

DATE: September 11, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-05071

ECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Ray T. Blank, Jr., Esquire, Department Counsel

FOR APPLICANT

Joseph Egan, Jr., Esquire

SYNOPSIS

Applicant was convicted of alcohol-related driving offenses in 1991 and 1998. He has mitigated the security concern that existed in this case. Clearance is granted.

STATEMENT OF THE CASE

On April 21, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was 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 answers to the SOR that were received by DOHA on May 19, 2005, and June 13, 2005, admitted all SOR allegations, and requested a hearing.

The case was assigned to another administrative judge on September 22, 2005, and reassigned to me on March 15, 2006, due to regional rotations. ⁽²⁾ A notice of hearing was issued on May 30, 2006, scheduling the hearing for June 14, 2006. The hearing was conducted as scheduled. The government submitted 11 documentary exhibits that were marked as Government Exhibits (GE) 1-11. GE 1-6 and GE 8-10 were admitted into the record without objection. Applicant's objection to GE 7 was overruled and it was admitted into the record. Applicant's objection to GE 11 was sustained. Applicant testified and submitted two documentary exhibits that were marked as Applicant's Exhibits (AE) 1 and 2, and admitted into the record without objection. The transcript was received on June 22, 2006.

FINDINGS OF FACT

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

Applicant is a 55-year-old man who, with the exception of several months in late 1997, has been employed as a carpenter by defense contractors since October 1996. He completed apprentice carpenter training in about 1980 and has worked as a journeyman carpenter since. He has been married since December 1976, and has an adult stepson and an adult daughter. He has lived in the same home since June 1993 that he purchased without a mortgage.

Applicant is a high school graduate. He was drafted into the U. S. Army when he was 19 years old, and served a combat tour in Viet Nam as an infantryman where he earned a Bronze Star, an Army Commendation Medal, an Air Medal, and the Combat Infantryman's Badge. He received one nonjudicial punishment for missing a formation while in the service. He attained the rank of corporal (paygrade E-4), and was awarded an honorable discharge.

Applicant was charged with Driving Under the Influence of Alcohol (DUI) in 1971. He testified at the hearing in this case he had not consumed any alcohol before being arrested on that occasion. Considering his appearance, demeanor, manner of testifying, and the subject matter of his testimony, that testimony is credible. On the advice of his attorney, he pled guilty to reckless driving and was fined.

Applicant was charged with DUI in August 1991 after he attended a work-related party and admittedly consumed too much alcohol. He pled nolo contendere to the DUI charge and was convicted. He was sentenced to six months probation, ordered to pay fines and court costs totaling \$455.50, and ordered to enroll in alcohol education and victim awareness programs. He was also ordered to serve 120 days in jail with the entire jail sentence being suspended.

Applicant was again charged with DUI in October 1997 after consuming beer with a friend. He pled nolo contendere and was convicted of this charge in September 1998. Applicant was sentenced to 12 months probation, ordered to pay fines and court costs totaling \$806.00, and was directed to perform 30 hours community service (converted to an additional \$300.00 fine). He was also required to enroll in alcohol education and victim awareness programs. Applicant successfully completed all conditions of his probationary sentence and received an early termination of probation after only six months.

Applicant attended an alcohol treatment program at a family counseling center for approximately two weeks as a result of his 1998 DUI conviction. While the SOR alleges he was diagnosed as alcohol dependent at that time, the record does not contain any evidence to support that allegation. Applicant stated in his response to the SOR that he was unaware of any such diagnosis having been made.

Applicant was again charged with DUI in July 28, 2000. He denies he was intoxicated at the time of this arrest. Applicant pled not guilty to the charge and was tried by a jury. The jury heard the testimony of the arresting officer, viewed a videotape made of Applicant at the time of the arrest and during the administration of a field sobriety test, and was able to hear a tape recording of portions of the conversation Applicant had with the arresting officer. The jury found Applicant not guilty after approximately 15 minutes of deliberation. The only other material evidence of record concerning this incident, the arresting officer's police report, does not provide sufficient evidence to disagree with the jury's verdict.

AE 1 and AE 2 establish that in addition to the July 28, 2000 DUI charge, Applicant was also mistakenly charged at the same time under an arrest warrant that had been issued for an individual with a similar name. The reason provided by the sheriff's office for mistakenly arresting Applicant on the warrant was because "the warrant was served by the Jail without proper verification." (AE 2)

Applicant has not been arrested or charged with any offense since July 2000. The last time he was intoxicated was in approximately 1998. His consumption of alcohol for the past couple of years has been limited to about a single glass of wine or beer on those infrequent occasions when he goes out to dinner with his wife

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 (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 was convicted of alcohol-related driving offenses that occurred in 1991 and 1997. He received court-ordered treatment as a consequence of the 1997 arrest. Disqualifying Condition (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* applies.

The record fails to establish Applicant drove a vehicle while intoxicated as charged in July 2000. Further, his testimony that he was not intoxicated at that time is credible. His alcohol-related convictions were separated by six years and the last conviction occurred eight years ago. He credibly testified he has not been intoxicated since approximately 1998 and that his alcohol consumption for the past few years has been limited to those monthly or so occasions when he goes out to dinner with his wife. Mitigating Conditions (MC) 1: *The alcohol related incidents do not indicate a pattern*; MC 2: *The problem occurred a number of years ago and there is no indication of a recent problem* and MC 3: *Positive changes in behavior supportive of sobriety* apply.

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, Applicant has mitigated the security concern caused by his alcohol consumption. He has overcome the case against him and satisfied his ultimate burden of persuasion. It is clearly consistent with the national interest to grant Applicant a security clearance. Guideline G is decided for Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline G: For Applicant

Subparagraphs a-g: For Applicant

DECISION

In light of all the circumstances 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.

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. The originally assigned administrative judge had scheduled a hearing for December 13, 2005, but granted Applicant's motion for a continuance without objection from the government. The record indicates the chief administrative judge attempted to schedule a hearing of this case in March 2006, but was unsuccessful because Applicant and his attorney were unavailable.
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.