

DATE: October 23, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-11869

DECISION OF ADMINISTRATIVE JUDGE

ROBERT J. TUIDER

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was convicted of three separate Driving While Under the Influence offenses following arrests in December 1999, December 2002, and January 2003. In early 2004, he was convicted of driving without a driver's license violating the sentencing terms of his December 2002 and January 2003 DUI convictions. He was sentenced to 30 days in jail. Applicant also continued to consume alcohol despite participating in Alcoholics Anonymous. Viewing the evidence as a whole, he has not mitigated alcohol consumption and criminal conduct concerns. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On March 24, 2006, DOHA issued a Statement of Reasons (SOR)-[\(1\)](#) detailing the basis for its decision-security concerns raised under Guideline G (Alcohol Consumption), and Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on May 12, 2006, and elected to have a hearing before an administrative judge.

On June 20, 2006, Department Counsel indicated he was ready to proceed, and the case was assigned to me on June 28, 2006. On August 3, 2006, DOHA issued a notice of hearing scheduling a hearing for August 23, 2006. The hearing was conducted as scheduled to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The government offered ten documents, which were admitted without objection as Government Exhibits (GE) 1 through 10. The Applicant did not offer any exhibits. DOHA received the transcript on August 31, 2006.

FINDINGS OF FACT

Applicant's admissions to all of the SOR allegations 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 43-year-old unmarried man with no dependents. In June 1981, he graduated from a technical high school. From October 1981 to June 1994, he served in the Navy in the as a nuclear trained submarine qualified electrician's mate. He was honorably discharged as an Electrician's Mate Second Class, pay grade E-5. His Navy career was progressing well until he was awarded nonjudicial punishment (NJP) in December 1991 while attached to a submarine. He was found guilty of advising subordinates to falsify propulsion plant logs and dereliction of duty. (SOR ¶ 2.a.) At NJP, he received forfeiture of \$200.00 pay per month for two months, suspended, and reduction from pay grade E-6 to E-5. He held a confidential security clearance while he was in the Navy.

Since January 2003, Applicant has been employed by a defense contractor as a shipyard test organization electrician. Tr. 33. He held an interim secret security clearance until he was laid off in May 2006 after his clearance was terminated as a result of these proceedings. Maintaining a clearance is a condition of his employment and he is eligible for rehire if granted a clearance.

In December 1999, Applicant was arrested and charged with driving under the influence (DUI). (SOR ¶¶ 1.b., Para. 2.b.) He had consumed six-to-eight beers during a three hour period at a local bar. The police administered two separate blood alcohol (BAC) tests and Applicant registered .17% and .14%. Applicant was found guilty and fined \$500.00, his driver's licence was suspended for six months, and he was ordered to complete an alcohol education program. From June 2000 to August 2000, he completed a 10-week alcohol education program. (SOR ¶ 2.c.) GE 2, GE 5.

In December 2002, Applicant was arrested and charged with illegal operation of motor vehicle under influence of alcohol, improper use-marker/license/registration, and failure to display lights. (SOR ¶¶ 1.d., 2.b.) On the night of this arrest, he had consumed about four beers at a local bar, forgotten to turn on his headlights before leaving the parking lot and was stopped by the police. The police administered a BAC and Applicant registered "slightly over the limit" (amount unknown). Before his case was adjudicated, he was arrested again in January 2003 for DUI. The December 2002 and January 2003 DUI-related arrests were consolidated. Applicant was found guilty of the DUI and the remaining two charges were nolle prossed.

In January 2003, Applicant was arrested and charged with illegal operation of motor vehicle under influence of alcohol, and failure to drive upon the right. (SOR ¶¶ 1.e., SOR 2.b.) He was drinking beer and playing darts from about 8:30 PM to 11:00 PM. When he reached for his cell phone, he crossed over the yellow line and was stopped by the police. The police administered two separate BAC tests and Applicant registered .125% and .119%. Applicant was found guilty of the DUI. Having been convicted of the December 2002 and January 2003 DUI-related offenses, Applicant was consecutively sentenced to be fined \$500.00, his driver's license was suspended for three years, and he was ordered to spend six months in jail, suspended after serving two days. He was also placed on probation for one year, and ordered to complete an alcohol assessment and education program. GE 2, GE 3, GE 4, GE 6.

In February 2004, Applicant was charged with operating unregistered motor vehicle, operating while under suspension, and operating motor vehicle without insurance. (SOR ¶ 2.a.) A fellow co-worker, who was renting a portion of Applicant's house, informed Applicant he had a personal emergency involving his mother, and requested Applicant to drive him immediately to his mother's house. Applicant agreed, and drove his boss' pick-up truck. Enroute, Applicant and his co-worker stopped at a convenience store. While parked at the convenience store, a police officer noticed the licence registration on his boss' truck had expired, which lead to further inquiries and the citation above. In April 2004, Applicant was found guilty of operating while under suspension and sentenced to one year in jail, suspended after serving 30 days, placed on one year probation, and fined \$515.00.

From approximately December 1999 to at least March 2004, Applicant consumed alcohol, at times to excess and to the point of intoxication. (SOR ¶ 1.a.) During this time, he continued to consume alcohol on a daily basis while participating in bi-weekly Alcoholics Anonymous meetings and during the completion of Phase I, II and/or III alcohol treatment. (SOR ¶ 2.f.)

Since serving 30 days in jail, Applicant has made some lifestyle changes to include moving to within walking distance of work to solve his transportation problems, and disassociating himself from the associates and friends with whom he drank. Tr. 18. He testified that things did not "click"

for him until he spent 30 days in jail. He saw prisoners come and go "like a family reunion" and they acted "like they were coming home, and [he did not] want to be coming home here (jail)." Tr. 49.

Applicant attended Alcoholics Anonymous twice a week from 2004 to 2005, and does not consider himself to be an alcoholic. Tr. 51. He is not a "teetotaler," and currently likes to have a beer and watch football games on Sunday. Tr. 19. He testified he is making improvements in his life, and is making a contribution by "trying to give something back." Before being laid off, he represented his union as a United Way volunteer and peer counselor. He also helped a female colleague change her shift so it would be easier for her to get child care. Tr. 20. Applicant did not submit any character evidence or work performance evaluations.

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead they are to be applied by administrative judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, administrative judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive. The government has the burden of proving any controverted fact(s) alleged in the SOR, and the facts must have a nexus to an Applicant's lack of security worthiness.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

BURDEN OF PROOF

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to "United States citizens . . . whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Executive Order 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Initially, the government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances which indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. Where the facts proven by the government raise doubts about an applicant's judgment, reliability or trustworthiness, then the applicant has the ultimate burden of establishing his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

Security clearances are granted only when "it is clearly consistent with the national interest to do so." *See* Executive Orders 10865 § 2 and 12968 § 3.1(b). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2 "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." *See Egan*, 484 U.S. at 531. Doubts are to be resolved against the applicant.

CONCLUSIONS

Guideline G - Alcohol Consumption

The Concern: 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.

Applicant consumed alcohol, at times to excess and to the point of intoxication from approximately December 1999 to at least March 2004. During this time frame, he was arrested for DUI three times - in December 1999, December 2002, and January 2003. His first exposure to the legal system and ten week alcohol treatment course after his December 1999 DUI arrest apparently did not make an impression on him. Further troubling is Applicant's third DUI in January 2003 on the heels of his second DUI arrest in December 2002 before his second DUI arrest was adjudicated.

The government established its case under Guideline G either by Applicant's admissions or evidence submitted to ¶¶ 1.a. through 1.f. These allegations give rise to Alcohol Consumption Disqualifying Conditions (AC DC) E2.A7.1.2.1. (*Alcohol-related incidents away from work, such as driving while under the influence, . . . or other criminal incidents related to alcohol use*).

Applicant offered no mitigating evidence other than his testimony that the 30 days he spent in jail following his February 2004 arrest caused him to rethink his behavior. He also has made some modest lifestyle changes such as dissociating himself from his drinking friends, but offered no other evidence of rehabilitation.

I have reviewed the Alcohol Consumption Mitigating Conditions (AC MC) and find none apply. In particular, I am unable to apply AC MC E2.A7.1.3.3. (*Positive changes in behavior supportive of sobriety*). Applicant has not only continued to consume alcohol, he continued to consume alcohol immediately after completing a treatment program, and also had two subsequent DUI arrest after completing this program. The un rebutted evidence provided by the government suggests his alcohol consumption is not under control. I conclude against Applicant on this concern.

Guideline J - Criminal Conduct

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and untrustworthiness.

Applicant's December 1991 NJP occurred over 14 years ago. NJP is reserved for minor offenses in the military. After being awarded NJP, Applicant completed his enlistment, was honorably discharged, and was subsequently granted a security clearance when hired by a defense contractor.

SOR ¶¶ 1.b., 1.d., and 1.e. are included under this Guideline and are discussed above under Guideline G. Comments and analysis under Guideline G are applicable under this section.

Applicant's February 2004 conviction for operating (a vehicle) while under suspension suggests the terms of Applicant's sentence following sentencing for his December 2002 and January 2003 DUI arrests had little or no impression on him. He chose to drive while his license was suspended. The court found his disregard for the law serious enough to sentence him to one year in jail, suspended after 30 days in jail.

The government established its case under Guideline J either by Applicant's admissions or evidence submitted to ¶¶ 2.a. through 1.c. These allegations give rise to Criminal Conduct Disqualifying Conditions (AC DC) E2.A10.1.2.1. (*Allegations or admission or criminal conduct, regardless of whether the person was formally charged*); and AC DC E2.A10.1.2.2. (*A single serious crime or multiple lesser offenses*).

Applicant's NJP is remote and was resolved in a forum reserved for minor offenses. This was one-time offense and significant length of time has elapsed since it occurred. Applicant honorably completed his enlistment following this NJP and he was subsequently granted a security clearance as a defense contractor. For SOR ¶ 2.a., I am able to apply Criminal Conduct Mitigation Conditions (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*); and CC MC E2.A10.1.3.6. (*There is clear evidence of successful*

rehabilitation). As to SOR ¶¶ 2.b. and 2.c., no Mitigating Conditions are applicable. I conclude against Applicant on this concern.

In fairness to Applicant, this decision should not be construed as a determination that he cannot or will not attain the true state of reform and rehabilitation necessary to justify the award of a DoD security clearance. To the contrary, his undocumented mitigating evidence and courtroom demeanor suggests sound potential for positive reform. Should Applicant be afforded an opportunity to reapply for a security clearance in the future, he may well demonstrate persuasive evidence of his security worthiness.

FORMAL FINDINGS

Formal findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1: Guideline G: AGAINST APPLICANT

Subparagraphs 1.a.- 1.f.: Against Applicant

Paragraph 2: Guideline J: AGAINST APPLICANT

Subparagraph 1.a. For Applicant.

Subparagraphs 1.b.-1.c.: Against Applicant

DECISION

In light of all of 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 J. Tuider

Administrative Judge

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.