

DATE: November 30, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-17348

ECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has been convicted four times of alcohol related incidents, the last occurring on April 5, 2001. Although he considers himself an alcoholic, and has twice been diagnosed as alcohol dependent, he continued to consume alcohol until at least November 2003. Applicant has failed to mitigate the security concerns that arise from his alcohol consumption and criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

On May 17, 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 security concerns under Guideline G, alcohol consumption, and Guideline J, criminal conduct. Applicant submitted a response to the SOR on June 14, 2004, and requested a clearance decision based on the written record without a hearing. In his SOR response, Applicant admitted all allegations contained in the SOR.

Department Counsel prepared a File of Relevant Material (FORM) on September 30, 2004, that was mailed to Applicant on October 3, 2004, and informed him he had 30 days from receipt of the documents to submit his objections and/or information he wished to be considered. Applicant acknowledged receipt of the file on October 8, 2004, but has not filed any additional information or interposed any objection to the material submitted by Department Counsel within the time allowed. The case was assigned to me November 17, 2004.

FINDINGS OF FACT

Applicant's admissions to the allegations contained in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, exhibits and testimony, I make the following findings of fact:

Applicant is a 46-year-old man who has been employed by a defense contractor as a cost account manager since March 2002. He was unemployed from January 2002 to March 2002, worked as a senior consultant from July 2001 to January 2002, and was unemployed from May 2001 to July 2001. He worked as a senior consultant from April 1996 to May 2001, and as a senior procurement administrator for the same defense contractor for

whom he now works from October 1980 to April 1996. He received a Master's degree in December 1993. He was married in August 1980, divorced in February 1982, and has no children.

Applicant was arrested on January 9, 1984, and charged with battery after he got into a fight with a bouncer at a bar. The charge was dismissed. He was next arrested on July 7, 1984, and charged with driving under the influence of alcohol (DUI). He was convicted of the DUI on October 24, 1984 and paid a fine of approximately \$278.00.

Applicant was again charged with DUI on October 22, 1987. He recorded a breath alcohol concentration (BAC) of .172 following this arrest. While at the police station he became involved in a physical altercation with police officers resulting in additional charges of battery of a police officer and resisting arrest being filed against him. He was convicted of the battery of a police officer. The DUI was reduced to reckless driving, and he was convicted of the reduced charge. Applicant was sentenced to six months concurrent probation, ordered to serve eight days on a work farm, and fined approximately \$575.00. He was also ordered to attend an alcohol education program.

Applicant was next charged with DUI on July 27, 1996. He was convicted on January 14, 1997, and sentenced to three years unsupervised probation, and ordered to pay a fine and court costs totaling \$2,361.00. His driving privileges were also suspended for six months. Applicant's last DUI arrest occurred on December 3, 2000. His BAC was .153 at the time of this arrest. He was convicted of the charge on April 5, 2001, and sentenced to six months probation, a fine and court costs totaling \$809.00, and ordered to perform 50 hours community service or pay an additional \$500.00 fine (he opted to pay the additional fine). Applicant was also ordered to attend two driver's education courses and attend group alcohol counseling sessions from June 14, 2001 to November 19, 2001.

In the course of attending the 2001 group counseling sessions, Applicant was found to meet the diagnostic criteria for alcohol dependence by a licensed mental health counselor. Although he was found to be proactive in treatment and intervention growth, his attendance was deemed to be inconsistent. He indicated during the treatment program that he had made alcoholics anonymous (AA) attendance a priority. His prognosis at discharge was found to be guarded because of his long-standing history of recovery and relapse.

Applicant was interviewed by a special agent from the Defense Security Service on November 5, 2002. He stated at that time that his use of alcohol since December 2001 consisted of consuming two to three beers over the weekend. He also stated he considered himself an alcoholic. In his SOR response, Applicant stated he has excluded alcohol from his life since January 2004.

Applicant was required to obtain a substance abuse evaluation as part of his security clearance application. During the course of the evaluation, dated December 15, 2003, Applicant disclosed he had quit drinking alcohol for a period of seven to eight months following his 2001 DUI arrest, and again had quit drinking in early 2003 when the security clearance process began. Applicant was again found to meet the diagnostic criteria for alcohol dependence, as specifically evidenced by his continued use of alcohol following the 2001 DUI conviction. The substance abuse evaluation was approved by a doctor of psychology.

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, and Guideline J, pertaining to criminal conduct, with their respective DC and MC, are 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.⁽²⁾ The government has the burden of proving controverted facts.⁽³⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁴⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽⁵⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁶⁾ 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.⁽⁷⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁸⁾

No one has a right to a security clearance⁽⁹⁾ and "the clearly consistent standard indicates that

security clearance determinations should err, if they must, on the side of denials."⁽¹⁰⁾ Any reasonable doubt about whether an applicant should be

allowed access to classified information must be resolved in favor of protecting national security. ⁽¹¹⁾

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 committed five alcohol related offenses between 1984 and 2000, and has twice been diagnosed as alcohol dependent. 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 3: *Diagnosis by a credentialed medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence*; and DC 5: *Habitual or binge consumption of alcohol to the point of impaired judgment* apply in this case.

Applicant, has been ordered to attend alcohol treatment programs on at least two occasions, the last time following his 2001 DUI conviction. He was found to meet the diagnostic criteria for alcohol dependence in 2001, and indicated he set AA attendance as one of his priorities. Still he continued to consume alcohol, even if at a reduced level, until at least the end of 2003 or the beginning of 2004, depending on which statement is accepted.

Applicant has provided no evidence to warrant finding he is dealing with his alcohol problem, such as current attendance at AA meetings, other than his self-serving statements that he has stopped drinking. The significance of Applicant's statements that he stopped drinking in November 2003 or January 2004 must be weighed against his acknowledged return to alcohol consumption following his seven or eight months of abstinence following his 2001 DUI conviction. Finally, as recently as December 2003, Applicant was again diagnosed as meeting the criteria of alcohol dependence by a psychologist. No mitigating condition exists, and Guideline G is decided against Applicant.

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. Willingness to abide by rules is an essential qualification for eligibility for access to the Nation's secrets. 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.

Applicant has been convicted of alcohol related offenses on at four occasions since 1984, and had another dismissed. DC 1: *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*; and DC 2: *A single serious crime or multiple lesser offenses* apply in this case.

The only two mitigating conditions that possibly apply in this case are MC 1: *The criminal behavior was not recent*; and MC 6: *There is clear evidence of successful rehabilitation*. However, considering that all Applicant's criminal behavior arose from his use of alcohol, neither of those conditions are applicable. He admits he continued to use alcohol until relatively recently, despite the diagnosis of alcohol dependence, and his own acknowledgment that he is an alcoholic and that attendance at AA meetings should be a priority for him. Based upon his 16-year track record of recurring criminal conduct, and his failure to present any evidence, other than his claim of abstinence, that he is effectively dealing with his alcohol problem, it is impossible to find that either mitigating condition applies. Guideline J 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

Subparagraph f: Against the Applicant

Subparagraph g: Against the Applicant

SOR ¶ 2-Guideline J: Against the Applicant

Subparagraph a: 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. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
4. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
5. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
6. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
7. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
8. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
9. *Egan*, 484 U.S. at 528, 531.
10. *Id* at 531.
11. *Egan*, Executive Order 10865, and the Directive.