

DATE: March 29, 2007

In re:

SSN:-----

Applicant for Security Clearance

ISCR Case No. 06-12284

DECISION OF ADMINISTRATIVE JUDGE

MARY E. HENRY

APPEARANCES

FOR GOVERNMENT

Ray T. Blank, Jr., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was arrested, charged, and convicted of a driving while intoxicated (DWI) offense in 1994 as a teenager. After 10 years of no alcohol-related problems, in the last two and one-half years, he has been arrested and charged with two alcohol-related offenses and cited for one alcohol-related offense. Although he recently started an alcohol treatment program, he has not mitigated the government's concerns regarding his alcohol consumption. He has mitigated the government's concerns about his personal conduct. Clearance is denied.

STATEMENT OF THE CASE

On October 25, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended. 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 sets forth security concerns arising under Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct) of the revised Adjudicative Guidelines (AG) issued on December 29, 2005, and implemented by the Department of Defense, effective September 1, 2006. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. On November 13, 2006, Applicant submitted a notarized response to the allegations. He elected to have his case decided on the written record, but the government requested a hearing pursuant to the Directive, Enclosure 3, ¶ E3.1.7.

DOHA assigned this case to me on January 3, 2007. DOHA issued a notice of hearing on January 29, 2007, which Applicant received on February 5, 2007. I held a hearing on February 14, 2007, at which time Applicant waived his right to 15 days notice of the hearing date. Six government documents were marked and admitted into evidence as Government Exhibits (GE) 1 through 6. Applicant submitted six documents at the hearing, which were marked as

Applicant Exhibits (AE) A through F. One witness for the government and Applicant testified. The hearing transcript (Tr.) was received on March 1, 2007. The record was held open until March 2, 2007 to allow Applicant to submit additional evidence, which he did. His additional evidence was marked as AE G through J. The government does not object to this evidence, which is admitted into the record.

FINDINGS OF FACT

Applicant admitted the allegations under Guideline G, subparagraphs 1.a through 1.d and 1.f of the SOR. ⁽¹⁾ Those admissions are incorporated as findings of fact. He denied the remaining allegations. ⁽²⁾ After a complete review of the evidence in the record and upon due consideration, I make the following findings of fact.

Applicant is a 29-year-old man, who works as a junior engineer for a Department of Defense contractor. He has worked in his current position for over two years. He has two associate degrees and a Bachelor of Science degree in electrical engineering. He is single. ⁽³⁾

Alcohol consumption

When he was 16 years old and a high school student, Applicant and a friend attended a party. They drank a bottle of champagne. As he started to drive his car from a parking lot, the police stopped him and administered a breathalyser test. The police then arrested and charged him with DWI. The court convicted him, suspended his driver's license for one year, and ordered him to perform community service and attend alcohol education classes. ⁽⁴⁾

On May 19, 2004, Applicant and his girlfriend had dinner and drinks at a local restaurant. A dispute arose over payment of the bill. The restaurant staff called the police, while the manager talked with Applicant, who told the manager that he had paid the bill and left a tip. The police arrived. Because he was upset about the accusation and the decision to call the police, he couldn't keep his mouth shut. As a result, the police arrested him for disorderly conduct in a motor vehicle. He spent two hours in the police station. The police released him, giving him a traffic ticket, not a criminal arrest document. He paid a fine. He admits that this arrest embarrasses him, because he believes that the arrest was ridiculous. ⁽⁵⁾

On December 17, 2005, Applicant and his fiancée attended his office Christmas party, where they each consumed alcoholic beverages (wine or beer) over several hours. They left the party and went to a local bar, where he ordered beer. Shortly after arriving at the bar, he and his fiancée got into argument. ⁽⁶⁾ He decided to leave the bar immediately, which they did. They continued to argue in the car. He describes his fiancée as very drunk and out of control. When the yelling, hitting, and arguing escalated, he stopped the car and told her to get out of the car. She refused. He went to her side of the car, unbuckled her seat belt, and pulled her out of the car. He then drove home. She arrived at their house shortly thereafter, and they continued to argue. The police arrived and tried to calm them down. He then voluntarily agreed to leave with the police, who took him to the police station. At the end of the evening, the police charged him with criminal domestic violence, despite his denials to the police that he hit her, as she claimed. He moved out of their house immediately thereafter. Applicant and his fiancée ended their relationship in March 2006. The court scheduled his trial on this charge for November 9, 2006. He appeared for trial, but his former fiancée did not. The court dismissed the charges against him. ⁽⁷⁾

Following the end of his engagement, Applicant started attending happy hours more often. He would drink a few beers and eat appetizers. On the evening of August 19, 2006, he did the same. After happy hour, he went to a comedy club, where he had one or two more beers. After leaving the comedy club, he met a former college friend. They decided to meet at his house, after he purchased beer for them. He drove his car to buy beer. The police noticed his erratic driving and pulled him over. The police administered an alcosensor test and field sobriety tests, then arrested and charged him with driving under the influence (DUI). At the police station, the arresting officer attempted to administer a breathalyser test, but was unable to do so. This case was scheduled for trial on February 13, 2007, but Applicant's attorney advised him that his trial was continued to a later date. ⁽⁸⁾

Subsequent to his last arrest, Applicant received an alcohol assessment test at a substance abuse center. While no diagnosis of alcohol dependence or an alcohol abuse was made, the center recommended that he attend a 20-hour

outpatient substance abuse program (ten 2-hour sessions). Applicant began his treatment program on January 16, 2007, and completed seven 2-hour sessions by February 15, 2007. He also attended three Alcoholics Anonymous meetings by the hearing. He continues to drink one or two beers at social occasions on the weekend, and an occasional glass of wine. He no longer drinks and drives. [\(9\)](#)

Personal Conduct

When completing his security clearance application, Applicant answered "no" to question f in Section 23: Your Police Record, which states:

In the last 7 years, have you been arrested for, charged with or convicted of any offenses not listed in response to a, b, c, d, or e above? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.)

Applicant did not list his arrest and subsequent ticket for disorderly conduct in a car because he did not understand he had been arrested since he received only a citation. The citation given to him for this incident is titled "Uniform Traffic Ticket".

Applicant reported the 2005 and 2006 alcohol incidents to his security office as required. His employer describes him as an outstanding engineer with very good performance. He is a reliable, dependable, motivated, and driven person, who is willing to accept tough challenges. An uncle he greatly admires provided favorable comments on his character. The record contains no evidence of financial or work problems as a result of his drinking. [\(10\)](#)

POLICIES

The revised Adjudicative Guidelines set forth disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. An administrative judge need not view the revised adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, are intended to assist the administrative judge in reaching fair and impartial common sense decisions. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the revised AG should be followed whenever a case can be measured against this policy guidance. In addition, each security clearance decision must be based on the relevant and material facts and circumstances, the whole-person concept, and 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. [\(11\)](#)

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. [\(12\)](#) The government has the burden of proving controverted facts. [\(13\)](#) The burden of proof is something less than a preponderance of the evidence. [\(14\)](#) 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. [\(15\)](#) Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision. [\(16\)](#)

No one has a right to a security clearance, [\(17\)](#) and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." [\(18\)](#) Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information. [\(19\)](#) 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. [\(20\)](#) 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.

CONCLUSIONS

Upon consideration of 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:

Alcohol Consumption

Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness. (AG ¶ 21) In just over two years, Applicant has been involved in three alcohol-related incidents after a 10-year absence from any police arrests for alcohol-related conduct. Each incident occurred after he consumed alcohol. Two incidents resulted in criminal arrests and one in a traffic citation. DC ¶ 22 (a) *alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent* applies. [\(21\)](#)

After his most recent arrest for driving under the influence, a substance abuse program evaluated Applicant, and recommended 20 hours of outpatient treatment. The evaluator did not diagnose Applicant as an alcohol abuser or alcohol dependent; thus, Applicant does not admit to alcoholism or alcohol abuse. When he was convicted of a DWI as a teenager, the court directed him to attend an alcohol education program, which is significantly different from an alcohol treatment program. Applicant did attend the education program. His recent alcohol-related arrests cannot be classified as treatment relapse because he has never received any type of substance abuse treatment. He is currently enrolled in an outpatient treatment program and is making satisfactory progress in the program. He has reduced the amount of alcohol he consumes and no longer drinks and drives. AG ¶ 23 (c) *the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress* has some applicability.

Personal Conduct

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. (AG ¶ 15) Under DC ¶ 16 (a), the government established that Applicant omitted a material fact from his SF-86 when he answered "no" to Section 23, question f. He denies, however, that he deliberately falsified his answer to this question. When a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred. [\(22\)](#) For DC ¶ 16 (a) *The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire . . . to apply*, the government must establish that Applicant's omission, concealment or falsification in his answers was deliberate.

Applicant credibly testified that he did not believe that he had been arrested in May 2004 because he received a traffic citation. The record contains a copy of the traffic ticket given to him by the police for this incident. He never appeared in court as a result of this incident. He willingly provided information regarding his three other alcohol-related arrests. He had no reason to hide this arrest. Thus, his belief that this incident was nothing more than a traffic citation which did not need to be listed is reasonable. I find that he did not intentionally falsify his answer to this question.

Allegation 2.b of the SOR suggests that Applicant's embarrassment about his May 2004 charge of disorderly conduct in a motor vehicle could make him vulnerable to coercion, pressure or exploitation under AG ¶ 16 (e). Applicant views the charge as ridiculous, and he admits he is embarrassed about it. He has acknowledged the incident in this proceeding and to the investigator. He is not required to tell everyone about the incident. Thus, he has taken positive steps to reduce and eliminate the possibility of exploitation, coercion, or pressure on him for this incident. AG ¶ 17 (f) applies.

Whole Person Analysis

Protection of our national security is of paramount concern. Security clearance decisions are not intended to assign guilt or to impose further punishment for past transgressions. Rather, the objective of the adjudicative process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Thus, in reaching this decision, I have considered the whole person concept in evaluating Appellant's risk and vulnerability in protecting our national interests.

After his first DWI offense, Applicant attended college and eventually graduated with a bachelor's degree in electrical engineering. His employer praised his work performance and work ethic. His employer describes him as dependable and reliable. Applicant moved in a positive direction after his first arrest. He, however, continued to drink. Over time, his drinking created problems for him, which led to three confrontations with the police and two arrests. His alcohol use impacted his ability "to keep his mouth shut", by his own admission, when talking with the police in May 2004. The inability to keep quiet led to his disorderly conduct charge.

For nearly 10 years, Applicant's alcohol consumption did not cause any problems. In the last two and one-half years, he had three incidents in which alcohol played a role, the most recent six months ago. Since his last arrest, he started an alcohol treatment program, and is learning more about alcohol and the problems connected with excessive use. He reduced his alcohol consumption, and decided not to drive after drinking. Recently, he made improvements in his behavior and changed his attitude toward alcohol use. However, those recent behavior and attitude changes are insufficient to demonstrate that he will remain committed to change in light of his slow down slide after his 1994 arrest. Applicant is improving his understanding of his alcohol use and its impact on him, but has not demonstrated that he can sustain his new behavior for a lengthy period of time. Thus, he has not mitigated the government's concerns about his alcohol use, although he has mitigated the government's concern about his personal conduct. 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 the Directive, are:

SOR ¶ 1-Guideline G : AGAINST APPLICANT

Subparagraphs a-f: Against Applicant

SOR ¶ 1-Guideline E : FOR APPLICANT

Subparagraphs a-b: For 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 a security clearance for Applicant. Clearance is denied.

Mary E. Henry

Administrative Judge

1. Applicant's response to the SOR, dated November 13, 2006, at 1-2.
2. *Id.*
3. GE 1 (Applicant's security clearance application) at 11-13; Tr. at 28-29.
4. GE 1, *supra* note 3, at 26; Tr. at 30-31.
5. AE G (Copy of the traffic ticket, dated May 19, 2004); Tr. at 22-24, 31-34.

6. They had been arguing all day. Tr. at 36-38.
7. GE 2 (Applicant's answers to interrogatories with attachments) at 6; GE 3 (United States Department of Justice, Federal Bureau of Investigation Criminal Information Services sheet, dated January 5, 2006) at 2; Tr. at 24-27, 36-44.
8. GE 3 (Notice of trial date); GE 5 (Arrest report, dated August 19, 2006), GE 6 (Citation for August 19, 2006 incident); Tr. at 49-54.
9. GE 2, *supra* note 7, at 7; AE A and H (Attendance sheets for treatment program); AE B and I (Payment receipts for treatment program); AE J (Letter from treatment program, dated February 15, 2007); Tr. at 61, 66-67.
10. AE C (letter, dated January 25, 2007); AE D (letter, dated January 25, 2007); AE E (Undated letter); AE F (Undated and unsigned letter); Tr. at 55-57.
11. Directive, revised Adjudicative Guidelines (AG) ¶2(a)(1)-(9).
12. ISCR Case No. 96-0277 at 2 (App. Bd., July 11, 1997).
13. ISCR Case No. 97-0016 at 3 (App. Bd., December 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.
14. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).
15. ISCR Case No. 94-1075 at 3-4 (App. Bd., August 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.
16. ISCR Case No. 93-1390 at 7-8 (App. Bd. Decision and Reversal Order, January 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.
17. *Egan*, 484 U.S. at 531.
18. *Id.*
19. *Id.*; Directive, revised AG ¶ 2(b).
20. Executive Order No. 10865 § 7.
21. AG ¶ 22 (d) and AG ¶ 22 (e) do not apply as Applicant has not been diagnosed as an alcohol abuser or alcohol dependent.
22. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov.17, 2004)(explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).