

DATE: March 7, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-17109

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Katherine A. Trowbridge, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

While Applicant has a history of DuI arrests and convictions over a five-year period spanning 1995 to April 1999 (for which he received counseling after each of the incidents), he has since turned his life around and ceased drinking. Concerned about losing his wife and kids through divorce and possibly losing his job, Applicant has sought and gained the support of his colleagues at work in aid of his commitment to abstain from drinking. With over 28 months of sustained abstinence and a respected work ethic to season his commitment not to consume alcohol anymore, Applicant makes the convincing case he will be able to sustain his self imposed sobriety. His alleged falsification of his isolated purchase of marijuana was unsubstantiated. Clearance is granted.

STATEMENT OF THE CASE

On August 29, 2002, 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 September 24, 2002, and requested a hearing. The case was assigned to this Administrative Judge on November 5, 2002. Pursuant to notice, a hearing was convened on December 17, 2002, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny or revoke Applicant's security clearance. At hearing, the Government's case consisted of five exhibits; Applicant relied on two witnesses (including himself) and five exhibits. The transcript (R.T.) of the proceedings was received on December 27, 2002.

STATEMENT OF FACTS

Applicant is a 49-year old field engineer for a defense contractor who seeks to retain his security clearance.

Summary of Allegations and Responses

Applicant is alleged to have (a) consumed alcohol to excess and to intoxication from 1970 to at least June 2000, (b) been arrested for DuI in April 1999, pleaded guilty to a second driving under the influence charge, sentenced to imprisonment, inpatient alcohol treatment, suspension of his driver's license, fines and abstention while on probation, (c) been arrested for DuI in November 1997, pleaded guilty, sentenced to probation, work release (revoked), community service, alcohol education awareness, group counseling, monitored antabuse, and suspension of his driver's license, (d) been arrested for DuI in April 1996, pleaded guilty to driving while impaired, and sentenced to probation, community service, alcohol awareness education, suspension of his driver's license, and a fine, (e) been arrested in 1995 for DuI, (f) characterized as a problem drinker following his 1995 arrest, (g) been disciplined by his employer in April 1999 for his April 1999 DuI arrest while driving on a company assignment and permitted to return to work only on condition he participate in an alcohol awareness program and submit to substance abuse screening, (h) received alcohol counseling and treatment from counseling service A from August 1998 to July 1999, while continuing to consume alcohol and (I) received alcohol counseling and treatment from treatment facility B from January 1997 to February 1997, while continuing to consume alcohol.

Additionally, Applicant is alleged to have (I) falsified his security clearance application (SF-86) of October 1999 by failing to acknowledge his marijuana purchase in April 1999 and (ii) knowingly and repeatedly violated his conditions of probation and work release by continuing to consume alcohol during his periods of probation.

For his response to the SOR, Applicant admitted most of the allegations. He denied habitually consuming alcohol, or to consuming to intoxication, from 1970 through June 2000, limiting his habitual consumption to a period spanning 1986 and June 2000, a period marked by troubling events in his marriage and ineffective court-prescribed treatments (shortly after his wife's first affair). He denied, too, using alcohol between August 1998 and July 1999, claiming his substitution of antabuse for the majority of this period. In mitigation of his drinking excesses, he claimed almost 28 months of self imposed sobriety.

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.

For the better part of his early adult life, Applicant drank socially, but rarely to excess. Following his marriage to his now ex-spouse (Ms. A) in 1982, he continued to keep his drinking under control. His drinking escalated in 1986, however, when he began to suspect his spouse was having an affair. His confronting her with his suspicions achieved little and left him with a sense of despondency. Instead of addressing his disappointments with his spouse, he turned to drinking in solitaire. Applicant's anxieties about his wife's fidelity heightened in 1993 after he arranged a trap to detect her suspected indiscretions. When he confronted her with having an extra-marital affair, she acknowledged it. From this point on, Applicant's marriage deteriorated. Once again, he turned to drinking in private to absorb his sorrows.

Between 1995 and November 1997, Applicant was involved in four separate alcohol-related arrests, each resulting in convictions, sentences, fines, ordered treatments and suspensions of driving privileges. In each case, Applicant accepted his court ordered conditions and attempted compliance with them. While enrolled in his 1997 court-ordered alcohol education classes, Applicant missed one of his assigned meetings and continued drinking on a weekly basis, despite his imposed abstention conditions added to his probation (*see ex. 4*). Applicant claims he misunderstood his probation conditions. He also continued to remain in a stressful marriage situation.

Following his November 1997 DuI arrest in State A (in which he registered a .189 per cent BAC), Applicant pleaded guilty to his second offense, was fined \$349.00, and was sentenced to thirty (30) days in jail (suspended subject to imposed conditions of probation). Since this second offense conviction violated his probation imposed in connection with his earlier conviction for his 1995 offense, additional conditions were imposed by the court as follows: suspension of driving privileges for a year, ordered AA attendance and counseling, classification as a problem drinker, and ordered to take antabuse and abstain from alcohol for the duration of his one year of probation, all subject to monitoring by his

court-appointed counselor. Because of his company-related travel requirements, Applicant's monitoring was to be administered by his team lead when he was on travel status.

Beginning his court-ordered classes in August 1998, Applicant made some early progress with his counseling with facility A. But his progress proved short lived. For when he reported to his detention bureau in September 1998, his probation officer detected alcohol on his breath. After he registered a .043 per cent BAC on the administered Breathalyzer, his probation officer reported the incident to the court. The court, in turn, revoked Applicant's work release and ordered him to spend the remainder of his thirty-day sentence in jail.

After completing his jail term in September 1998, Applicant (with the aid of his counseling and antabuse) was able to maintain his abstinence for the better part of the ensuing five months. Separation from his wife in December 1998, however, wrought renewed stress for him. While on a company trip to State B in April 1999, he consumed an excessive amount of alcohol on his off-hours (*viz.*, 2 to 3 beers while doing his laundry, which were followed up with 4 to 5 12 ounce beers in a two to three-hour period). When pulled over by a police car a short time later, he was administered a series of field sobriety tests by the officer on the scene; Applicant failed each of these tests. The same officer then administered a Breathalyzer on Applicant: Applicant registered a .16 per cent BAC on this test. Applicant was, in turn, arrested and charged with DuI. When he appeared in the State B court on this latest DuI offense, he pleaded guilty as charged. In addition to being fined \$819.00, he was sentenced to 30 days in jail, suffered the loss of his driving privileges for three years, ordered to enroll in an inpatient alcohol treatment program (24 to 28 days), and ordered to remain abstinent for the three years of probation he was placed on.

Upon returning home from his company assignment in April 1999, Applicant reported his DuI incident to his employer. Disciplinary action was taken against Applicant that conditioned his return to work on his taking the following steps: seek assistance from his company employee assistance program (EAP), successfully complete any recommended plan, and agree for the ensuing twelve months to periodic unannounced substance abuse screening at Company expense (*see ex. 5*). After frustrated attempts to enter into a State B 28-day inpatient program (*see R.T.*, at 54-59), Applicant settled on an approved outpatient program in State A. However, he ceased going to his B facility sessions in July 1999. To what extent he complied with his EAP's alcohol screening, AA or any other imposed conditions is less clear. While he has no problem attending AA meetings, he finds them to be of no help in keeping him sober (*see R.T.*, at 70-71). Losing his wife and kids, and potentially his job, is what he attributes to having the most impact on his sobriety.

Applicant completed his ordered incarceration between May 1999 and June 1999. He didn't quit drinking, however, until confronted by an interviewing DSS agent in June 2000 about his bringing a bottle containing hard liquor to his interview (*see R.T.*, at 74-75). Applicant assures he has remained abstinent since his June 2000 DSS interview, a period of 28 months. He now perceives himself as an alcoholic, albeit never diagnosed as such (*see R.T.*, at 75-76). This acknowledgment in itself represents a considerable piece of self reflection by Applicant: Previously, he considered himself to be borderline alcoholic, but still only a problem drinker (*see ex. 2*). From time to time he has attended AA meetings, but never regularly. He attended his last AA session in July 2002. To date, Applicant has not fulfilled the inpatient treatment condition in his probation order. Afforded the opportunity to complete a substituted 28-session outpatient program in his home state, he hopes to complete this part of his probation in the near future: before his three-year probation expires. His intention is to abstain from alcohol consumption in the future (*see R.T.*, at 76).

For the past twenty months, Applicant has availed himself of periodic outpatient alcohol counseling from a State A counseling service when he is not traveling. As a result of a disagreement with his counselor over his attendance, he and his counselor terminated their professional arrangement in August 2002 (*see R.T.*, at 64-67). He has delayed enrolling in an inpatient treatment program due to the travel uncertainties associated with his job and is now in the process of trying to enroll in an outpatient program to satisfy his probation conditions (*see R.T.*, 66-67). Because of a lack of treatment data and diagnostic impressions about Applicant, evaluating his recovery is more complicated. Either an inpatient program or approved outpatient treatment program could realistically be expected to produce both a diagnosis and prognosis based on a furnished alcohol consumption history, family data, and testing results. Without treatment data and input from recognized support programs like AA, any reliable recovery evaluation must necessarily be limited to assessments of Applicant's accounts of his alcohol abuse and his reasons for it and the accounts of others (like his former spouse and work associates) who know him best. All of those expressing their opinions about Applicant's progress agree the indiscretions of Applicant's former wife had a great deal to do with his resort to abusive drinking (*see*

ex. A; R.T., at 86-87).

Applicant appears to be well regarded by his supervisors and colleagues at work as a team member who can be relied on to perform his important maintenance assignments. Supervisors and work associates knowledgeable of Applicant's past drinking problems credit him with making significant positive changes in his life to ensure his continued employment and retention of his security clearance. Some associates report that Applicant doesn't frequent bars or accompany friends for drinks anymore and doesn't associate with people who entice him to drink again. Others credit Applicant with spending more time with his daughters in their school and sporting functions since his divorce. All who claim to know him well assure they no knowledge of his returning to alcohol in the past two and a half years (*see ex. A*). Their accounts bear considerable corroboration and reflect support of Applicant's claims of more than two years of self-imposed abstinence.

When asked to complete an SF-86 in October 1999, Applicant answered **no** to question 29, which inquired about any purchases of sales of illegal substances (to include marijuana) with the past seven years. In answering no, Applicant omitted any mention of the marijuana found on his person when he was arrested in April 1999. Applicant denies any knowing, wilful omission, assuring he misread the question to call for convictions relative to drug purchases for profit (*see answer; R.T., at*). His explanation is credible given these circumstances: his listing of his April 1999 DuI arrest, his purchase of the marijuana from the bar stranger not for his use, but to placate the stranger at a time when Applicant had consumed way too much alcohol, and the absence of any visible history of use or involvement in illegal drugs in his background. Department Counsel interposes no challenge of Applicant's explanations, and his explanations are accepted (*see R.T., at 78-79*).

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) list "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 E.2.2 of the Adjudicative Process 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:

Alcohol Consumption

The Concern: 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.

Disqualifying Conditions:

DC 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.

DC 2 Alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job.

Mitigating Conditions:

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

MC 3 Positive changes in behavior supportive of sobriety.

Personal Conduct

Basis: conduct involving questionable judgment, untrustworthiness, unreliability, 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, falsification or misrepresentation 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.

DC 5 A pattern of dishonesty or rule violations.

Mitigating conditions:

MC 1 The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability.

Burden of Proof

By virtue 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 cognizable 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 persuasion 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.

CONCLUSION

Appellant comes as a highly regarded maintenance engineer who developed alcohol problems attributable to an unraveling marriage. Between 1995 and April 1999, he was arrested and convicted of a series of four DuI offenses. His last such incident occurred in April 1999 while he was on a company related trip and raises a potential question of whether his abuse should be classified as job-related. Never diagnosed as an abusive drinker or alcohol dependent, Applicant, nonetheless, often drank himself to intoxication in the quiet sanctuary of his home after confrontations with his spouse over her extra-marital affairs. His court-ordered counseling programs that followed his 1996 and 1997 DuI incidents each resulted in Applicant's consuming alcohol while enrolled in his respective programs and ensuing difficulties in maintaining his sobriety while away on company trips. His counseling commitments since his last alcohol-related incident (*viz.*, his DuI of April 1999) have been erratic and accompanied by periods of resumed drinking.

On the strength of the evidence presented, one disqualifying condition (DC) of the Adjudication Guidelines for alcohol consumption may be applied: DC 1 (alcohol-related incidents away from work). While DC 2 (alcohol-related incidents at work) might have some tangential relationship to Applicant's April 1999 DuI offense, all of the circumstances

surrounding the offense involve after-hours conduct that cannot be considered to fall within the scope of Applicant's tasked work assignment; even though the offense occurred while he was on work-related travel status.

Assessment of Applicant's alcohol-related conduct must be made on the basis of a review of the entire evidentiary record developed to date, not merely the information developed with respect to his identified four DuI offenses. In making an overall assessment of Applicant's clearance eligibility, major emphasis must be accorded his most recent drinking history, job performance and support he receives from his supervisor, work colleagues, and former spouse. In Applicant's case his support base remains very strong among those who know him professionally and personally.

By his actions and improved understanding, Appellant demonstrates he has taken the necessary restorative and corrective measures in his personal affairs to ensure that he does not repeat the same or similar judgment lapses associated with his prior problems with alcohol abuse. His mitigation efforts not only reflect important seasoning (twenty eight months worth of sustained abstinence) without any further incidents or problems in these covered areas, but manifest impressive and sustaining positive steps to ensure that he does not experience any alcohol abuse relapses or recurring problems with law enforcement authorities in the future. Significantly, during Applicant's maintained sobriety over the past twenty eight months, he has not encountered any problems with either law enforcement authorities, his work, or in his personal life. While a completed inpatient or outpatient treatment program might have yielded more illuminating data about his alcohol history, and perhaps provide better indicators for making predictive judgements about his ability to sustain his abstinence in the future, he is to be credited with a fairly sizable support network currently at work. During his extensive company-related traveling, he always has his team of associates around him who are familiar with his past alcohol missteps and ready to provide support. This kind of support appears to have been more effective in keeping him sober than the AA meetings he has attended in the past.

Applicant's demonstrated efforts to remedy his judgment lapses associated with alcohol abuse enable him to take advantage of two mitigating conditions (MC) of the Adjudication Guidelines for alcohol consumption: MC 2 (problem occurred a number of years ago and there is no indication of a recent problem) and C 3 (positive changes in behavior). Altogether; Applicant provides sufficient demonstrative indications of sustained mitigation of both his drinking problems and encounters with law enforcement authorities to overcome any residual security risks associated with his past alcohol-related judgment lapses.

Considering the record as a whole, Applicant makes the convincing showing that he has both the maturity and resource support at his disposal to avert any recurrent problems with judgment lapses related to alcohol and personal conduct (repeated rule violations) to warrant safe predictions that he is no longer at risk to judgment impairment associated with such conduct. Favorable conclusions warrant with respect to the judgment impairment and rule violation allegations covered by Guidelines G and E, respectively.

Posing potential security concern as well are Applicant's omissions of his single marijuana purchase preceding his April 1999 arrest for DuI. Applicant's explanations of his misreading the question are accepted and enable Applicant to surmount the falsification implications of his omission. Applicant may invoke C 1 (information unsubstantiated) of the Adjudicative guidelines for personal conduct and carries his evidentiary burden in refuting the allegations he falsified his SF-86 by omitting his marijuana purchase. Favorable conclusions warrant with respect to sub-paragraph 2.a of Guideline E.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the E 2.2 factors enumerated in the Adjudicative Guidelines of the Directive.

FORMAL FINDINGS

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

GUIDELINE G (ALCOHOL): FOR APPLICANT

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: FOR APPLICANT

Sub-para. 1.c: FOR APPLICANT

Sub-para. 1.d: FOR APPLICANT

Sub-para. 1.e: FOR APPLICANT

Sub-para. 1.f: FOR APPLICANT

Sub-para. 1.g: FOR APPLICANT

Sub-para. 1.h: FOR APPLICANT

Sub-para. 1.i: FOR APPLICANT

GUIDELINE E (PERSONAL CONDUCT): FOR APPLICANT

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: FOR APPLICANT

DECISION

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 Applicant's security clearance.

Roger C. Wesley

Administrative Judge