

DATE: September 29, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-14207

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Robin C. Lemonidis, Esquire

SYNOPSIS

Applicant was convicted of driving under the influence of alcohol in 1992 and 2002, and battery in 2000. He has failed to mitigate the security concerns his criminal and personal conduct have created. Clearance is denied.

STATEMENT OF THE CASE

On February 6, 2006, 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 security concerns under Guideline J (criminal conduct), Guideline D (sexual behavior), Guideline G (alcohol consumption), and Guideline E (personal conduct). Applicant submitted a sworn answer to the SOR that was received by DOHA on March 30, 2006, admitted the SOR allegations contained in subparagraphs 1.a, 1.b, 1.c (following an amendment to the allegation made by Department Counsel, Tr. 15-17), 3.a (except for the dates alleged in the allegation, Tr. 11-12), 3.b (as clarified on the record following the amendment to the allegation contained in subparagraph 1.c made by Department Counsel, Tr. 11-18) and 3.c, denied the allegations contained in subparagraphs 2.a and 4.a, and requested a hearing.

This case was assigned to me on May 22, 2006. A notice of hearing was issued on May 30, 2006, scheduling the hearing for June 14, 2006. ⁽²⁾ The hearing was conducted as scheduled. The government submitted 20 documentary exhibits that were marked as Government Exhibits (GE) 1-20, and admitted into the record without objection. Applicant testified, called three witnesses to testify on his behalf, and submitted ten documentary exhibits that were marked as Applicant's Exhibits (AE) 1-10, and admitted into the record without objection.

The record was held open to allow Applicant the opportunity to submit additional documentation in support of his case. Three documents were timely received. The first two documents were marked as AE 11 and 12, and admitted into the record without objection. Department Counsel' written objection to the admission of the third document [marked as Appellate Exhibit (App. Ex.) IV] was marked as App. Ex. III. That objection is sustained for the reasons asserted in

Department Counsel's written objection. However, App. Ex. III has been considered by me as arguments of counsel with the exception of those assertions made therein that have no evidentiary support in the record. The transcript was received on June 22, 2006.

PROCEDURAL MATTERS

Department Counsel moved to amend SOR subparagraph 1.c before the presentation of evidence. The proposed amendment was reduced to writing and is included in the record as App. Ex. I. The amendment was allowed without objection.

FINDINGS OF FACT

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

Applicant is 48 years old and has been employed by a defense contractor as a software design engineer since June 1999. He was employed as a software engineer by several different employers from 1991 to 1999, two of whom were federal contractors. Applicant served in the U. S. Navy from July 1977 until February 1981, and was honorably discharged as a second class petty officer (paygrade E-5). He has never been married and has no dependents.

Applicant was arrested on March 15, 1992, and charged with driving under the influence of alcohol (DUI) after being stopped for speeding. He refused to submit to a breathalyzer test. He pled nolo contendere to the DUI charge on May 7, 1992, was found guilty of that charge, and was sentenced to one year probation, 50 hours community service, assessed fines and court costs totaling \$455.50, and was ordered to complete an alcohol education program. His driving privileges were also revoked for six months.

Applicant was charged with the felony offenses of Lewd or Lascivious Conduct and False Imprisonment of a Child Under 13 on December 4, 2000, based on two separate incidents. Applicant pled guilty to reduced charges of misdemeanor battery as to each offense on October 9, 2002, and was sentenced to one year probation on each count to be served consecutively, and ordered not to have unsupervised contact with children under 18 years of age, not to stay in any accommodation overnight when a child under 18 years of age was present, and to complete a psychological evaluation and any follow-up treatment deemed necessary. Applicant completed the terms of his probation successfully and the probation was terminated in October 2003.

There were two twelve-year-old male victims of the above offenses, one of whom lived in the town home next door to Applicant's town home. Applicant's and the boys' versions of what occurred differ substantially.

According to the two boys, on one occasion in or about August 2000, they were invited into Applicant's home to watch television. While in the house, Applicant grabbed one of the boys and attempted to pull the boy near to him while they were sitting on a couch or lazy boy chair. The boy struggled with Applicant, was successful in pulling away from him, and attempted to leave the residence. Applicant then tackled the boy and held him to the floor. The boy started crying, screaming and struggling with Applicant who placed his hand over the boy's mouth in an attempt to muffle the screaming. The boy was eventually successful in freeing himself from Applicant's hold. Both boys then fled the residence. At some point while the boys were in the residence, Applicant kissed the second boy on the top of the head. According to the boys, Applicant was consuming alcohol when this incident occurred.

Both boys returned to Applicant's residence sometime shortly after the above incident. They entered Applicant's residence and observed him laying on the couch in the living room, apparently sleeping. The zipper on his trousers was open and his penis was exposed.

Applicant denies anything like the above incident ever occurred. When questioned by police about the incident on November 6, 2000, Applicant stated: "I was only playing around" and "It was all in fun." (GE 7, p. 2) In a statement he provided to a Special Agent from the Defense Security Service on May 7, 2003, Applicant admitted the boys were inside his residence in August 2000, that he started "rough housing" with them, and that he recalled grabbing one of them from behind and tickling him. (GE 18) He testified the "rough housing" never went beyond tickling and the boys

never left his residence in a way that would have led him to believe they were upset or angry. (Tr. 45-46)

The second incident occurred on or about November 4, 2000, and involved only the boy who lived next door to Applicant. According to that boy, Applicant provided him with a pair of motorcycle boots, rubbed his shoulder, placed a studded dog collar around his neck, and asked him to walk around outside his residence while wearing them. The boy did as he was asked. Applicant also asked the boy to kiss the motorcycle boots that Applicant was wearing. When the boy declined to do as asked, Applicant put his foot up on a barbecue grill, grabbed the boy by the head, and attempted to force him to kiss the boot. Applicant was unsuccessful in getting the boy to kiss his boot.

Applicant admits providing the boy with motorcycle boots and a studded dog collar to wear. However, he claims this was done in an effort to assist the boy in creating a Halloween costume styled after the Mad Max movie character. The boy was still wearing the collar when his father's live-in girlfriend came home and saw him with it on. She contacted the police several days after she observed him wearing the dog collar.

The boys and Applicant agree that Applicant took photographs of the next door neighbor boy on occasion, including while wearing the boots and dog collar. However, all versions indicate these photographs were primarily innocuous shots of such activities as the boy skateboarding, and none indicate they contained any sexual context. Applicant also had set up a camera in a second floor window of his residence that was aimed at the common area in front of his and the boy's residence.

Police officers searched Applicant's house and automobile in December 2000. They found numerous items made of leather, including numerous pairs of motorcycle boots, pants, jeans, and chaps. They also discovered a spiked leather dog collar, a leather dog collar with rings, four leather restraint belts, boots spurs, and what the police described as a black leather strap mouth gag and a black leather strap male genital harness. (GE 6) Included among the motorcycle boots recovered were one pair that were in a child's size.

Applicant obtained the court-ordered psychological evaluation, conducted by a licensed psychologist, on September 23, 2002. The evaluation consisted of a clinical interview, psychosocial history, mental status examination, a Minnesota Multiphasic Personality Inventory - 2, and review of a motion and correspondence filed and submitted by Applicant's attorney. In the course of the evaluation, Applicant described his alcohol use as "moderate," suggested he would consume beer or wine on weekends, and noted his consumption of alcohol was limited to one six pack per week. (AE 1, p. 3) Applicant was diagnosed as "Alcohol Abuse (Provisional)." The evaluation concluded as follows:

The results of this evaluation do not indicate the existence of any significant mental disorder on the part of (Applicant). Overall, he is likely to behave in a responsible manner. Others will perceive (Applicant) in a positively, [sic] and it is likely that he will behave in a rational and logical way across most situations.

Of concern is the possibility that (Applicant) may at times fail to recognize problematic emotions being experienced by him. And, he may rely upon alcohol and/or drugs in order to limit is [sic] experience of these emotions. There is a history of alcohol abuse on his part, but (Applicant) indicated that he now drinks only "moderately." Whether this perception is accurate remains uncertain. But, it is clear that (Applicant's) involvement in alcohol abuse might contribute to impulsive behavior which could reflect poor judgment that is not consistent with his overall character.

This examiner would recommend that (Applicant) closely monitor his potential for substance abuse problems and abstain from any excessive alcohol consumption in the future. Possibly, he might benefit from an outpatient treatment program similar to (omitted) if his use of alcohol were to become problematic in the future. (AE 1, p. 5)

On November 4, 2002, six weeks later, Applicant was charged with Driving Under the Influence with Property Damage after he ran into the back of a stopped vehicle while he was driving a motorcycle. He was taken to a hospital where his blood was drawn and registered a .340 blood alcohol concentration. Despite the high BAC, Applicant testified that while he had been drinking earlier in the day, he had only consumed four drinks in the two hours preceding the accident. (Tr. 86-89) He pled nolo contendere to a reduced charge of DUI on January 9, 2003, was found guilty of that charge, and was sentenced to 12 months probation, assessed fines and court costs totaling \$1,334.00, and ordered to attend a victim's awareness program and an alcohol education program. His driving privileges were suspended for nine months.

Applicant was evaluated by a licensed clinical social worker on November 21, 2002. The social worker did not recommend sex offender treatment, but did note: "client agrees with me problems with alcohol abuse. Individual counseling was agreed on." He was diagnosed as "Alcohol Abuse (By History). (AE 3) Applicant met with the social worker on a weekly basis until he was released from treatment on March 12, 2003. The notation at the time of release was: "he was treated for his impulsive binge drinking and was released with successful completion." (AE 2)

Applicant underwent a psychological evaluation on March 15, 2006, specifically for presentation at the hearing of this case. The evaluation was conducted by an individual with a Doctorate of Philosophy in Behavioral Sciences with a specialization in Psychotherapy. (AE 10) Applicant provided the following substance abuse history to the evaluator:

(Applicant) denies having ever used any illicit drugs. He began drinking alcohol at age 17. In 1992 he was arrested for a D.U.I. From 2000 to 2001, (Applicant) reports he drank heavily due to stress in his life at that time. His father had passed away and [sic] was dealing with some legal difficulties. In 2002, (Applicant) received his second D.U.I. during a motorcycle accident. Currently (Applicant) drinks wine with other people approximately once a month. (AE 7, p. 2)

The evaluation concluded as follows:

(Applicant) is an above-average intellectually functioning individual who is free from any major psychological distress. He is clear and logical in his thought process. He has the ability to make sound decision. [sic]

(Applicant) has gotten into legal trouble with his consumption of alcohol in the past. He has since made changes and his problem with alcohol seems to have disappeared. In the last four years (Applicant) has shown stability and made recovery from past behaviors.

In regard to the Battery Charges, [sic] (Applicant) pled guilty to, this is an indication that it was an isolated incident and showed no historical indicator to conclude there were any previous or recurring behaviors. (Applicant) erred on the side of poor judgment but there is no evidence to conclude he ever committed sexual abuse.

(Applicant) is a stable individual who has changed and gained insight from his past behaviors. He is capable of making appropriate decisions regarding his personal and professional life. He is not a danger or risk to the community. . . .⁽³⁾

Applicant testified he totally abstained from consuming alcohol between the time he committed the second DUI and late 2004. Since 2004, he testified he drinks no more than one glass of wine with dinner, and then only about once every three months. (Tr. 60) Applicant's brother works with and shares an office with Applicant. He testified he picked Applicant up from the police station following the 2002 DUI arrest, took him home, and threw out all alcoholic beverages that were in Applicant's house. To his knowledge, Applicant did not consume any alcohol for about two years following the 2002 arrest, and now only occasionally consumes wine with dinner. Applicant's friend testified he and Applicant socialize and ride motorcycles together. Applicant has not consumed alcohol in his presence since the 2002 DUI arrest.

Applicant's immediate supervisor testified that Applicant is a valued employee who is dependable, diligent, detail oriented, loyal and trustworthy. His work performance appraisals (AE 9) confirm the supervisor's opinion and support finding that Applicant has an established track record for making significant workplace contributions, especially through utilization of Applicant's exceptional technical expertise.

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 itigating 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 J (criminal conduct), Guideline D (sexual behavior), Guideline G (alcohol consumption), and Guideline E (personal conduct), with their respective DC and MC, are 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.⁽⁴⁾ The government has the burden of proving controverted facts.⁽⁵⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁽⁶⁾ although the government is required to present substantial evidence to meet its burden of proof.⁽⁷⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁸⁾ 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.⁽⁹⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁰⁾

No one has a right to a security clearance⁽¹¹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹²⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹³⁾

CONCLUSIONS

Under Guideline D, sexual behavior is a security concern if it involves a criminal offense, indicates a personality or emotional disorder, may subject the individual to coercion, exploitation, or duress or reflects lack of judgment or discretion.

Applicant's actions with the two boys raise serious questions and concerns about his motives and intentions. However, there is insufficient evidence to actually establish he was sexually motivated. I have considered all of the evidence presented in connection with this concern, including the items found during the search of Applicant's residence, the handwritten statements of the boys, and the narratives of the police reports. While the police reports indicate there were sexual overtones to Applicant's conduct, such as simulated anal intercourse, those assertions are strongly contradicted by the lengthy transcribed statements (AE 11 and AE 12) taken from the boys. Further, although the items found in Applicant's residence seem to indicate, at a minimum, he had an interest in deviant sexual conduct, there is no evidence those items were ever displayed to the boys or contemplated for use with the boys. No Guideline D disqualifying condition applies. Guideline D is decided for Applicant.

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 offenses in 1992 and 2002. The boys involved in the 2000 battery offense indicated he had been drinking and/or was drunk when they were in his house in November 2000. He was twice diagnosed as alcohol abusive, and underwent treatment for his abuse of alcohol from November 2002 until March 2003. 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*; DC 3: *Diagnosis by a credentialed medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence*; and DC 5: *Habitual or binge consumption of alcohol to the point of impaired judgment* apply.

Applicant's two DUI's occurred 10 years apart. The incident with the boys at his residence occurred two years before the last DUI, and is of a totally dissimilar nature. Applicant's claims that he totally abstained from alcohol between 2002 and 2004, and now consumes no more than a glass of wine with dinner once every month or so is unrebutted and is corroborated by the testimony of his brother and friend. He obtained an evaluation in March 2006 that concluded he has made positive changes and displayed stability in his lifestyle and his problem with alcohol seems to have disappeared. Mitigating Conditions (MC) 1: *The alcohol related incidents do not indicate a pattern*; DC 2: *The problem occurred a number of years ago and there is no indication of a recent problem*; and DC 3: *Positive changes in behavior supportive*

of sobriety apply. Guideline G is decided for Applicant.

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the Nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

Applicant was convicted of DUI offenses that occurred in March 1992 and November 2002, and of two counts of battery that occurred in or about August and November 2000. Disqualifying Conditions (DC) 1: *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*; and DC 2: *A single serious crime or multiple lesser offenses* apply.

Applicant provided a sworn statement to a Special Agent of the Defense Security Service (DSS) on May 7, 2003, in which he related his version of what occurred with the two boys. His hearing testimony was substantially the same as in that statement. He denies anything untoward occurred and instead claims the boys and the "stepmother" made up a story to get him into trouble. I have carefully considered and weighed his statements and testimony against the statements of the boys, most notably the transcribed interviews conducted by the police (AE 11 and AE 12), and am convinced the boys were truthfully relating what occurred. Conversely, Applicant has consistently provided false information about the incidents, including at the hearing of this case.

Applicant's criminal conduct that resulted in the two DUI convictions is mitigated by the passage of time and the rehabilitative matters discussed above under Guideline G. There is no SOR allegation that Applicant provided false information in the DSS statement or at the hearing. Thus, I cannot consider his repeated false sworn statements about the incidents with the boys as an independent reason to deny him a security clearance. However, I can and do consider the statement and testimony as they relate to the potential application of mitigating conditions to the Guideline J, subparagraph 1.b and Guideline E allegations.

In consideration of the false statement and testimony, I find MC 1: *The criminal behavior was not recent*; MC 4: *The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*; and MC 6: *There is clear evidence of successful rehabilitation* under Guideline J do not apply. Instead, Applicant has displayed his willingness to continue to commit criminal activity as exhibited by his false sworn statement and his false testimony after being specifically admonished of the potential criminal penalties that could be imposed under 18 U.S.C. § 1001. MC 2: *The crime was an isolated incident* does not apply because of his two other criminal

convictions. The remaining mitigating conditions clearly have no applicability to the facts of this case. Guideline J, subparagraph 1.b is decided against Applicant.

Under Guideline E, personal conduct is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Applicant's actions with the two young boys in 2000 displayed enormous bad judgment, exposed him to public ridicule, caused him extreme embarrassment, and resulted in the imposition of criminal sanctions. DC 1: *Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances*; and DC 4: *Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail* apply.

Having found the boys versions of what occurred to be truthful, MC 1: *The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability* under Guideline E does not apply. Because Applicant continues to deny and cover up what really occurred between him and the boys and instead accuses them of lying about the incidents, MC 5: *The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, of duress* does not apply. The remaining mitigating conditions clearly have no applicability to the facts of this case. Guideline E is decided against Applicant.

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 failed to mitigate the security concern caused by his criminal and personal conduct. He has failed to overcome the case against him or satisfy his ultimate burden of persuasion. It is not clearly consistent with the national interest to grant Applicant a security clearance.

FORMAL FINDINGS

SOR ¶ 1-Guideline J: Against Applicant

Subparagraph a: For Applicant

Subparagraph b: Against Applicant

Subparagraph c: For Applicant

SOR ¶ 2-Guideline D: For Applicant

Subparagraphs a-b: For Applicant

SOR ¶ 3-Guideline G: For Applicant

Subparagraphs a-c: For Applicant

SOR ¶ 4-Guideline E: Against Applicant

Subparagraph 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.

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. Applicant's attorney was contacted by Department Counsel sometime before issuance of the formal notice of hearing and agreed to this hearing date. At the hearing, Applicant's attorney stated she was prepared to proceed (Tr. p. 9).
3. Department Counsel objected to remaining portions of this exhibit and, in response, Applicant's attorney moved to strike the remainder of the exhibit. (Tr. 69)
4. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
5. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
6. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
7. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
8. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
9. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

10. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

11. *Egan*, 484 U.S. at 528, 531.

12. *Id* at 531.

13. *Egan*, Executive Order 10865, and the Directive.