary exhibits that were marked as Government Exhibits (GE) 1-9, and admitted into the record without an objection. The Applicant testified, called one witness, but did not submit any documentary exhibits. The transcript was received October 14, 2004.

PROCEDURAL MATTERS

Although not alleged in the SOR, the record establishes Applicant was charged with Armed Robbery and Possession of Firearm During Robbery in March 1975. Applicant has consistently maintained the charges were dismissed, and GE 7, a FBI arrest record, contains notations that seem to indicate both charges were dismissed on April 22, 1975. However that

same document, which is partially cut off on the right side, also contains the following notation under the armed robbery charge: *SENTENCE 5 YRS SV 1YR B/P*. Neither Department Counsel nor Applicant could explain the meaning of the entry, and Department Counsel stated he was satisfied, based upon his investigation and a review of all evidence in his file, that this case does not involve 10 U.S.C. § 986.

FINDINGS OF FACT

Applicant's 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 54 years old, has never been married, but has been in a spouse-like living arrangement with a woman for more than 20 years. He has worked as a utility worker for his present employer, a defense contractor, since October 1997. He was previously employed by a different defense contractor in the same position from June 1993 to September 1997, and before that as a general laborer in private industry from May 1991 to May 1993. He has nine years of formal education, and has received a General Educational Development (GED) diploma. He has never been issued a security clearance.

Applicant began consuming alcohol when he was six years old, having it provided to him by his custodians to control his hyperactivity. He apparently was raised by grandparents and uncles, and did not meet his mother until he was able to track her down in 1997. He does not know who his father is, and went by a fictitious last name given to him by his caretaker relatives until after he located his mother. Having discovered his real last name, he filed for a name change in approximately 2003.

Applicant drove to his present state of residence in 1973 with some friends in search of employment. He was convicted of Possession of Marijuana shortly after arriving in that state and was sentenced to 10 days confinement (5 days suspended). He was charged with Armed Robbery and Possession of a Firearm During Robbery in March 1975, and those charges were apparently dismissed in April 1975. He was charged with Grand Larceny in April 1976, and those charges were dismissed that same month. He was charged with Possession of Marijuana in 1982, convicted of that offense, and paid a fine of \$75.00. ⁽²⁾

Applicant was charged with Driving While Intoxicated (DWI) on August 10, 1990. His blood alcohol concentration (BAC) at the time of his arrest was .113. He pled nolo contendere to that charge on October 19, 1990, and was sentenced to 30 days jail (all but 72 hours suspended), and fined \$500.00 (\$250.00 suspended). His driver's license was revoked for 90 days, and he was ordered to obtain and comply with the recommendations of alcohol screening as soon as possible. There is no evidence he obtained any alcohol counseling at the time.

Applicant's employer referred him for an alcohol assessment in September 1998 after co-workers complained of him smelling of alcohol at work. The assessment (GE 9) indicated his sleeping and eating habits at the time centered around alcohol. He reportedly was consuming a fifth of rum daily to cope with stress and to self-medicate for pain and sleeplessness. He was diagnosed as chemically dependent and was recommended for inpatient treatment. He did not comply with the inpatient recommendation, but instead attended a couple of outpatient sessions.

Applicant was charged with DWI on April 1, 2001, and entered a plea of nolo contendere to the charge on April 2, 2001. He was sentenced to 45 days jail (all but 72 hours suspended), and given the option of either paying a \$250.00 fine or performing 40 hours community service work. He was also placed on probation for one year, and his driver's license was revoked for 90 days. He was again ordered to obtain an alcohol assessment and comply with recommendations, and again there is no evidence he did so.

He was again charged with DWI and Driving with a Revoked Drivers License on September 17, 2001. Although Applicant denies drinking before this arrest, his BAC when he was arrested measured .107. A petition to revoke the probation imposed following his April 2, 2001 conviction was filed on September 18, 2001. He entered a plea of no contest to the DWI charge on March 8, 2003, and was sentenced to 180 days jail (120 days suspended), and fined \$1,000.00. He was also placed on probation until September 8, 2005, and his driver's license was suspended for three years. He was once again ordered to obtain an alcohol assessment and comply with recommendations, and once again

there is no evidence he did so. The revoked license charge was dismissed. There is no indication in the record what happened to the probation revocation petition.

Applicant claims to have cut his alcohol consumption by approximately 75% since his last DWI arrest. He estimated he now drinks about a half-pint of rum on weekends, and claims he never drinks during the week or while working. He also denies he ever drives after drinking. He has been told by his spouse-like companion that she thinks he is an alcoholic, but he denies he is one because he is confident he can quit drinking whenever he wants.

His spouse-like companion testified she has suggested to Applicant that he attend either an alcohol abuse program or alcoholics anonymous (AA) meetings. She last saw him intoxicated in approximately June 2004. However, he works at a distant location and she does not see him on a regular basis.

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, with its respective DC and MC, is 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 been convicted of three alcohol-related driving offenses, the last two occurring in 2001. He has been sentenced to jail, had substantial fines imposed, and severe driving restrictions placed on him because of these convictions. He is presently serving a probationary sentence based on the last conviction. He was referred by his employer for an alcohol assessment in 1998 because of complaints made by his co-workers. He was ordered to obtain alcohol assessments and comply with recommendations following each of his arrests, but there is no evidence he has ever done so. Inpatient treatment was recommended in 1998, but he did not follow that recommendation either.

Disqualifying Conditions (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; DC 2: Alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job; DC 4: Evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program; and DC 5: Habitual or binge consumption of alcohol to the point of impaired judgment apply in this case.

Applicant has failed to comply with the several court orders that he obtain alcohol abuse assessments and follow recommendations, and the employer generated recommendation that he obtain inpatient treatment. He has also ignored his spouse-like partner's recommendation that he either attend an alcohol abuse program or participate in AA. He continues to consume alcohol, was last observed in an intoxicated state three to four months ago, and denies he has a problem that requires intervention. I have considered all Mitigating Conditions under Guideline G and none apply in this case. Guideline G is decided against 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 Applicant has failed to overcome the case against him and satisfy his ultimate burden of persuasion. It is not clearly consistent with the national interest to grant Applicant a security clearance.

FORMAL FINDINGS

SOR ¶ 1-Guideline G: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Subparagraph d: Against the Applicant

Subparagraph e: 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.

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. No security concern exists under either guideline H (drug involvement) or guideline J (criminal conduct) considering the length of time that has passed since Applicant's last arrest and reported use of a controlled substance.
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.