

DATE: November 8, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-06549

DECISION OF ADMINISTRATIVE JUDGE

MARY E. HENRY

APPEARANCES

FOR GOVERNMENT

Nichole Noel, Esq., Department Counsel

FOR APPLICANT

Mark Zaid, Esq.

SYNOPSIS

Applicant, a 61-year-old systems analyst, had one job-related drinking incident in 2001 and one DWI in 2003. Although he has twice stopped drinking, Applicant continues to drink at a lower level of consumption. Applicant has not mitigated the government's security concerns regarding his alcohol consumption. Clearance is denied.

STATEMENT OF THE CASE

On May 9, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial 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. Specifically, the SOR set forth security concerns arising under Guideline G, Alcohol Consumption, of the Directive. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On June 7, 2005, Applicant submitted a notarized response to the allegations. He requested a hearing. This matter was assigned to me on August 1, 2005. A first notice of hearing was issued on August 18, 2005, scheduling a hearing for September 14, 2005. Applicant's counsel filed a timely Motion to Reschedule the Hearing Date, which was granted by Order dated September 9, 2005. An amended notice of hearing was issued on September 13, 2005, and a hearing was held on September 26, 2005. Government Exhibits 1 through 5 were admitted into evidence. Applicant Exhibits A through J were admitted into evidence. Two witnesses testified on behalf of Applicant, who also testified. The hearing transcript was received on October 17, 2005.

FINDINGS OF FACT

Applicant admitted, with explanations, the allegations in subparagraphs 1.a through 1.g of the SOR. Those admissions are incorporated as findings of fact. After a complete review of the evidence in the record and upon due consideration, I make the following additional findings of fact:

Applicant is a 61-year-old senior systems analyst for a defense contractor.⁽²⁾ Applicant has worked for this contractor for three years.⁽³⁾ Applicant completed a security clearance application (SF 86) in July 2004.⁽⁴⁾

Applicant received a Bachelor of Science degree in 1966 and his Ph.D. in 1970 from major U.S. universities.⁽⁵⁾ He did his post-doctoral studies in Europe from 1970 through 1972.⁽⁶⁾ He began his career in aerospace in 1973.⁽⁷⁾ From 1973 through 1995, he worked for several companies.⁽⁸⁾ In 1995, he was laid off by his employer as a result of downsizing.⁽⁹⁾ From 1995 until May 2001, he ran a consulting business.⁽¹⁰⁾ In May 2001, he accepted employment with a defense contractor, which ended a few months later.⁽¹¹⁾ He began his current employment in August 2002.⁽¹²⁾

Applicant began drinking in 1990 in response to problems in his marriage.⁽¹³⁾ From this time through 1994, he regularly consumed two to five scotches when drinking.⁽¹⁴⁾ Applicant and his second wife divorced in 1994.⁽¹⁵⁾ Between 1995 and 1999, he drank two-three glasses of champagne a day, when not working, and a few glasses of alcohol in the evening.⁽¹⁶⁾ During this time, he struggled with his consulting business, and his mother and older brother, who was 59-years-old, died.⁽¹⁷⁾ In 2001, a five and one-half year relationship ended.⁽¹⁸⁾ In May 2001, he stopped drinking during the day when he started a new job.⁽¹⁹⁾ He continued drinking two to five scotches late in the day.⁽²⁰⁾ Shortly after beginning this job, he started drinking prior to the beginning of each work day.⁽²¹⁾

In August 2001, a co-worker reported to their employer the smell of alcohol on Applicant.⁽²²⁾ His employer required him to take a breathalyser test, which showed a blood alcohol level of .11%. His employer also required him to attend alcohol counseling and Alcoholics Anonymous (AA), which he did from August 2001 until May 2002.⁽²³⁾ During this time, he stopped drinking.⁽²⁴⁾ In 2002, he received the AA medallion for completing its program.⁽²⁵⁾ Within a short time after leaving AA, he resumed drinking two to five scotches a day plus two to three glasses of champagne a day on the weekends.⁽²⁶⁾

On May 29, 2003, after a day of drinking, he attempted to drive his car home.⁽²⁷⁾ He ran a red light, causing an accident.⁽²⁸⁾ The police arrived and gave him a field sobriety test, which he failed.⁽²⁹⁾ His breathalyser test results showed a blood-alcohol content of .29%.⁽³⁰⁾ The police charged him with driving while intoxicated (DWI).⁽³¹⁾ In court in August 2003, he pled no contest to the charge.⁽³²⁾ The court sentenced him to four days in jail, suspended his driver's license, and fined him.⁽³³⁾ The court also directed that he participate in the state sponsored Alcohol Safety Action Program and attend counseling.⁽³⁴⁾ He complied.⁽³⁵⁾

In his 2003 signed statement, Applicant opined that his future use of alcohol depended upon the outcome of his second treatment program and the impact of his DWI on his job and security clearance.⁽³⁶⁾ He stated: "I love alcohol, because that is the only thing in life that gives me pleasure."⁽³⁷⁾ He also stated that to his knowledge, he had not been diagnosed as alcohol dependent.⁽³⁸⁾

From September 2003 until May 2004, Applicant stopped drinking.⁽³⁹⁾ During this time, he actively participated in AA counseling.⁽⁴⁰⁾ He attended 32 AA meetings, exceeding the court's requirement.⁽⁴¹⁾ He has acknowledged that he has a problem with alcohol consumption and is an alcoholic.⁽⁴²⁾ He denies that he has been diagnosed as alcohol dependent by anyone qualified to make such a diagnosis.⁽⁴³⁾ The record does not contain any evidence documenting such a diagnosis.

Applicant resumed drinking alcohol in May 2004, after deciding to discontinue with AA. He thought his security clearance had been approved.⁽⁴⁴⁾ He continues to drink at least three days a week or more.⁽⁴⁵⁾ He does not drink

anything alcoholic, including any product with an alcohol content such as mouthwash, from the time he wakes up in the morning until he has completed his work day.⁽⁴⁶⁾ He does drink after work, consuming about half of his previous level of alcohol.⁽⁴⁷⁾ He usually drinks at happy hour with co-workers, then at a restaurant or bar near home, where he also has dinner.⁽⁴⁸⁾ He does not drive when he is drinking.⁽⁴⁹⁾

His owns property and has a good credit history.⁽⁵⁰⁾ His performance evaluations are excellent and he has received commendations for his work.⁽⁵¹⁾ His co-workers describe him as an upstanding,

forthright and conscientious individual who gets the job done and is an outstanding worker.⁽⁵²⁾ He is also an amateur photographer.⁽⁵³⁾

Two co-workers testified on behalf of Applicant. They indicated he has never been drunk at work, including lunch,⁽⁵⁴⁾ never smelled of alcohol at work,⁽⁵⁵⁾ never been hung over at work,⁽⁵⁶⁾ never been late to work because of excessive drinking the previous evening,⁽⁵⁷⁾ and never out of control.⁽⁵⁸⁾ They described him as trustworthy.⁽⁵⁹⁾ They testified without qualification that he would safeguard the security of the United States.⁽⁶⁰⁾ In signed statements, his boss and another co-worker agreed with this testimony.⁽⁶¹⁾

Applicant testified at the hearing. Despite having reviewed his 2003 statement before signing, he disavowed his statement about loving alcohol. He testified that he would not have made this comment except for the duress caused by the interview process and the intimidation of the investigator.⁽⁶²⁾

POLICIES

Enclosure 2 of the Directive sets forth adjudication guidelines which must be considered in the evaluation of security suitability. 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 in Paragraph E2.2., Enclosure 2 of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Included in the guidelines are disqualifying conditions and mitigating conditions applicable to each specific guideline. In addition, each security clearance decision must be based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically, these are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 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. 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.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽⁶³⁾ The government has the burden of proving controverted facts.⁽⁶⁴⁾ The burden of proof is something less than a preponderance of the evidence.⁽⁶⁵⁾ Once the government has met its burden, the burden shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽⁶⁶⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁶⁷⁾

No one has a right to a security clearance⁽⁶⁸⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽⁶⁹⁾ Any reasonable doubt about whether an applicant

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should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information. 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." The decision to deny an individual a security clearance is not necessarily a determination as to the allegiance, loyalty, and patriotism of an applicant. ⁽⁷¹⁾ It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guideline 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.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate adjudicative factors, I conclude the following with respect to the allegations set forth in the SOR:

The government has established its case under Guideline G. Based on all the evidence, 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*), 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*), and AC DC E2.A7.1.2.5. (*Habitual or binge consumption of alcohol to the point of impaired judgment*) apply in this case. Applicant's DWI arrest and subsequent conviction qualify as an alcohol-related incident away from work. Prior to his arrest, he had reported to work smelling of alcohol, an alcohol-related work incident. Once it learned of his behavior, Applicant's employer required him to attend alcohol counseling and AA.

In addition to the above incidents, the evidence reflects a pattern of habitual drinking since 1990. After work, Applicant usually drank several scotches. His level of consumption increased on the weekends to include daytime drinking. Over time, his weekday consumption increased to include daytime drinking. Although he stopped drinking twice, he resumed his pattern of consuming alcohol in 2002 and again 2004, this time limiting his drinking to after work three or more times a week.

The government asserts that AC DC E2.A7.1.2.3. (*Diagnosis by a credentialed medical professional of alcohol abuse or alcohol dependence*) and AC DC E2.A7.1.2.6. (*Consumption of alcohol subsequent to a diagnosis of alcoholism by a credentialed medical professional and following completion of an alcohol rehabilitation program*) apply because Applicant admitted to alcohol dependence in his answer to allegations 1.d, 1.e and 1.f of the SOR. I find that these disqualifying conditions do not apply in this case. In its pleading, the government alleged alcohol dependence, but failed to allege that a credential professional made this diagnosis. Based on the government's pleading, Applicant admitted to alcohol dependence only. He did not admit to a diagnosis of alcohol dependence by a credentialed medical professional. There is no evidence of any competent diagnosis of alcoholism (or alcohol dependence) in the record.

I considered all the Alcohol Consumption Mitigating Conditions (AC MC) and conclude that none apply in this case. Applicant's alcohol consumption is recent. His DWI occurred a mere two years ago. Despite two periods of abstinence, he continues to drink regularly and at a significant level. While he need not totally abstain from the use of alcohol, his pattern of drinking many nights in local bars raises serious security concerns, particularly in light of his admission that he is an alcoholic and his past alcohol-related problems. Although he no longer drinks in the morning or drives when he intends to drink, he does not view his ongoing and regular consumption of alcohol as problematic enough to quit. In fact, once he thought that his security issues related to the DWI had been resolved, he decided he could resume drinking. His efforts to reduce the quantity of alcohol he consumes are admirable. However, his reduction in his drinking volume is not enough to mitigate the security concerns arising from his drinking.

Finally, I also considered "the whole person" concept in evaluating Applicant's risk and vulnerability in protecting our

national interests. For many years, he drank within moderation. When he began to encounter high levels of stress and problems related to his marriage and his work plus family deaths, he drank, often to excess. At this time, he does not drink at work. His performance reviews have been excellent and his co-workers consider him trustworthy. Nonetheless, his continued and frequent drinking outside of work poses a serious risk to security. He does not recognize the problems which can result from his behavior. He does not accept the fact that he has a problem with alcohol nor does he recognize the potential impact his conduct could have on protecting the national interests. I conclude that Applicant has not mitigated or overcome the government's case under Guideline G. Accordingly, for the reasons stated, I find that it is not clearly consistent with the national interest to grant a security clearance to Applicant.

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 (Alcohol Consumption): AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: For Applicant

Subparagraph 1.e: For Applicant

Subparagraph 1.f: Against Applicant

Subparagraph 1.g: For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant a security clearance for Applicant. Clearance is denied.

Mary E. Henry

Administrative Judge

1. Applicant's Answer to SOR, dated June 7, 2005, at 1-2.
2. Government Exhibit 1 (Security Clearance Application, dated July 23, 2004) at 1-2.
3. *Id.*
4. *Id.*
5. Tr. at 49.
6. *Id.* at 50.
7. *Id.* at 51.
8. *Id.* at 51-54; Government Exhibit 1, *supra* note 2, at 2-4.
9. Tr. at 54, 88; Applicant Exhibit D (Employer letter, dated January 4, 1995).

10. Tr. at 54, 88; Government Exhibit 1, *supra* note 2, at 2-3.
11. *Id.*
12. Tr. at 97.
13. *Id.* at 84, 86.
14. *Id.* at 86.
15. *Id.*; Government Exhibit 1, *supra* note 2, at 4.
16. Tr. at 86-88.
17. Government Exhibit 1, *supra* note 2, at 5; Tr. at 54, 88; Applicant Exhibit E (copies of newspaper articles) at 1.
18. Tr. at 96.
19. *Id.* at 89-90.
20. *Id.*
21. *Id.* at 91; Government Exhibit 2 (Applicant's signed statement, dated October 9, 2003) at 3.
22. Tr. at 91-92.
23. *Id.* at 60, 92.; Government Exhibit 2, *supra* note 21, at 3.
24. *Id.*; Government Exhibit 2, *supra* note 21, at 2.
25. Tr. at 60, 95.
26. *Id.* at 60, 95-96.
27. *Id.* at 99-100.
28. *Id.*
29. *Id.* at 100.
30. *Id.* at 99; Government Exhibit 4 (Certificate of blood alcohol analysis).
31. Government Exhibit 2, *supra* note 21, at 3.
32. *Id.*; Tr. at 101.
33. *Id.*; Tr. at 101-102.
34. *Id.*; Tr. at 102.
35. Government Exhibit 5 (Agreement To Participate In Alcohol Safety Action Program).
36. Government Exhibit 2, *supra* note 21, at 3.
37. *Id.*

38. Government Exhibit 2, *supra* note 21, at 3.
39. *Id.*; Tr. at 60, 66, 102.
40. Tr. at 61, 102-103.
41. *Id.* at 62, 104; Applicant Exhibit I (Summary statements for AA between October 29, 2003 and January 26, 2004).
42. Tr. at 56, 106.
43. *Id.* at 57, 58, 105-106; *see also* Government Exhibit 2, *supra* note 21, at 3.
44. *Id.* at 61, 67-68.
45. *Id.* at 70, 72-73.
46. *Id.* at 69-70, 107-108.
47. *Id.* at 71-72, 108-110.
48. *Id.* at 72-73.
49. *Id.* at 70.
50. *Id.* at 76-77; Applicant Exhibit J (credit report, dated September 17, 2005).
51. Applicant Exhibits B (Performance evaluations for the years 2002, 2003, and 2004) and C (work commendations for the years 2004 and 2005).
52. Tr. at 29, 42.
53. *Id.* at 81-82.
54. *Id.* at 27, 74.
55. *Id.* at 28.
56. *Id.*
57. *Id.* at 30, 42, 74.
58. *Id.* at 47.
59. *Id.* at 31.
60. *Id.* at 31, 44.
61. Applicant Exhibits G (letter, dated September 22, 2005) and H (letter, dated September 23, 2005)
62. Tr. at 64-65.
63. ISCR Case No. 96-0277 (July 11, 1997) at 2.
64. ISCR Case No. 97-0016 (App. Bd., December 31, 1997) at 3; Directive, Enclosure 3, ¶ E3.1.14.
65. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

66. ISCR Case No. 94-1075 (App. Bd., August 10, 1995) at 3-4; Directive, Enclosure 3, ¶ E3.1.15.

67. ISCR Case No. 93-1390 (App. Bd. Decision and Reversal Order, January 27, 1995) at 7-8; Directive, Enclosure 3, ¶ E3.1.15.

68. *Egan*, 484 U.S. at 531.

69. *Id.*

70. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.

71. Executive Order No. 10865 § 7.