

DATE: August 31, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 06-02209

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Candace L. Le'i, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant began consuming alcohol at age 14, engaged in habitual binge drinking in college, and was arrested for driving under the influence (DUI) in September 2003, after consuming 11-14 beers. He abstained from April 2004 until September 2005, when his probation ended. He then resumed alcohol consumption in less frequent and more moderate amounts. The security concern based on alcohol consumption is not mitigated. Clearance is denied.

STATEMENT OF THE CASE

On March 14, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to not grant a security clearance to Applicant. This action was taken under Executive Order 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 (Directive). The SOR alleges security concerns under Guideline G (Alcohol Consumption).

Applicant answered the SOR in writing on March 31, 2006, admitted the allegations in part and denied them in part, offered explanations, and elected to have the case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's written case on June 15, 2006. A complete copy of the file of relevant material (FORM) was provided to Applicant, and he was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant received the FORM on July 10, 2006, and he responded on August 2, 2006. The case was assigned to me on August 14, 2006.

PROCEDURAL RULING

The FORM included a motion by Department Counsel to amend SOR ¶ 1.b to conform to the evidence. The motion is granted.

FINDINGS OF FACT

Based on the entire record, I make the following findings of fact:

Applicant is a 25-year-old software engineer for a defense contractor. He graduated from college in June 2004, and he began working for his current employer in September 2004. He held an interim clearance from December 6, 2004, until the SOR was issued (Response to FORM at 2; letter dated March 30, 2006, from facility security officer, attached to GX 3).

Applicant began consuming alcohol in 1995, when he was 14 years old. The frequency of consumption and the amount he consumed increased until he consumed 5-8 beers on 15-20 occasions in early 2003. By late 2003, he had consumed 6-8 beers on 20-30 occasions, and on 4-5 occasions he had consumed 8-14 beers (Attachment 1 to Government Exhibit (GX) 3).

On September 27, 2003, while in college, Applicant was arrested for driving under the influence (DUI). He admitted he probably consumed 12-14 beers before his arrest (GX 3 at 1). On September 29, 2003, prosecution was deferred for two years. He was placed on probation for five years, required to perform 88 hours of community service, required to attend group therapy three times a week for three months, followed by weekly group therapy for six months, after which he was required to report once a month for monitoring. He also was required to attend Alcoholics Anonymous (AA) meetings twice a week and abstain from alcohol (GX 3 at 2; Attachment 2 to GX 3).

Applicant began his alcohol abuse treatment on March 31, 2004. During his intake interview, he admitted consuming alcohol the night before. Based on his admission, a probation violation was filed with the court. In his answer to the SOR, he explained he did not know that consumption of alcohol was prohibited from the date he was placed on probation.

While in treatment, Applicant was diagnosed as alcohol dependant. The record does not reflect the identity or qualifications of the person making the diagnosis. Although several staff members at the treatment facility included the letters "CDP" in their signature blocks, their professional qualifications are not further described in the FORM.

In the summer of 2004, Applicant missed ten AA meetings because of a family emergency, resulting in a second probation violation report. In August 2004, he was evaluated as "in essential compliance" and having an excellent attitude (Attachment 2 to GX 3). He was released from the monthly monitoring requirement in September 2004 (Attachment 5 to GX 3). From November 3, 2005, and January 3, 2006, he voluntarily attended eight additional therapy sessions, covered partly by his health insurance and partly at his own expense (Attachment 4 to GX 3). He successfully completed the court-ordered program on March 7, 2006 (Attachment 3 to GX 3).

Applicant abstained from alcohol from March 2004, when he entered the outpatient treatment program, until September 30, 2005, when he completed his two-year probation. Since that date, he has "occasionally consumed moderate amounts of alcohol" (GX 3 at 1.) He defines his moderate use of alcohol as consuming 1-6 beers on 10-12 occasions (Attachment 1 to GX 3).

Applicant's supervisor, who is aware of the security concern based on alcohol consumption, submitted a letter stating he has never observed any alcohol-related impairment of his performance or any alcohol consumption on the job. His facility security officer regards him as very conscientious.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the security

guidelines contained in the Directive. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

The Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant'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. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in persons with access to classified information. However, the decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions 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. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3; *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

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. A disqualifying condition (DC 1) may arise from alcohol-related incidents away from work, such as driving under the influence. Directive ¶ E2.A7.1.2.1. Applicant's DUI arrest establishes DC 1.

Applicant's reported probation violation based on failure to attend AA meetings (SOR ¶ 1.e) was caused by a family emergency. His counselor noted his failure to attend meetings and the reasons for the failure, but found him "in essential compliance" and noted his good attitude. Applicant denies being returned to monitored probation in May 2005, and there is no evidence to contradict his denial. I conclude Applicant has refuted the allegation that he was placed on monitored probation, and he has mitigated his failure to attend AA meetings as required. Accordingly, I resolve SOR ¶ 1.e in his favor.

A disqualifying condition (DC 3) may be based on "[d]iagnosis by credentialed medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence." Directive ¶ E2.A7.1.2.3. Similarly, a disqualifying condition (DC 4) may be based on "[e]valuation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program." Directive ¶ E2.A7.1.2.4. Neither disqualifying condition is established in this case because there is no evidence of the identity or qualifications of the person who diagnosed Applicant as alcohol dependent.

"Habitual or binge consumption of alcohol to the point of impaired judgment" is a disqualifying condition (DC 5). Directive ¶ E2.A7.1.2.5. "Binge drinking" is "the consumption of five or more drinks in a row on at least one occasion." U.S. Dept. of Health & Human Services, Substance Abuse and Mental Health Services Administration, *The National Household Survey on Drug Abuse: Binge Drinking Among Underage Persons*, Apr. 11, 2002, available at <http://www.oas.samhsa.gov>. Applicant's own description of his alcohol consumption during college establishes habitual heavy drinking, often qualifying as binge drinking. His arrest for DUI after consuming 11-14 beers demonstrates both binge drinking and impaired judgment. I conclude DC 5 is established.

A disqualifying condition (DC 6) applies when there has been "[c]onsumption of alcohol, subsequent to a diagnosis of alcoholism by a credentialed medical professional and following completion of an alcohol rehabilitation program." Directive ¶ E2.A7.1.2.6. The term "alcoholism" is no longer used by medical professionals and does not appear in DSM IV-TR. In previous versions of the DSM, it was synonymous with alcohol dependence. DC 6 is not established because there is no evidence of a diagnosis by a credentialed medical professional.

Since the government produced substantial evidence to establish DC 1 and DC 5, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. The burden of disproving a mitigating condition is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns based on alcohol consumption can be mitigated (MC 1) by showing that "[t]he alcohol-related incidents do not indicate a pattern." Directive ¶ E2.A7.1.3.1. Although Applicant's admissions establish a pattern of heavy drinking in college, the evidence establishes only one alcohol-related incident, i.e., his arrest for DUI in September 2003. One incident does not constitute a pattern. I conclude MC 1 is established.

Security concerns under this guideline may be mitigated by evidence that "[t]he problem occurred a number of years ago and there is no indication of a recent problem." (MC 2). Directive ¶ E2.A7.1.3.2. There are no "bright line" rules for determining when conduct is "recent." The determination must be based "on a careful evaluation of the totality of the record within the parameters set by the directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." *Id.* Applicant's last alcohol-related incident was almost three years ago. However, he was on probation for two of those years. He resumed his alcohol consumption almost immediately after completing his probation. It has been less than a year since he completed his probation. Because Applicant did not request a hearing, my ability to assess his credibility and sincerity is limited. "Only with the passage of time will there be a track record that shows whether a person, through actions and conduct, is willing and able to adhere to a stated intention to refrain from acting in a way that the person has acted in the past." ISCR Case No. 97-0727, 1998 DOHA LEXIS 302 at *7 (App. Bd. Aug. 3, 1998). I conclude Applicant has not carried his burden of establishing MC 2.

"Positive changes in behavior supportive of sobriety" also are a mitigating condition (MC 3). Directive ¶ E2.A7.1.3.3. Applicant has provided virtually no evidence regarding changes in behavior, except for his statement that he now drinks moderately. There is no evidence regarding his off-duty leisure activities, and no evidence he has taken measures to reinforce and support his stated intention to limit his alcohol consumption to moderate drinking. I conclude MC 3 is not established.

Finally, a mitigating condition (MC 4) may be established if, "[f]ollowing diagnosis of alcohol abuse or alcohol dependence, the individual has successfully completed inpatient or outpatient rehabilitation along with aftercare requirements, participates frequently in meetings of Alcoholics Anonymous or a similar organization, has abstained from alcohol for a period of at least 12 months, and received a favorable prognosis by a credentialed medical professional or licensed clinical social worker who is a staff member of a recognized alcohol treatment program." Directive ¶ E2.A7.1.3.4. Applicant successfully completed an outpatient rehabilitation program and its aftercare requirements. However, there is no evidence of AA participation, no favorable prognosis by a credentialed medical professional, and no abstinence from alcohol. I conclude MC 4 is not established.

Applicant is now two years out of college, and he enjoys a good reputation with his supervisor. He may well be on his way to a life of moderate social drinking without further incidents, but it is too soon to tell whether he will revert to his

previous pattern of habitual heavy drinking. After weighing the disqualifying and mitigating conditions and evaluating all the evidence in the context of the whole person, I conclude he has not mitigated the security concern based on alcohol consumption.

FORMAL FINDINGS

The following are my findings as to each allegation in the SOR:

Paragraph 1. Guideline G (Alcohol): AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: For Applicant

Subparagraph 1.f: 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 Applicant a security clearance. Clearance is denied.

LeRoy F. Foreman

Administrative Judge