



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



In the matter of:)	
)	
)	ISCR Case No. 08-08444
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Paul M. DeLaney, Esq., Department Counsel
For Applicant: *Pro Se*

September 23, 2009

Decision

LAZZARO, Henry, Administrative Judge

Applicant was twice convicted of underage drinking offenses in 2004. He was convicted of underage drinking and driving in 2005. He was charged with Driving While Intoxicated (DWI) in 2006. He has not driven a vehicle after consuming alcohol since he was charged with DWI in 2006, and he now consumes alcohol responsibly and in moderation. Applicant has mitigated the security concern that was created by his alcohol consumption.

On April 2, 2009, 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 April 23, 2009. Applicant admitted all allegations 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 me on May 29, 2009. A notice of hearing was issued on July 15, 2009, scheduling the hearing for August 17, 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 but did not offer any other evidence. The transcript was received on August 25, 2009.

Findings of Fact

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

Applicant is a 23-year-old single man who has been employed as a welder by a defense contractor since March 2008. He graduated from high school in June 2004, and worked steadily at a variety of jobs until he became unemployed in December 2006. He attended a technical school from January 2006 until January 2007, from which he received a certificate in welding. He obtained employment as a welder in April 2007, and he worked continuously as such for several non-government contractors until he was hired by his present employer.

Applicant began drinking alcohol with friends when he was about 16 years old. He estimates he drank about 12 beers on almost every weekend while he was in high school. In June 2004, and again in December 2004, he was charged with and convicted of Underage Consumption. He was fined about \$150, including court costs, following both of these convictions.

Applicant was charged with Inattentive Driving, Underage Drinking and Driving, Open Bottle Law (Possession), and Underage Consumption on September 25, 2005. Applicant testified he had only consumed two drinks over the course of an hour or two before he was arrested and that while his blood alcohol content (BAC) disclosed he had been drinking alcohol as a minor he was not intoxicated. (Tr. 47-48) He provided a statement on June 4, 2008, in which he stated his BAC was about 0.04 to 0.06 at the time. (GE 2) He pled guilty to and was convicted of Underage Drinking and Driving on March 3, 2006, and he was sentenced to unsupervised probation for one year and ordered to serve 45 days in jail (stayed for one year). Additional conditions of his probationary sentence included no possession of alcohol or drugs and attendance at a Mothers Against Drunk Driving (MADD) Impact Panel. Applicant admits he did not benefit from attendance at this MADD panel because he thought at the time that he should not have been required to attend it since he had not been driving while intoxicated. (Tr. 51)

Applicant continued to consume alcohol following his March 2006 conviction in violation of his probation. On June 10, 2006, he was charged with 4th Degree Driving While Impaired,² Operate a Motor Vehicle - Alcohol Concentration 0.08 Within 2 Hours, and

² 4th Degree Driving While Impaired is a misdemeanor in which there is not an aggravating factor present. Minn. Stat. §169A.27. Aggravating factors that would enhance the penalty for a DWI conviction are: 1) having a qualified DWI incident in the preceding ten years; 2) having a BAC of 0.20 or more; or 3) having

Underage Drinking and Driving. Applicant estimates he had consumed about 12 beers at a city festival during the course of the day before he was arrested. On April 2, 2007, he pled guilty to the offense of Operate a Motor Vehicle - Alcohol Concentration 0.08 Within 2 Hours and the remaining charges were dismissed. He was placed on unsupervised probation for two years, sentenced to serve 45 days in jail (44 days stayed for two years), and fined \$400. Other terms of probation included attendance at a MADD Impact Panel and completion of a 2-day DWI program. Applicant apparently was impacted by his second attendance at a MADD panel because as he testified his drinking habits "have gotten a lot better ever since I've had to take my MADD impact panel classes." (Tr. 29)

As a consequence of the conviction, Applicant's driving privileges were suspended by the state for six months following his April 2007 conviction. Despite the suspension, Applicant continued to drive to and from work because he was unable to obtain another means of transportation to get to his place of employment. He was convicted of speeding on May 31, 2007, of failure to drive in a single lane and driving after suspension on September 13, 2007, and no drivers license in possession or failure to display upon request on September 22, 2008. He was fined as a result of each of these convictions.

Applicant credibly testified he has neither operated a motor vehicle after consuming alcohol nor consumed alcohol while he remained underage since he was convicted of the DWI in April 2007. He currently drinks no more than a couple of beers on weekends, once or twice a month, while at bars with friends. Because of a medical condition, Applicant does not consume any alcoholic beverages other than beer. He recently purchased a house and he plans on returning to a technical school to obtain additional training in welding skills.

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.³ The government has the burden of proving controverted facts.⁴ The burden of

a child under the age of 16 in the motor vehicle. Minn. Stat. §169A.03.

³ ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

⁴ ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

proof in a security clearance case is something less than a preponderance of evidence,⁵ although the government is required to present substantial evidence to meet its burden of proof.⁶ “Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.”⁷ 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.⁸ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁹

No one has a right to a security clearance¹⁰ and “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹¹ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.¹²

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 began consuming alcohol while he was still in high school. He was twice convicted of underage drinking in 2004, and of underage drinking and driving in 2005. He was convicted of 4th Degree DWI in April 2007, for an offense that occurred in June 2006. Disqualifying Condition (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.*

Applicant is an unsophisticated young man who appears to have learned a convincing lesson following his 2007 DWI conviction. While he had three prior alcohol-related offenses, only one of those involved the operation of a motor vehicle and his BAC at that time was under the presumptive limit for intoxication. The other two were based

⁵ *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

⁶ ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

⁷ ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

⁸ ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

⁹ ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

¹⁰ *Egan*, 484 U.S. at 528, 531.

¹¹ *Id* at 531.

¹² *Egan*, Executive Order 10865, and the Directive.

solely on him consuming alcohol while being underage. He is now of age and he credibly testified that he consumes alcohol responsibly and in moderation. He also credibly testified he never operates a motor vehicle after he has consumed alcohol.

Considering Applicant's age at the time he committed the alcohol-related offenses, his steady work history before and after completing welding training, that over three years have passed since his last alcohol related offense, and his overall testimony, appearance, and demeanor, I find Mitigating Conditions (MC) 23(a): *so much time has passed . . . 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 . . . issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of . . . responsible use (if an alcohol abuser)* apply.

The objective of the security-clearance process is the fair-minded assessment of a person's trustworthiness and fitness for access to classified information. The "whole person" concept recognizes we should view a person by the totality of his 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-f:	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

