

DATE: October 30, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-05111

DECISION OF ADMINISTRATIVE JUDGE

MARK W. HARVEY

APPEARANCES

FOR GOVERNMENT

Lynette Andresen, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Forty-two-year-old Applicant was convicted of driving while under the influence of alcohol in 2003, and his probation was vacated due to consumption of alcohol in 2005. Applicant did not provide any evidence of rehabilitative efforts and failed to mitigate security concerns about his criminal conduct and alcohol consumption. Clearance is denied.

STATEMENT OF THE CASE

On November 26, 2003, Applicant applied for a security clearance and submitted a Security Clearance Application (SF 86).⁽¹⁾ On October 28, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, 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.⁽²⁾ The SOR alleges security concerns under Guideline J (Criminal Conduct) and Guideline G (Alcohol Consumption). 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 him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.⁽³⁾

In a notarized answer dated November 28, 2005, Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing.⁽⁴⁾ A complete copy of the file of relevant material (FORM), dated June 23, 2006, was provided to him on July 5, 2006, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation.⁽⁵⁾ Any such submissions were due by August 4, 2006.⁽⁶⁾ Applicant did not provide additional materials in response to the FORM. The case was assigned to me on October 12, 2006.

FINDINGS OF FACT

As to the factual allegations under Guidelines J and G, Applicant admitted all the SOR allegations.⁽⁷⁾ His admissions are incorporated herein as findings of fact. In regard to allegations under SOR ¶¶ 1.a. and 2.a., on November 30, 2003, Applicant was arrested and charged with driving while intoxicated. On May 20, 2004, he was convicted and sentenced to 180 days' confinement (suspended), 18 months' probation, a fine of \$1,271.00, and 49 hours of community service.⁽⁸⁾ For allegations under SOR ¶¶ 1.b. and 2.a., Applicant's probation was revoked because he consumed alcohol on February 15, 2005. He was sentenced to 30 days' confinement, a fine of \$1,000.00, and his driver's license was suspended for 180 days. He served 15 days' confinement. After a complete and thorough review of the evidence of record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 42-year-old⁽⁹⁾ employee of a defense contractor. From 1988 to 1990, he attended college, and was awarded an associates degree.⁽¹⁰⁾ He was in Army from 1982 to 2002, and is now retired from the military.⁽¹¹⁾ He married in 1983. His wife is a citizen of South Korea, and has registered as an alien.⁽¹²⁾ She intends to apply to become a United States citizen.⁽¹³⁾ Applicant received a secret clearance from the Defense Department in 1984.⁽¹⁴⁾ He is seeking to obtain or continue a security clearance.

On August 3, 2004, a Special Agent of the Defense Security Service (DSS) interviewed Applicant.⁽¹⁵⁾ His answers were consistent with his response to the SOR, except he added some information pertaining to his arrest and conviction for driving while intoxicated on November 30, 2003. He stated that he drank eight or ten cans of beer during a six-hour golf outing. He was driving when stopped by the police. He failed a roadside sobriety test and was arrested.

Applicant attended an Alcohol Anonymous orientation for one day.⁽¹⁶⁾ He determined that no further alcohol counseling or treatment was necessary. During his DSS interview on August 3, 2004, he stated:

I never considered myself to have any alcohol related problems and I was never recommended for or ordered to seek treatment for my use of alcohol. Since my arrest, I have quit drinking as I learned my lesson well. For many years as a Non-Commissioned Officer of the US Army, I preached to my soldiers about the evils of drinking and driving. Then to my dismay, I went out and got arrested for the same thing. I can guarantee this will never be repeated in my life time.

Applicant did not provide details about the circumstances for his subsequent revocation of his probation on February 15, 2005, but in response to a security interrogatory, he said his probation was revoked for "violation of conditions (consumption of alcohol)," and that he was confined from 15 to 26 February 2005.⁽¹⁷⁾

POLICIES

In an evaluation of an applicant's security suitability, an administrative judge must consider Enclosure 2 of the Directive, which sets forth adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into Disqualifying Conditions (DC) and Mitigating Conditions (MC), which are used to determine an applicant's eligibility for access to classified information.

These adjudicative guidelines are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, an administrative judge should apply these guidelines in conjunction with the factors listed in the adjudicative process provision in Section E2.2., Enclosure 2, of the Directive. An administrative judge's overarching adjudicative goal is a fair, impartial and common sense decision.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," an administrative judge should consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision. Specifically, an administrative judge should consider the nine adjudicative process factors listed at E2.2.1 of the Directive: (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:

Criminal Conduct - Guideline J: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. Directive ¶ E2.A10.1.1.

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. Directive ¶ E2.A7.1.1.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, pertaining to this adjudicative guideline 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 is arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security." 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 government initially has the burden of producing evidence 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 initial burden, applicant then has the burden of persuasion, that is to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the government's case, and ultimately to demonstrate it is clearly consistent with the national interest to grant or continue applicant's clearance. [\(18\)](#)

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. It is 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 entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

The scope of an administrative judge's decision is limited. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides 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 that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

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

Guideline J (Criminal Conduct)

The government has met its initial burden under Guideline J. Applicant's driving while intoxicated on November 30, 2003 is a criminal offense that is of concern, especially in light of his desire to have access to the nation's secrets. The Directive clearly expresses the government's concern regarding criminal conduct in provision E2.A10.1.1.1. (*A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness*). A person who is involved in criminal activity may also be irresponsible or careless in his or her duty to protect classified information.

Applicant's driving while intoxicated on November 30, 2003 gives rise to Criminal Conduct Disqualifying Condition (CC DC) E2.A6.1.2.1. (*allegations or admission of criminal conduct, regardless of whether the person was formally charged*). On February 15, 2005, in violation of the terms of his probation, Applicant consumed alcohol, and was sentenced to 30 days' confinement, a fine of \$1,000.00, and his driver's license was suspended for 180 days. He served 15 days' confinement. Applicant's conduct, which resulted in a probation violation is not "criminal conduct," but it is significant because it is another negative event involving the judicial system, creating additional doubt concerning his judgment, reliability and trustworthiness.

Once the government produced substantial evidence of a disqualifying condition, the burden shifted to Applicant, "to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the government. ⁽¹⁹⁾

I considered Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1. (*the criminal behavior was not recent*), CC MC E2.A10.1.3.2. (*the crime was an isolated incident*), CC MC E2.A10.1.3.3. (*the person was pressured or coerced into committing the act and those pressures are no longer present in that person's life*), CC MC E2.A10.1.3.4. (*the person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*), and CC MC E2.A10.1.3.5. (*acquittal*). However, none of these five mitigating conditions applied because there were two incidents-in 2003 and 2005. The two incidents are recent. They are within close temporal proximity to each other, and accordingly are not isolated. Applicant's decision to drink alcohol and drive was voluntary, he was not influenced by others, and he was not pressured or coerced. There is no evidence about amelioration of the factors leading to the incidents. Applicant pleaded no contest and was found guilty. ⁽²⁰⁾ None of the mitigating conditions are applicable to the conduct alleged in SOR ¶¶ 1.a. and 1.b.

Guideline G (Alcohol Consumption)

The government has met its initial burden under Guideline G. Examination of Applicant's actions reveals conduct involving excessive alcohol consumption. The Directive clearly expresses the government's concern regarding excessive alcohol consumption in provision E2.A7.1.1. (*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*). Excessive alcohol consumption could indicate that the Applicant may negligently fail to properly safeguard classified information. Applicant's driving under the influence of alcohol and his probation violation for alcohol consumption are actions falling 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*).

I considered Alcohol Consumption Mitigating Condition (AC MC) E2.A7.1.3.1. (*the alcohol-related incidents do not indicate a pattern*), AC MC E2.A7.1.3.2. (*the problem occurred a number of years ago and there is no indication of a recent problem*), and AC MC E2.A7.1.3.3. (*positive changes supportive of sobriety*). However, none of these mitigating conditions applied because there were two incidents (in 2003 and 2005). The two incidents constitute a pattern because they are in close temporal proximity to each other. They are recent. There is no evidence about reduction of factors leading to the incidents, or facts supporting a change in Applicant's life circumstances, counseling or other rehabilitative measures supportive of sobriety. No mitigating conditions are applicable to the conduct alleged in SOR ¶ 2.a.

"Whole Person" Analysis

In addition to the enumerated disqualifying and mitigating conditions, I have considered the general adjudicative guidelines related to the whole person concept under Directive provision E2.2.1. As noted above, Applicant's history of alcohol abuse, and unwillingness to maintain sobriety, resulting in judicial intervention, confinement, fines and loss of his driver's license are sufficiently serious to be a security concern. E2.2.1.1. His actions were knowledgeable and voluntary. E2.2.1.2. He is 42 years old, sufficiently mature to be fully responsible for his conduct. E2.2.1.4. The likelihood of recurrence cannot yet be determined because insufficient time has passed since the last alcohol-related incident and the corroborating evidence of a change is sparse. E2.2.1.9. I also considered his twenty years of honorable

military service, including the awards listed on his DD Form 214, as well as the absence of evidence of prior security violations. After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the security concerns pertaining to criminal conduct and alcohol consumption.

The evidence leaves me with grave questions and doubts as to Applicant's security eligibility and suitability. I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"⁽²¹⁾ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under Enclosure 2 of the Directive. Applicant has failed to mitigate or overcome the government's case.

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 J: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Paragraph 2., Guideline G: AGAINST APPLICANT

Subparagraph 2.a.: Against 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.

Mark W. Harvey

Administrative Judge

1. Item 4 (Electronic Security Clearance Application (SF 86)), is dated November 26, 2003 on page 1 and on the signature page. Applicant's signature on the last page of Item 4 is accompanied by a warning about the application of 18 U.S.C. Sec. 1001 for false statements.
2. Item 1 (Statement of Reasons (SOR), dated October 28, 2005) at 1-2.
3. *Id.*
4. Item 3 (Applicant's response to SOR, notarized November 28, 2005).
5. Defense Office of Hearings and Appeals (DOHA) transmittal letter, dated June 23, 2006.
6. *Id.* The DOHA transmittal letter informed Applicant that he had 30 days after receipt to submit information.
7. Item 3, *supra* note 4, is the source for all factual assertions in this paragraph, except as specifically indicated in note 8, *infra*.
8. Item 6 (Applicant's statement to a Special Agent of the Defense Security Service, dated August 3, 2004) at 2, provided the date his sentence was adjudged.

9. Item 4, *supra* note 1, question 1., at 1.
10. *Id.*, question 5., at 2.
11. *Id.*, question 11., at 4; Item 7 at 4.
12. *Id.*, question 10., at 4; Item 6 (Applicant's statement to a Special Agent of the Defense Security Service, dated August 3, 2004) at 3.
13. *Id.*
14. Item 4, *supra* note 1, question 31., at 7.
15. Item 6 (Applicant's statement to a Special Agent of the Defense Security Service, dated August 3, 2004) at 1. Item 6 at page 1 is the source for this paragraph.
16. *Id.* at 2 is the source for this paragraph.
17. Item 7 (response to interrogatory, dated October 6, 2005) at 3.
18. "The Administrative Judge [] consider[s] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).
19. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).
20. Item 6 (Applicant's statement to a Special Agent of the Defense Security Service, dated August 3, 2004) at 2.
21. *See* ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).