

DATE: December 14, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-17343

ECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Twenty-seven-year-old Applicant's alcohol consumption resulted in one arrest for malicious mischief and criminal trespass in September 1996; an arrest for DUI in October 1996; a citation for open container or consuming alcohol in a public place in July 2002; and an arrest for DUI in January 2003, all followed up by court action. Applicant denied being intoxicated during any of the incidents, yet he consumed 36 to 48 ounces of beer in September 1996; 80 ounces of beer in October 1996; and a minimum of three mixed drinks in January 2003. His self-reported alcohol consumption to alcohol counselors in 1997 and 2003 was substantially minimized and less than complete, resulting in erroneous favorable alcohol assessments. Clearance is denied.

STATEMENT OF THE CASE

On April 5, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to 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 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, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn, written statement, dated April 21, 2004, Applicant responded to the allegations in the SOR and requested a hearing. The case was assigned to me on June 22, 2004. A notice of hearing was issued that same date, and the hearing was held on July 15, 2004. During the hearing, six Government exhibits and the testimony of one Applicant witness (the Applicant), were received. The transcript (Tr.) was received on July 28, 2004.

FINDINGS OF FACT

Applicant has admitted all of the factual allegations pertaining to alcohol under Guideline G (subparagraphs 1.a. through

1.d.). Those admissions are incorporated herein as findings of fact. He failed to address the allegations pertaining to criminal activity or personal conduct under Guidelines J and E, respectively, and those allegations will be considered denied.

After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 27-year-old employee of a defense contractor seeking to retain a security clearance which was previously granted to him in November 1997.

Applicant was an alcohol abuser. He commenced consuming alcohol when he was 14-years-old, (1) but that early alcohol consumption was undistinguished as to quantity (up to two beers at a time) (2) and frequency (once every two months). (3) During Applicant's junior year in high school, in about 1993, (4) the frequency increased to about once a month and the quantity increased to four beers at a time. (5) That drinking pattern admittedly continued until at least May 2003, (6) and probably until about February 2004. (7) In September 1996, when he was 20-years-old, Applicant's alcohol consumption became something of a problem and his involvement in alcohol-related incidents resulted in arrests.

On September 22, 1996, at about 1a.m., Applicant and two rowdy friends were in a cemetery visiting the grave site of his brother who have died two years earlier. During the four-hour period before visiting the cemetery Applicant drank three or four 12-ounce beers, (8) but subsequently denied being intoxicated. (9) While at the cemetery, Applicant drove his automobile more than 50 yards from the paved area over the damp ground to the grave site, leaving deep tire tracks. (10) One of his friends, who happened to be intoxicated, fired several shots into the air drawing the attention of a nearby police officer. (11) The officer responded and apprehended Applicant and one of his friends, at gun point, while the third suspect fled the scene. (12) One weapon was found along with 10 spent casings. (13) Flowers from the surrounding grave sites had been removed from their holders and scattered about. (14) Applicant was arrested and charged with (1) malicious mischief, 3rd degree, and (2) criminal trespass, 2nd degree. The first charge was eventually dismissed with prejudice, (15) and the other charge was deferred pending completion of an alcohol assessment. (16)

On October 6, 1996, after consuming two 40-ounce beers, and having a dispute with his girlfriend, Applicant was stopped by the police for weaving while driving home. (17) He was administered two breath tests, both of which registered below the legal limit, but because he was below the legal drinking age, he was charged with driving under the influence (DUI). (18) Two months later, the charge was amended to minor operating vehicle after consuming alcohol. (19) Applicant was eventually found guilty to the amended charge and sentenced to serve 90 days in jail (suspended), fined \$1,000.00 (\$400.00 suspended), and ordered to undergo an alcohol assessment within 60 days. (20)

In May 1997, Applicant underwent a one-day "complete alcohol and drug evaluation" (21) at a state approved DWI client assessment service pursuant to the court mandate. (22) The counselor, a CDS III, the exact significance of which was not specified, opined Applicant has "no significant problem with alcohol," (23) but recommended he enroll in an alcohol and drug information school. (24) He was also advised to abstain, (25) but resumed his consumption of alcohol over a period of months. (26)

In July 2002, while assisting someone to board a boat he was on, Applicant stepped off the boat and onto the pier while holding a cup of beer in his hand. (27) He was cited with open container or consuming alcohol in a public place, (28) and eventually fined \$95.00. (29)

On January 3, 2003, after consuming a "minimum" of three mixed drinks (30) over a four to six hour period at a sports bar, Applicant drove towards his home and was stopped by the police for speeding. (31) He was first administered a field sobriety test and then a Breathalyzer test. (32) When he purportedly experienced asthma-related respiratory difficulties

while participating in the Breathalyzer test, he was offered the opportunity to submit a blood sample. He declined to do so. (33) Applicant was charged with DUI. (34) Upon his plea, Applicant was convicted as charged and sentenced to imprisonment for 365 days (364 days suspended), fined \$2,000.00 (\$1,500.00 suspended), placed on five years probation, ordered to pay restitution, and directed to attend a DUI victim's panel and undergo an alcohol assessment. (35) He attended the DUI victim's panel in March 2003, underwent an alcohol assessment in April 2003, and completed the eight hours of alcohol and other drug information school in May 2003.

As noted above, Applicant underwent a one-day assessment for chemical abuse/dependence consisting of a battery of self-assessment tests, a drug abuse history, and a clinical interview at a state approved DWI client assessment service pursuant to the court mandate. The counselor, a CDP, the exact significance of which was not specified, opined there was insufficient evidence of substance abuse/dependence and Applicant has "no significant problem with alcohol, (36) but recommended he enroll in an alcohol and drug information school. (37) He was also advised to abstain, (38) but chose not to do so, and again resumed his consumption of alcohol over a period of months. (39)

Applicant denies ever having an alcohol problem. (40) Nevertheless, in an effort to change his life, Applicant contends that about five months prior to the hearing (which I calculate to be February), he stopped drinking alcohol. (41) That contention differs from his sworn statement of April 21, 2004, when he acknowledged his alcohol consumption to be "very minimal." (42) He claims he has no plans to resume the consumption of alcohol. (43)

Applicant has been employed by the same government contractor since December 2001, and is currently serving as a team leader, assistant foreman, and lead painter. His area manager considers Applicant to be reliable, trustworthy, and honest, and notes Applicant was only one of two recipients of outstanding achievement awards presented by the company in the past two and one-half years. Prior to his present position he held a number of positions as a laborer or painter for varying periods of time.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision set forth in Section E2.2., Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (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.

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:

Alcohol Consumption - Guideline G: 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.

Criminal Conduct - Guideline J: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Personal Conduct - Guideline E: 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, as well as those which could mitigate security concerns, pertaining to the adjudicative guidelines are set forth and discussed in the Conclusions section below.

Since the protection of the national security is the paramount consideration, the final decision in each case must be arrived at by applying the "clearly consistent with the interests of national security" standard⁽⁴⁴⁾ or "clearly consistent with the national interest" standard. For the purposes herein, despite the different language in each, I have concluded those standards are one and the same. In reaching this Decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the government to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. Because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions are predictive in nature and must often address potential, rather than actual, risk of compromise of classified information.

Finally, Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides that industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, an assessment of credibility, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to each allegation set forth in the SOR:

The government has established its case under Guideline G. Commencing at some point in 1996, and continuing periodically until at least January 2003, Applicant exhibited a pattern of questionable judgment, irresponsibility, and immature behavior by abusing alcohol. His alcohol consumption resulted in one arrest for malicious mischief, 3rd degree, and criminal trespass, 2nd degree, in September 1996; an arrest for DUI in October 1996; a citation for open container or consuming alcohol in a public place in July 2002; and an arrest for DUI in January 2003, followed up by court action. These incidents and the conduct which contributed to the incidents fall within Alcohol Consumption Disqualifying Condition (AC DC) 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*) and AC DC

E2.A7.1.2.5. (*habitual or binge consumption of alcohol to the point of impaired judgment*). However, because there is no evidence that alcohol had any impact on his job performance and activities, there does not appear to be any justification to apply AC DC E2.A7.1.2.2. (*alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job*).

Following two of the incidents, the courts in 1997 and 2003 mandated he undergo alcohol assessments or evaluations. He did so. After furnishing self-assessments and undergoing several tests and interviews, in both instances, the counselors opined Applicant has "no significant problem with alcohol," but recommended he enroll in an alcohol and drug information school. He was also advised to abstain, but chose not to do so and resumed his consumption of alcohol over a period of months. The favorable alcohol assessments or evaluations conducted by the CDS III counselor and the CDP counselor indicate Applicant's situation does not fall within AC DC E2.A7.1.2.3. (*diagnosis by a credentialed medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence*) or AC DC E2.A7.1.2.4. (*evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program*).

I am not convinced of the accuracy of those assessments and evaluations, especially where they were based substantially on self-assessments and information furnished by Applicant. Furthermore, I believe Applicant continues to be in denial as to his "problem," continues to minimize the characterization of his use of alcohol consumption, both as to quantity and frequency, and seemingly maximizes his period of abstinence. Applicant has denied being intoxicated during any of the four alcohol-related incidents, yet he consumed three or four 12-ounce beers--36 to 48 ounces--in September 1996; two 40-ounce beers--80 ounces or over one-half of a gallon--in October 1996; and a minimum of three mixed drinks in January 2003. It remains unclear how much beer he consumed when he stepped onto the pier in July 2002. His self-reported alcohol consumption to the counselors in 1997 and 2003 was substantially minimized. In 1997, he said he had consumed one 40-ounce beer and was stopped by the police because he was tired and weaving in October 1996, ⁽⁴⁵⁾ when, in fact, he had consumed twice that quantity. He totally omitted the alcohol-related incident of September 1996. In 2003, he reported only one alcohol-related incident, the 2003 DUI, ⁽⁴⁶⁾ but omitted the alcohol-related incidents of September 1996, October 1996, and July 2002. Likewise, when reporting quantities of alcohol consumed, he stated he only drank two to three beers at a sitting, three times per year, ⁽⁴⁷⁾ but never explained that the quantities were huge, consisting at times of 36 to 80 ounces at a time. Considering the number of skewered facts, along with the limited amount of honest facts, presented to the counselors during those alcohol assessments, their assessments are essentially worthless in this instance.

As indicated above, Applicant's versions of the length of his abstinence are inconsistent. After consuming relatively large quantities of alcohol from 1996 to at least February 2004, and continuing his consumption of alcohol despite being advised to abstain on two different occasions, in 1997 and 2003, he continued to drink. In April 2004 he conceded his alcohol consumption was still "very minimal," but during the hearing in July 2004 he contended he had abstained for five months. Those two statements are inconsistent and incompatible leaving me to wonder if there is any truth to his assertion of abstinence.

Complete honesty and candor on the part of applicants for access to classified information is essential to make an accurate, meaningful security clearance determination. Without all the relevant and material facts, a clearance decision is susceptible to error, thus jeopardizing the nation's security. The nature of Applicant's actions and activities, and the minimizing of the seriousness of same, along with the various inconsistencies, therefore pose a serious potential risk to the nation's security precautions which go to the very heart of the nation's security system. An applicant's responsibilities associated with the granting of a security clearance are considerable in terms of protecting the national security and in maintaining appropriate personal conduct. Along with the responsibilities is accountability. In this instance, Applicant is now accountable for those past actions and activities.

There may be some recent changes in Applicant's alcohol consumption, and he may have, in fact, decided to finally abstain. Those purported changes, whether they occurred in February 2004 or thereafter, would fall within Alcohol Consumption Mitigating Condition (AC MC) E2.A7.1.3.3. (*positive changes in behavior supportive of sobriety*). However, because the most recent incident occurred in 2003, I believe that is too recent to apply AC MC E2.A7.1.3.2. (*the problem occurred a number of years ago and there is no indication of a recent problem*).

Under the evidence presented, I possess little confidence that Applicant's alcohol abuse will not recur. Considering the length of the period of alcohol abuse--seven years, from 1996 until 2003--I believe a longer period of proven abstinence should be in place before such confidence can be supported. Moreover, Applicant's consistent denial of the existence of an alcohol problem despite the four alcohol-related incidents, as well as his minimization of alcohol consumption, and his lack of candor to both alcohol treatment counselors, indicate Applicant does not yet have a full understanding of the situation. Even with new purported intentions and an unspecified period of abstinence, more time is simply necessary.

I do not take this position lightly, but based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my evaluation of the evidence, and my application of the pertinent factors under the Adjudicative Process, I find that Applicant has failed to mitigate or overcome the government's case. The evidence leaves me with grave questions and doubts as to Applicant's continued security eligibility and suitability. Accordingly, allegations 1.a. through 1.d. of the SOR are concluded against Applicant

The government has established its case under Guideline J. Although Applicant's conduct was predominately alcohol-related, it was also criminal, and in this regard also falls within Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1. (*allegations or admissions of criminal conduct, regardless of whether the person was formally charged*) and CC DC E2.A10.1.2.2. (*a single serious crime or multiple lesser offenses*). His repeated actions negates the potential application of Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.2. (*the crime was an isolated incident*). As the most recent incident occurred in 2003, CC MC E2.A10.1.3.1. (*the criminal behavior was not recent*) does not apply. Consequently, I conclude that Applicant has failed to mitigate or overcome the government's case. Accordingly, allegation 2.a. of the SOR, as it pertains to the allegations in paragraph 1., is concluded against Applicant.

The government has established its case under Guideline E. As noted above, Applicant's conduct was predominately alcohol-related, but also criminal. And, because it involved questionable judgment, untrustworthiness, and unreliability, personal conduct becomes an issue, however redundant. Applicant's repeated violations of the law fall within Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.5. (*a pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency*). In this instance, we are dealing solely with violations of the law. No mitigating conditions appear to apply. I conclude that Applicant has failed to mitigate or overcome the government's case. Accordingly, allegation 3.a. of the SOR, as it pertains to the allegations in paragraph 1., is concluded against Applicant.

For the reasons stated, I conclude Applicant is not eligible for access to classified information.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1., Guideline G: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

Subparagraph 1.d.: Against the Applicant

Paragraph 2., Guideline J: AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

Paragraph 3., Guideline E: AGAINST THE APPLICANT

Subparagraph 2.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.

Robert Robinson Gales

Chief Administrative Judge

1. Government Exhibit 2 (Statement, dated May 27, 2003), at 7.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. Tr., at 36-37.
8. Government Exhibit 2, *supra* note 1, at 1.
9. *Id.*
10. Government Exhibit 3 (Police Incident Report, dated September 22, 1996), at 8.
11. Government Exhibit 2, *supra* note 8, at 2.
12. Government Exhibit 3, *supra* note 10, at 5-6.
13. *Id.*, at 7.
14. *Id.*, at 8.
15. Government Exhibit 4 (District Court Docket, dated May 19, 2003), at 1.
16. *Id.*
17. Government Exhibit 2, *supra* note 8, at 2.
18. *Id.*, at 2-3.
19. Government Exhibit 4, *supra* note 15, at 3.
20. *Id.*, at 4.
21. Government Exhibit 6 (DWI/PC Assessment Report, dated May 7, 1997), at 2.
22. *Id.*, at 1.
23. *Id.*

24. *Id.*, at 2.

25. Tr., at 41.

26. Tr., at 41.

27. Government Exhibit 2, *supra* note 8, at 3.

28. Government Exhibit 4, *supra* note 15, at 8.

29. *Id.*

30. Response to SOR, dated April 21, 2004, at 3.

31. Government Exhibit 2, *supra* note 8, at 4.

32. *Id.*

33. *Id.*

34. *Id.*

35. Government Exhibit 4, *supra* note 15, at 6.

36. Government Exhibit 5 (Treatment Center Evaluation Report, dated April 7, 2003), at 2-3.

37. *Id.*, at 2.

38. Tr., at 42.

39. Tr., at 42.

40. Tr., at 37; Government Exhibit 2, *supra* note 8, at 8.

41. Tr., at 37.

42. Response to SOR, dated April 21, 2004, at 3.

43. Tr., at 37.

44. Exec. Or. 12968, "*Access to Classified Information*," as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995, and further modified by memorandum, dated November 10, 1998. However, the Directive, as amended by Change 4, dated April 20, 1999, uses both "clearly consistent with the national interest" (Sec. 2.3.; Sec.2.5.3.; Sec. 3.2.; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.; Sec. E3.1.26.; and Sec. E3.1.27.), and "clearly consistent with the interests of national security" (Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (Enclosure 2, Sec. E2.2.2.).

45. Government Exhibit 6, *supra* note 21, at 4.

46. Government Exhibit 5, *supra* note 36, at 1.

47. *Id.*, at 2.