



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)	
)	
)	ISCR Case No. 08-03745
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Braden Murphy, Esq., Department Counsel
For Applicant: Leslie McAdoo Gordon, Esq.

March 16, 2009

Decision

LAZZARO, Henry, Administrative Judge

Applicant was charged with Public Drunkenness in 2003. He appeared in court on that charge and it was dismissed. In 2007, he was convicted of Driving with a Blood Alcohol Content of 0.08 or more. He is currently serving a period of unmonitored summary probation based on that conviction. He has mitigated the security concern caused by his alcohol consumption.

On September 4, 2008, 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 alleges a security concern under Guideline G (alcohol consumption). Applicant's response to the SOR was received by DOHA on October 23, 2008. Applicant denied the allegation contained in SOR subparagraph 1.a, admitted the allegations contained in subparagraphs 1.b-1.d, and requested a hearing.

¹ This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive), and revised adjudicative guidelines which became effective within the Department of Defense for SORs issued after September 1, 2006.

The case was assigned to another administrative judge on January 5, 2009, and reassigned to me on January 22, 2009, due to caseload considerations. A notice of hearing was issued on January 26, 2009, scheduling the hearing for February 20, 2009. The hearing was conducted as scheduled. The government submitted two documentary exhibits that were marked as Government Exhibits (GE) 1-2, and admitted into the record without objection. Applicant testified and submitted eight documentary exhibits that were marked as Applicant Exhibits (AE) 1-8, and admitted into the record without objection. The record was held open to give Applicant the opportunity to submit additional documentation. One document was timely received, marked as AE 9, and admitted into the record without objection. A copy of an e-mail received from substitute Department Counsel indicating the Government did not object to AE 9 was marked as Appellate Exhibit (App. Ex.) I and made a part of the record. The transcript was received on February 26, 2009.

Findings of Fact

After a thorough review of the pleadings, testimony and exhibits, I make the following findings of fact:

Applicant is a 34-year-old single man who has been employed by a defense contractor, currently with the title of security consultant, since August 1997. He graduated from high school in 1993, attended college until 1994, and has worked steadily since that time. He has sporadically continued his education and has been steadily attending college part-time for the past three semesters. Applicant was a member of the Army Reserve Officer Training Corps while he attended college from 1993-94.

Applicant submitted letters from two co-workers and a woman who knows him through his involvement with her son in the Big Brothers program. They attest to his reputation for trustworthiness, dependability and being a dedicated employee who can be trusted with access to classified information. His co-workers have seen him in social situations where alcohol was being consumed and found his consumption to be responsible and not to excess. Applicant's facility security officer submitted a letter verifying that Applicant has not been involved in any security incidents and has been proactive in remaining current on security practices and completing security training.

Applicant was charged with Accident Damage to Unattended Vehicle or Property in June 2003. Applicant testified he consumed two beers prior to the accident which involved him sideswiping a parked automobile. The incident occurred near where Applicant was staying and he parked his car without informing anyone of the accident. He was convicted of the offense, fined \$300 and assessed court costs of \$79.

In July 2003, Applicant was charged with Public Drunkenness. He had been attending a bachelor party being held for a friend and consumed about eight drinks during the course of visiting about four different bars. He and his friends had rented two hotel rooms and he admits he passed out in the friends' room because he had consumed too much alcohol. His friends decided to carry him to his room, but on their way dropped him and left him laying in a hotel hallway. He appeared in court and the charge was dismissed.

In May 2007, Applicant conducted a “mileage run”² consisting of four flights. The trip began in the morning on one coast and consisted of two legs to reach the other coast and two more legs to arrive back at his starting point. Applicant received complimentary upgrades and the corresponding free alcoholic beverages on the flights and consumed about ten mixed drinks and four glasses of wine. He stopped drinking a couple of hours before the last flight landed and mistakenly thought he was sober enough to operate an automobile.

Applicant was driving from the airport to his girlfriend’s house when he was stopped by police. His blood alcohol content (BAC) was 0.12 when he was arrested. He was charged with Driving Under the Influence (DUI) and Driving with a Blood Alcohol Content of 0.08 or more (DUI-BAC).

On July 10, 2007, Applicant’s attorney appeared in court without Applicant being present and entered a plea of *nolo contendere* to the DUI-BAC charge. The DUI charge was dismissed. The imposition of sentence was suspended and Applicant was placed on summary probation for a period of 36 months with the following conditions: serve one day in jail with credit for one day served, pay a fine, costs and restitution totaling \$1,703,³ participate in and successfully complete a 3-month licensed first-offender alcohol and drug education and counseling program, attend ten alcoholics anonymous (AA) meetings at the rate of two times per week, and various other admonitions dealing with compliance with driving requirements. Applicant paid all fines and costs, complied with all other terms of the summary probation, and submitted proof of compliance to the court on October 26, 2007.

Applicant’s case was marked as “closed” based on his completing all conditions of the summary probation. His remaining time on probation is unmonitored and the only obligation he owes to the court is to comply with all laws. The next scheduled event in Applicant’s case is the termination of probation, which is scheduled to occur in July 2010.

Applicant’s driving privileges are suspended in the state where the DUI-BAC offense occurred. He can apply for reinstatement of those driving privileges at any time, but, because he has a valid driver’s license in the state where he now lives and he no longer has reason to drive in the state where the offense occurred, he has not applied for reinstatement of those privileges.

Applicant completed the court-ordered alcohol counseling and education program on October 21, 2007. He began the court-ordered attendance at AA meetings on September 27, 2007, and completed them on October 23, 2007. He still attends AA meetings on an irregular basis about once a month and has the telephone number of a sponsor in the event he feels the need to talk to someone. Applicant testified at some

² Applicant explained that a “mileage run” is flying from one location to another and back to acquire frequent flyer miles.

³ Applicant was given the option of serving 13 days in jail or performing 13 days of what appears to be community service in lieu of paying the fines, but opted to pay the fine and costs.

length about what he learned at the AA meetings he attended and how they have affected his lifestyle. For example, Applicant testified as follows:

Where I'd just come to the realization, after going to those meetings, that I was extremely fortunate. Everyone there had just awful situations that I just could not believe.

They didn't seem, it was just really, really surprising as to how horrible some of the situations were. Specifically, some of the AA cases where you go to these meetings and you listen to these stories and it's just some of the most gut-wrenching stuff I've ever heard.

And I realized at that point that I did not want any part of that in my life.

* * *

I came to a realization that that's just not an important part of my life anymore. It never was. It was something I think I was just being lazy about and I let it get the best of me, in a couple of circumstances.

But now it's not important at all. It's minimized. I'm more focused on my career than I ever have before, especially my education.

So between those two things and pursuing a few personal relationships, I don't have time for it, it's just not important. I do not want anything to do with that lifestyle. (Tr. 30-32)

The impact of the alcohol education program and attendance at AA meetings was so great on Applicant that he terminated a long-term relationship with a woman he had planned on marrying because he realized it was one of the influences in his life that caused him to occasionally abuse alcohol.

Applicant continues to consume alcohol in moderation in social settings. In response to an interrogatory that was propounded to him by the Government in June 2008, Appellant stated he drinks to the point of intoxication once every three to four months and the last time he was intoxicated was on April 27, 2008. He testified at length to what he meant by those statements and made clear that he interprets "intoxication" to mean having consumed any quantity of alcohol that might impair one's ability to operate an automobile. The April 27, 2008 intoxication he referred to consisted of him consuming three or four drinks while he was a spectator at a hockey game he attended with a friend.

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 and mitigating conditions 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 G (alcohol consumption) with its disqualifying and mitigating conditions, is most relevant in this case.

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 clearance¹¹ 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

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.

Analysis

Guideline G, 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. (Adjudicative Guideline [AG] ¶ 21)

Applicant consumed a modest amount of alcohol before he was involved in a property damage accident that he failed to report in June 2003. He was found guilty of a non-alcohol related traffic offense, fined \$300 and assessed court costs of \$79. He attended a bachelor party a month later, obviously drank excessively, and passed out in the hotel room of some friends. The friends, in an effort to carry him to his own room in the same hotel, dropped him and left him laying in a hallway. He was charged with Public Drunkenness, attended court, and the charge was dismissed.

In May 2007, Applicant consumed an excessive amount of complimentary alcohol that was provided to him by an airline. He was stopped by police as he was driving from an airport to his girlfriend's house and was charged with DUI and DUI-BAC. His BAC was 0.12. In July 2007, he entered a plea of *nolo contendere* to the DUI-BAC charge through an attorney and was placed on 36 months unmonitored summary probation with various conditions. He completed all conditions of the summary probation by October 2007, and has no continuing obligation under the probation other than to comply with all laws.

Disqualifying Conditions (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. The record substantiates only two situational alcohol-related offenses that were separated by four years. Appellant's remaining use of alcohol use cannot properly be categorized as either habitual or binge consumption. Thus, DC 22(c): *habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent* does not apply. The remaining disqualifying conditions have no applicability to the facts of this case.

Appellant convincingly testified about the effects his 2007 arrest and conviction, and his attendance at the alcohol counseling and education program and AA meetings have had on his lifestyle. His testimony, quick compliance with all conditions of probation, the changes in his personal life and his use of alcohol, his continuing, albeit limited, attendance at AA meetings, his educational accomplishments, and the letters of recommendation he submitted clearly establish he has learned from his past transgressions and he is unlikely to abuse alcohol in the future. Mitigating Conditions (MC) 23(a): *so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment*; and MC 23(b): *the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this*

problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser) apply.

The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. 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, I find Applicant has mitigated the security concern caused by his alcohol consumption. He has overcome the case against him and satisfied his burden of persuasion. Guideline G is decided for Applicant. It is clearly consistent with the national interest to grant Applicant a security clearance.

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:

Paragraph 1, Guideline G: FOR APPLICANT

Subparagraphs 1.a-d: For Applicant

Conclusion

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. Clearance is granted.

Henry Lazzaro
Administrative Judge

