

DATE: May 8, 2002

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-03908

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

William S. Fields, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has an extensive history of alcohol-related arrests and convictions on charges varying from DuI to domestic violence (including one resulting in his conviction on a probation violation): five in all over a three-year period spanning 1997 through 1999. His sentences encompassed jail sentences (suspended in part), fines in some instances, and probation (to include attendance at alcohol awareness and safety programs (ASAP), jail time and probations). Considered together, his actions are still too recent and recurring to be consider mitigated. Compounding Applicant's problems with alcohol and domestic violence are the knowing and wilful omissions of his various arrests on the Questionnaire for National Security Positions (SF-86) he executed in December 1999, which he fails to extenuate or mitigate. Clearance is denied.

STATEMENT OF THE CASE

On October 24, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which 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, and recommended referral to an administrative judge to determine whether clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on November 14, 2001, and elected to have his case decided on the basis of the written record. Applicant was furnished the File of Relevant Material (FORM) on February 5, 2002, and is credited with receiving it on March 13, 2002. He provided a timely response to the FORM on arch 15, 2002. The case was assigned to this Administrative Judge on March 28, 2002.

STATEMENT OF FACTS

Applicant is 31 years of age and seeks a security clearance with his current defense contractor.

Summary of Allegations and Response

Applicant is alleged to have been arrested for four alcohol-related offenses spanning the period of September 1997 through May 1999, for which he received fines and jail sentences (some suspended) and probation (lifted following his January 1999 alcohol-related arrest on domestic assault and battery charges).

Additionally, Applicant is alleged to have falsified his SF-86 by understating the number of alcohol-related offenses he was arrested for. Applicant's omissions are alleged to be in violation of the criminally covered provisions of 18 U.S.C. Sec. 1001 (a felony).

For his response to the SOR, Applicant admits each of his covered offenses, while denying any intent to criminally falsify his SF-86.

Relevant and Material Factual Findings

The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference adopted as relevant and material findings. Additional findings follow.

Between September 1997 and May 1999, Applicant was arrested in connection with four alcohol-related offenses and convicted in each instance. In his first such conviction (in September 1997), he was only fined and ordered to attend an alcohol awareness course. The lessons he learned from this experiences were of limited value, however, for in May 1998, he was arrested in connection with another alcohol-related incident, this one for domestic assault, a misdemeanor. The charges resulted from a heated argument that developed between Applicant and his spouse. When he went to court on the charge in August 1998, the court found him guilty and sentenced him to 60 days in jail, with all but one weekend suspended, conditioned on Appellant's maintaining good behavior for one year.

While awaiting trial on his May 1998 domestic assault charges, Applicant was arrested and charged (in July 1998) with violation of a protective order that his live-in girlfriend had obtained after he assaulted her back in May 1998. This charge was not apparently associated with alcohol abuse by Applicant and was *nolle prosequi*.

Just six months later (in January 1999), Applicant was arrested again in connection with an alcohol-related incident (even if he was not intoxicated as he claims), this time for assault and battery of a family member. After being found guilty, he was sentenced to four months in jail on a work release program. While in jail, the court also charged and convicted him of violation of a court order: that he maintain good behavior for one year from the date of his August 1998 alcohol-related, domestic assault conviction (*see* item 6).

Applicant was arrested in connection with a fourth separate alcohol-related offense in May 1999 and charged with DuI (with a blood-alcohol content (BAC) of .17 per cent). He was found guilty by the court as charged and sentenced to 90 days in jail (suspended), suffered the suspension of his driver's license for 12 months, fined \$400.00, and ordered to attend an ASAP for eleven weeks. Applicant is credited with successfully completing the ASAP.

Besides the incidents of alcohol-abuse associated with his DuI and domestic violence incidents, Applicant has continued to consume alcohol excessively between 1986 and at least December 1999: oft-drinking to excess and to the point of intoxication (*i.e.*, every two to three months he estimates).

When asked to complete an SF-86 in December 1998, Applicant omitted all of his alcohol-related and associated domestic violence arrests, except for one: his 1997 DuI arrest and conviction. Acknowledging knowing and deliberate omission, he attributes his omissions to privacy concerns and his intention to address them in an anticipated DSS interview. When interviewed by a DSS agent in December 1999 (approximately a year later), he admitted his other alcohol-related arrests only after being confronted by the interviewing DSS agent. Inferences of knowing and wilful omission attributable to Applicant in connection with the alcohol-related arrests he left off his SF-86 were neither promptly nor voluntarily disclosed to the interviewing DSS agent.

Applicant is highly regarded by his current employer who cites his strong work ethic and team leadership as reasons he

has been entrusted with considerable responsibility, which has led to job promotions for him. Applicant's supervisor credits Applicant with being a valuable and trusted employee.

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) lists "binding" policy considerations to be made by Judges in the decision making process covering DOHA cases. The term "binding," as interpreted by the DOHA Appeal Board, requires the Judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the Judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E2.2 of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Criminal Conduct

Disqualifying Conditions:

DC 1 Allegations or admission of criminal conduct.

DC 2 A single serious crime or multiple lesser offenses.

Mitigating Conditions: None.

Alcohol Consumption

Disqualifying Conditions:

1. Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse , or other criminal incidents related to alcohol abuse.

Mitigating Conditions:

2. The problem occurred a number of years ago and there is no indication of a present problem.

3. Positive changes in behavior supportive of sobriety.

Personal Conduct

Concern: 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.

Disqualifying Conditions:

DC 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, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Mitigating conditions: None.

Burden of Proof

By dint of the precepts framed by the Directive, a decision to grant or continue an Applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a nexus to the applicant's eligibility to obtain or maintain a security clearance. The required showing of nexus however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of accessible risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of proof shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

CONCLUSIONS

Applicant comes to these proceedings with a considerable history of alcohol-related and domestic violence arrests and convictions, along with SF-86 omissions, material to the evaluation of his security clearance eligibility.

Applicant's Alcohol-related and domestic violence-related arrests and convictions

Applicant's series of alcohol/domestic violence related offenses and court order violations (six in all over a three-year period spanning 1997 and 1999) resulted not only in fines, supervised probation and alcohol education and safety classes, but more recently imposed jail time as well. Most of the incidents were alcohol-related, including the two domestic assaults upon his girlfriend. Applicant doesn't deny the affects of alcohol upon his actions and admits to continued drinking to intoxication every two to three months.

Applicant's problems with alcohol raise Government security concerns. Inadvertent disclosure risks associated with alcohol abuse transcend the work place environment and expose the individual to the risk of compromising classified information both on and off the job. Application of one of the Adjudicative Guidelines (for alcohol consumption) is appropriate given Applicant's recurrent history of problem drinking: Disqualifying Condition (DC) 1 (alcohol-related incidents away from work). Government may also invoke disqualifying conditions for criminal conduct: DC 1 (admission of criminal conduct) and DC 2 (single serious crime or multiple lesser offenses).

Even confining Applicant's alcohol-related incidents to his most recent May 1999 arrest does not free him of security-related concerns. Government's security concerns remain considerable for so long as Applicant remains vulnerable to drinking abuses. Prior abusive drinking followed by recurrent drinking excesses (to include periodic drinking to intoxication in private or in public) may indicate either active drinking problems or latent ones that need to be explored and monitored if deemed necessary. Applicant's recurrent drinking problems are marked by not only his four alcohol-related incidents between 1997 and 1999, but his subsequent admitted drinking to intoxication levels on a regular basis to the present.

Despite completing the court's ordered ASAP following his last reported alcohol-related incident (in May 1999), Applicant continues to drink at intoxicating levels on a fairly regular basis: every two to three months. He can point to no voluntary substance abuse counseling or AA participation in the aftermath of his last alcohol-related incident and appears to be in some denial of any current alcohol problem that could expose him to security lapses. Medical assessments would be helpful in identifying and correcting any residual alcohol problems of Applicant, but are clearly lacking in this record. Without a current assessment and prognosis, Applicant may not reasonably claim any of the mitigation conditions of the Administrative Guidelines for alcohol and criminal conduct, or absolve himself of security risks associated with his recurrent history of proven alcohol abuse.

Considering the record as a whole, to include the high entrusted standing he maintains with his employer, it is still too soon to conclude that Applicant's alcohol-related problems are behind him. Unfavorable conclusions warrant with respect to each of the allegations covered by sub-paragraphs 1.a through 1.f of Guideline J and sub-paragraphs 2.a and 2.b of Guideline G.

Applicant's SF-86 omissions

Raising security concerns as well as Applicant's knowing and wilful omissions of her alcohol-related and domestic violence arrests in his SF-86. So much trust is imposed on persons cleared to see classified information that deviation tolerances for incidents of trust betrayal are always difficult to reconcile with accepted requirements of reliability and trust. Applicant falsified his SF-86 in diverse ways: omission of four of his accumulated alcohol-related and domestic violence arrests out of apparent fear his FSO would leak information about his arrest history to his supervisors and colleagues and, in doing so, jeopardize his job. If this were only a question of mistaken impression of what his facility clearance officer might disclose, he might find extenuation in his miscalculation. But our Appeal Board has never afforded safe sanctuary from a deliberate omission of material information (prior alcohol-related and domestic violence covered arrests to be included) in situations (as here) where the attributed reason for the omission is fear of company embarrassment. So important is the policy of promoting full disclosure of adverse information material to a clearance investigation that permissible variances from prompt, good faith disclosure is necessarily very limited.

Applicant's omissions were knowing, deliberate and material to a determination about his clearance eligibility. They invite application of DC 2 of the Adjudication Guidelines (for falsification). And since Applicant never volunteered disclosure of his material arrest history until he was confronted by his DSS interviewer over a year later (in December 1999), he cannot be credited with making any prompt, good faith corrections under the governing Adjudicative Guidelines for Personal Conduct. Our Appeal Board has repeatedly held that neither the promptness prong nor the good faith prong of MC 3 of the Adjudication Guidelines (for personal conduct) are satisfied by an applicant's waiting for a DSS agent to schedule an interview, which in some cases (as here) may take months, even years. *Cf.* ISCR Case No. 30-1130 (January 4, 2001).

While Applicant is to be credited with his coming forward voluntarily with the complete information about his past alcohol-related abuse record when confronted by the interviewing DSS agent, his efforts were not soon and spontaneous enough to meet either the promptness or good faith requirements of the Adjudicative Guidelines, as distilled by our Appeal Board. These requirements must be respected, even as Applicant is commended for his candor and increased maturity by his employer. Applicant still needs more time to demonstrate his reliability and trustworthiness.

Considering all of the evidence produced in this record, including the major credits accorded him by his employer for overall trust and responsibility, and the available guidelines in the Directive (inclusive of the E.2.2 factors), unfavorable conclusions warrant with respect to sub-paragraph 3.a of Guideline E. Because each of the covered omissions meet the provisions of 18 U.S.C. Sec. 1001 as to intent and materiality, unfavorable conclusions warrant as well with respect to sub-paragraph 1.g of Guideline J.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the factors set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR and ensuing conclusions in the context of the FINDINGS OF FACT, CONCLUSIONS and the FACTORS listed above, this Administrative Judge makes the following FORMAL FINDINGS:

GUIDELINE J (CRIMINAL CONDUCT): AGAINST APPLICANT

Sub-para 1.a: AGAINST APPLICANT

Sub-para. 1.b: AGAINST APPLICANT

Sub-para 1.c: AGAINST APPLICANT

Sub-para. 1.d: AGAINST APPLICANT

Sub-para. 1.e: AGAINST APPLICANT

Sub-para 1.f: AGAINST APPLICANT

Sub-para. 1.g: AGAINST APPLICANT

GUIDELINE G (ALCOHOL): AGAINST APPLICANT

Sub-para. 2.a: AGAINST APPLICANT

Sub-para. 2.b: AGAINST APPLICANT

GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT

Sub-para. 3.a: 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 or continue Applicant's security clearance.

Roger C. Wesley

Administrative Judge