

DATE: March 28, 2007

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 06-17178

DECISION OF ADMINISTRATIVE JUDGE

SHARI DAM

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Robin A. Rattley, Esq.

SYNOPSIS

Applicant is 45 years old. Since leaving active duty with the U.S. Navy in 1984, he has worked for a federal contractor. When he completed a security clearance application in 1993, he disclosed three arrests, two of which related to the use of alcohol. He did not disclose those charges in his January 2004 security clearance application. Subsequently, in September 2004 he was arrested for driving under the influence. He mitigated the security concerns raised under the alcohol consumption, criminal and personal conduct guidelines. Clearance is granted.

STATEMENT OF THE CASE

On August 31, 2006, the Defense Office of Hearings and Appeals (DOHA) under Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons under Guidelines G (Alcohol Consumption), J (Criminal Conduct), and E (Personal Conduct) why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant a security clearance to Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted.

On October 17, 2006, Applicant filed an Answer to the SOR, but was subsequently notified that it was insufficient to comply with the requirements under the Directive. On December 22, 2006, he filed another Answer and elected to have a hearing. The case was assigned to me on January 26, 2007. A Notice of Hearing was issued on February 8, 2007, setting the hearing for February 28, 2007. At the hearing, the Government introduced Exhibits (GX) 1 and 2 into evidence without objections. Applicant and his wife testified. The record was left open until March 16, 2007, to give Applicant an opportunity to submit documentary evidence. DOHA received the hearing transcript (Tr.) on March 12, 2007. No additional documents were submitted.

FINDINGS OF FACT

Based on the entire record, including Applicant's admissions in his Answer to the SOR and at the hearing, I make the following findings of fact:

Applicant is 45 years old. He recently married his girlfriend of 22 years, who has lived with him for many years. From June 1980 to June 1984, he was on active duty in the U. S. Navy. After leaving active duty, he went on inactive duty until January 1991, when he received an honorable discharge. He was a 3rd class petty officer at the time of the discharge (GX 2 at 2). Since June 1984, he has worked as an electrician for a federal contractor where he is also a make-up supervisor (Tr. 23). He has held a secret security clearance since August 1985 (GX 1 at 6).

Applicant completed a National Agency Questionnaire (NAQ) in August 1993 (GX 2). In it, he disclosed that he was arrested in 1990, 1992 and 1993. In November 1990, he was arrested and charged with Driving While Intoxicated (DUI) and Reckless Driving. Both charges were not prosecuted. In October 1992, he was arrested and charged with Operating a Motor Vehicle While Under the Influence of Alcohol. The matter was not prosecuted. ⁽¹⁾ In March 1993, he was arrested and charged with Felony Destruction of Private Property. He made restitution and the charges were dismissed. ⁽²⁾ Applicant's wife helped him complete the NAQ.

When Applicant completed the January 2004 SCA, Applicant did not disclose the 1992 felony arrest for the destruction of property under Question 21: *Your Police Record-Felony Offenses*, or the 1990 and 1992 alcohol related arrests under Question 24. *Your Police Record-Alcohol/Drug Offenses*. He admitted that he did not list those arrests, but denied that he deliberately attempted to deceive the Government (Tr. 24, 25). At the time, his wife was very sick and unable to help him fill out the form (Tr. 16, 20). He was confused by the questions and did not think he was required to disclose the three charges because they were dismissed and not convictions (Tr. 19). His explanation was credible.

In September 2004, Applicant was arrested and charged with another DUI after attending his sister-in-law's wedding (Tr. 27). He was given a breathalyzer test and his blood alcohol level was .11 (Tr. 28). He pled guilty, was fined \$250, and placed on a year's probation. His driver's license was suspended for one year and he was required to attend driving school. The court also ordered him to participate in an alcohol safety program. He attended eight weeks of Alcoholics Anonymous meetings and stopped consuming alcohol for a year (Tr. 35-36). His wife attended a meeting with him (Tr.56). He has not participated in any rehabilitative program since that time.

After approximately a year of alcohol abstinence and completing the program, Applicant resumed consuming alcohol when he became distressed over his wife's illness (Tr. 38). He drank occasionally at home from that point to about six months ago when he stopped as his wife's medical condition worsened (Tr. 38). He realized that drinking caused him many problems and that he was the sole provider for the family (Tr. 24, 30). When he met with a government investigator in arch 2006, he told her that he drank "about a fifth of liquor over a week's time in the last five years." (Tr. 29) However, that time period was before the September 2004 conviction (Tr. 31, 38). He denied that he consistently consumed alcohol to the point of intoxication from 1986 until March 2006 (Tr. 25).

Currently, Applicant manages stress through physical training at his home gym several days a week with a new set of friends (Tr 38). He no longer exercises with the friends with whom he previously drank (Tr. 51).

Applicant's wife generally handles all of the paperwork in the family. She helped her husband complete the NAQ in 1993, but was unable to assist him in January 2004 because of her illness (Tr. 47). She understands how he became confused by the wording of the questions on the SCA (Tr. 48). She confirmed that he stopped drinking about six months ago, changed friends, exercises regularly, and has taken more responsibility around the house, as she is unable to work (Tr. 51-57). She believes he has matured since her illness (Tr. 58).

POLICIES

Enclosure 2 of the Directive, *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, sets forth criteria that must be evaluated when determining security clearance eligibility. Within those adjudicative guidelines are factors to consider in denying or revoking an individual's request for access to classified information (Disqualifying Conditions), and factors to consider in granting an individual's request for access to classified information (Mitigating Conditions). By recognizing that individual circumstances of each case are different, the

guidelines provide substantive standards to assist an administrative judge in weighing the evidence in order to reach a fair, impartial and common sense decision.

Granting an applicant's clearance for access to classified information is based on a high degree of trust and confidence in the individual. Accordingly, decisions under the Directive must include consideration of not only the *actual* risk of disclosure of classified information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information.⁽³⁾ The decision to deny an individual a security clearance is not necessarily a judgment about an applicant's loyalty.⁽⁴⁾ Instead, it is a determination that an applicant has not met the strict guidelines established by the Department of Defense for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information.⁽⁵⁾ The Directive presumes a rational connection between past proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability.⁽⁶⁾

Once the government establishes a disqualifying condition by substantial evidence, the corresponding burden of rebuttal shifts to the applicant to present evidence in refutation, extenuation, or mitigation sufficient to overcome the position of the government.⁽⁷⁾ An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his clearance."⁽⁸⁾

Based upon the allegations contained in the SOR and a consideration of the evidence as a whole, the following adjudicative guidelines are pertinent to an evaluation of the facts of this case:

Guideline G - Alcohol Consumption: A security concern arises 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.

Guideline J - Criminal Conduct: A security concern arises when a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Guideline E - Personal Conduct: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information, and raises a security concern.

CONCLUSIONS

Upon consideration of all facts in evidence, an assessment of credibility and the application of the appropriate legal standards, I conclude the following with respect to the allegations set forth in the SOR:

Guideline G: Alcohol Consumption

Based on the evidence, including Applicant's admissions, the Government established a disqualification under Alcohol Consumption Disqualifying Condition (AC DC) E2.A7.1.2.1 (*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*). Applicant admitted he was arrested and charged with criminal conduct in 1990, 1992 and 2004 for incidents involving the misuse of alcohol.

The Government having raised a security concern, the burden shifted to Applicant to mitigate or rebut the allegations. After reviewing the mitigating conditions under this guideline, in particular Alcohol Consumption Mitigating Condition (AC MC) E2.A7.1.3.3 (*Positive changes in behavior supportive of sobriety*), I concluded it applies. In addition to being remorseful about his past behavior, Applicant expressed an appreciation of the consequences associated with the abuse of alcohol and the criminal justice system. He appears to be committed to his wife and accepts sole responsibility for supporting the family in view of her medical problems. That evidence, along with his wife's testimony of a noticeable

change in him over the past six months, and a change in friends, comprises sufficient mitigation under this condition.

Guideline J: Criminal Conduct

Based on the evidence and Applicant's admissions regarding the four criminal charges, the Government established a disqualification under Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged*), and CC DC E2.A10.1.2.2 (*A single serious crime or multiple lesser offenses*), as to ¶¶ 2. a and 2.b.

In refutation of those allegations, Applicant provided evidence to establish some mitigation under Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1 (*The criminal behavior was not recent*), and CC MC E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*). Three of the charges are more than ten years old and either were dismissed or not prosecuted. As to the 2004 conviction, Applicant successfully completed all court ordered terms and has not been involved in any subsequent incidents for more than two years. In addition to these facts and those stated above, he has satisfactorily performed his job over the last ten years and has been a supervisor for two years, which constitutes evidence of successful rehabilitation.

Based on the conclusion, stated below, that Applicant did not deliberately falsify his SCA, as required under 18 U.S.C. § 1001, the allegations contained in SOR ¶ 2.c are concluded in his favor.

Guideline E: Personal Conduct

The Government alleged in Paragraph 3 that Applicant intentionally falsified his SCA by failing to disclose the 1990 and 1992 arrests, which operates as a disqualification under Personal Conduct Disqualifying Condition (PC DC) E 2.A5.1.2.2 (*The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status determines security clearance eligibility or trustworthiness, or award fiduciary responsibilities*). Although Applicant admitted that he failed to disclose the information, he denied that he did intentionally.

When a falsification allegation is controverted or denied, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's 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 state of mind at the time the omission occurred. *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)).

Applicant credibly explained that he failed to disclose the three arrests because he was confused by the questions and did not think he was required to list them because he was not convicted of the charges. He now realizes that he made a mistake. Regrettably, he did not have his wife to help him interpret the questions as she had done when he completed the 1993 application and made full disclosure. The Government conceded that his explanation was plausible and I conclude similarly. Hence, the allegations contained in SOR ¶¶ 3.a and 3.b are found in his favor.

Whole Person Analysis

In addition to evaluating the disqualifying and mitigating conditions under each guideline, the adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at a balanced decision. Directive ¶ E2.2.2. describes the essence of scrutinizing all appropriate variables in a case as the "whole person concept." In evaluating the disqualifying and mitigating conduct an administrative judge should consider: (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.

I considered Applicant's middle age, his fourteen years of military service, the length of time he has worked for his

current employer and his current supervisory role, as well as the fact that he has held a security clearance since 1985 without any problems. I took into account his testimony about the alcohol charges and his present concern about his wife's health. Although it may be prudent for him to participate in an ongoing rehabilitation program as an additional method of managing stress, I do not believe similar criminal problems will recur in the future, given his awareness of the security clearance process and the impact additional incidents would have on his employment. Applicant mitigated those security concerns raised by his alcohol consumption and criminal conduct. Those concerns raised under personal conduct are found in his favor. Accordingly, Guidelines G, J and E are concluded for him.

FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph 1: Guideline G (Alcohol Consumption) FOR APPLICANT

Subparagraphs 1.a through 1.d: For Applicant

Paragraph 2: Guideline J (Criminal Conduct) FOR APPLICANT

Subparagraphs 2.a through 2.c: For Applicant

Paragraph 3. Guideline E (Personal Conduct) FOR APPLICANT

Subparagraphs 3.a through 3.b: For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant a security clearance to Applicant. Clearance is granted.

Shari Dam

Administrative Judge

1. Paragraph 1.c of the SOR lists the date of the arrest as August 23, 1992.
2. Paragraph 2.a of the SOR lists the date of the arrest as November 13, 1992.
3. Directive, Enclosure 2, ¶ E2.2.2.
4. Executive Order 10865, § 7.
5. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
6. ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).
7. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); Directive, Enclosure 3, ¶ E3.1.15.
8. *Id.*