

DATE: August 18, 2006

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-12700

DECISION OF ADMINISTRATIVE JUDGE

MARTIN H. MOGUL

APPEARANCES

FOR GOVERNMENT

Candace Le'i, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was found guilty of Driving Under the Influence (DUI) in 2002 and 2004. He attended alcohol related treatment in 2004. Applicant has consumed no alcohol since July 24, 2004, and he intends never to imbibe again. Mitigation has been shown. Clearance is granted.

STATEMENT OF THE CASE

On March 10, 2006, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant which 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 clearance should be denied or granted.

Applicant filed a notarized response dated April 24, 2006, to the allegations set forth in the SOR, and requested a hearing before a DOHA Administrative Judge. On May 31, 2006, the case was assigned to this Administrative Judge to conduct a hearing. Pursuant to formal notice dated June 29, 2006, a hearing was held on July 19, 2006.

At the hearing, Department Counsel offered three documentary exhibits (Government's Exhibits 1-3) and no witnesses were called. Applicant offered one documentary exhibit (Applicant's Exhibit A) and offered his own testimony. The record was left open, and Applicant submitted additional documents which have been marked collectively as Exhibit B. All exhibits have been entered into evidence without objection. The transcript (Tr) was received on July 27, 2006.

FINDINGS OF FACT

The Government opposes Applicant's request for a security clearance, based upon the allegations set forth in the SOR. In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline J (Criminal Conduct)

and Guideline G (Alcohol Consumption) of the Directive. The SOR contains two allegations, 1.a. and 1.b., under Guideline J, and two allegations, 2.a. and 2.b., under Guideline G. Applicant admits all of the SOR allegations. The admitted allegations are incorporated as Findings of Fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the admitted documents, and the live testimony and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 26 years old, and unmarried. He is employed as an Aerospace Engineer by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Paragraph 1 Guideline J (Criminal Conduct)

The Government alleges that Applicant is ineligible for clearance because he has engaged in criminal acts that occurred in 2002 and 2004, and which have been included in the SOR as 1.a. and 1.b. Both allegations will be discussed as they were alleged in the SOR:

a. Applicant was arrested on July 23, 1991, and charged with DUI and Negligent Driving. On April 22, 2003, a bench warrant was issued for his failure to appear. Applicant testified that during the court process, the case had been continued, but he had never received notice of the continued date. He never knowingly failed to attend any court scheduled appearance. When he learned of the bench warrant, he returned to the court and quashed the warrant and set the case for trial (Tr at 21-22).

Applicant was sentenced to 365 days in jail, of which 363 were suspended, five years probation. He was ordered to pay \$1,560 in probation fees, a fine of \$880, and \$125 in court fees. His license was suspended for 365 days.

b. Applicant was arrested on July 25, 2004, and charged with (1) Driving Under the Influence of Alcohol, and (2) Driving With Blood Alcohol Level of .08% or Higher. Applicant was found guilty and was sentenced to serve 180 days in jail, which was suspended. He was fined \$1,700, ordered to participate in a counseling program, to serve two days of public work service, and he was placed on five years of probation. Finally, his driver's license was restricted for 70 days.

Applicant was required to attend 30 Alcoholics Anonymous (AA) meetings as a result of his first arrest and three AA meetings because of his second arrest. He attended all the required meetings and approximately seven more (tr at 44-45).

Paragraph 2 Guideline E (Alcohol Consumption)

The Government alleges in this paragraph that the Applicant is ineligible for clearance because he abuses alcohol to excess.

a. That information as set forth in subparagraphs 1.a. and 1.b., above.

b. Applicant attended 40 hours at an alcohol education school in June through August, 2004, at the suggestion of an alcohol counselor, who reviewed his case as a result of his 2002 arrest.

At the hearing Applicant testified that he has consumed no alcohol since July 24, 2004, and he intends to abstain from imbibing in the future. Applicant also testified that he has changed his lifestyle by running and cycling and reading self-help books to improve himself (Tr at 27- 31). I find Applicant's testimony regarding his abstention and his desire never to consume alcohol again to be credible.

Four individuals submitted character letters on behalf of Applicant (Exhibit A). Two have known him primarily through work related interaction, one was a friend and former roommate, and the fourth is from Applicant's mother. All of them were extremely positive about Applicant's excellent character and honesty. Applicant's mother and friend spoke about the profound change in Applicant since he no longer consumes alcohol, and now lives a much healthier life.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines that must be carefully considered in evaluating an individual's security eligibility and making the overall common sense determination required. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. 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, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*

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.

Each adjudicative decision must also include an assessment of: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (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 (*See* Directive, Section E2.2.1. of Enclosure 2).

BURDEN OF PROOF

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance. Assessment of an applicant's fitness for access to classified information requires evaluation of the whole person, and consideration of such factors as the recency and frequency of the disqualifying conduct, the likelihood of recurrence, and evidence of rehabilitation.

A person who seeks access to classified information enters into a fiduciary relationship with

the U.S. Government that is predicated upon trust and confidence. Where facts proven by the Government raise doubts about an applicant's judgment, reliability, or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, I conclude the following:

Guideline J (Criminal Conduct)

The Government has established by substantial evidence that Applicant's conduct, which occurred in 2002 and 2004, and which is the basis for allegations 1.a. and 1.b. of the SOR, is criminal.

Under Guideline J, I conclude that Disqualifying Conditions (DC) (E2.A10.1.2.1.), allegations or admissions of criminal conduct, regardless of whether the person was formally charged; and DC (E2.A10.1.2.2.), a single serious crime or multiple lesser offenses, apply because Applicant's conduct did involve serious criminal offenses, the 2 DUIs. Regarding Mitigating Conditions (MC), I find that there is clear evidence of successful rehabilitation, and MC (E2.A10.1.3.6.) applies, because Applicant was extremely convincing that he has not consumed any alcoholic beverage since July 2004, and he intends never to drink alcohol again. I resolve Guideline J for Applicant.

(Guideline G - Alcohol Consumption)

Applicant's consumption of alcohol to excess has led to his two alcohol related incidents in 2002 and 2004.

The Government established, by substantial evidence, that Applicant was involved in alcohol-related incidents away from work, in this case driving under the influence, which is Disqualifying Condition (DC) (E2.A7.1.2.1.). It has also been established that Applicant has engaged in habitual or binge consumption of alcohol to the point of impaired judgment which is which is DC (E2.A7.1.2.5.).

MC (E2.A7.1.3.3.) applies, because as discussed above, Applicant has changed his behavior positively and significantly to support his sobriety. Guideline G is concluded for Applicant.

FORMAL FINDINGS

Formal Findings, as required by Section 3. Paragraph 7 of Enclosure 1 to the Directive, are hereby rendered as follows:

Paragraph 1. Guideline J: FOR APPLICANT

Subparagraph 1. a.: For Applicant

Subparagraph 1. b.: For Applicant

Paragraph 2. Guideline G: FOR APPLICANT

Subparagraph 2. a.: For Applicant

Subparagraph 2. b.: 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.

Martin H. Mogul

Administrative Judge