

DATE: April 28, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-17863

DECISION OF ADMINISTRATIVE JUDGE

BURT SMITH

APPEARANCES

FOR GOVERNMENT

Jonathan Beyer, Esq., Department Counsel

FOR APPLICANT

Joe C. Ashworth, Esq.

SYNOPSIS

In 1982-1983, Applicant's alcohol abuse was the cause of three automobile collisions resulting in serious personal injury, property damage, and a fatality. In 1984, Applicant was sentenced to three years' imprisonment upon conviction of vehicular homicide while intoxicated. In about 1990, Applicant returned to occasional alcohol consumption and she expresses an intent to continue drinking alcohol in the future on a moderate basis. For clearance purposes, this poses a risk of relapse and further alcohol abuse. Applicant's request for clearance is denied under 10 U.S.C. 986. Waiver by the Secretary of Defense is not recommended.

STATEMENT OF THE CASE

On June 6, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992, as amended by DepSecDef Memorandum, dated June 7, 2001 (the DoD Memorandum)⁽¹⁾, issued a Statement of Reasons (SOR) to Applicant. The SOR details reasons 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 for Applicant. It recommended referral to an Administrative Judge to determine whether a clearance should be granted or denied.

The Applicant responded to the SOR in a written answer dated July 1, 2002, in which she initially requested a decision without a hearing. She later retained counsel, and on October 3, 2002, she requested and was granted a hearing. The case was assigned to me on October 28, 2002. On November 5, 2002, a Notice of Hearing was issued scheduling the hearing on December 17, 2002. At the hearing the Government submitted six documentary exhibits. Applicant testified, and she presented testimony from one witness. The transcript was received by DOHA on December 26, 2002.

FINDINGS OF FACT

The Applicant is 39 years old and married with two children. She holds a BS degree in computer science, and she is

employed by a defense contractor as a technical director. In her answer to the SOR, Applicant admits that during 1982-1983 she was involved in three incidents of alcohol-related criminal conduct while driving an automobile. The first of these incidents caused serious harm to a victim and the third resulted in a loss of life.

Applicant graduated from high school in 1981 at age 17. Alcohol abuse was not uncommon in Applicant's family. (Tr. 15-17.) During her high school years and immediately thereafter, Applicant frequently consumed beer to the point of intoxication while in the company of her friends. In August 1982, Applicant became intoxicated at a bar, and she fell asleep at the wheel when she drove home. She lost control of her car and struck a motorcycle, severely injuring a female rider. Applicant claims she saw nothing in her rearview mirror to indicate an accident had occurred, and she continued on her way, without stopping to investigate. (Gov. Ex. 4, p.2.)

Upon arriving at home, Applicant learned from room mates the female victim was a friend, and Applicant also realized she had caused the collision. The victim's leg was amputated, and on the next day, Applicant visited her in the hospital, saying nothing of her own involvement in the collision. Applicant was eventually arrested, but the file contains no court records indicating the outcome of the court proceedings. Applicant testified she was given "tickets," but she has no further information. (Tr. 17.)

Eight months later, in April 1983, Applicant was involved in another automobile collision involving alcohol abuse. Applicant became intoxicated while babysitting, and when she drove away she fell asleep at the wheel. She struck several parked cars, causing damage to the vehicles, and she left the scene without stopping. As before, Applicant was arrested, but the file contains no records indicating the outcome of court proceedings. Applicant claims she received "about five tickets." (Gov. Ex. 4, p. 2; Tr. 17.)

In October 1983, six months after driving into the parked cars, Applicant was again driving in an intoxicated condition when she made a U-turn into the path of an oncoming vehicle. Although Applicant was apparently uninjured, the driver of the other car was killed. Applicant was arrested, and in June 1984, she pled guilty to vehicular homicide (intoxicated) and DUI. Applicant was sentenced to three years' confinement, with two years suspended, and she was placed on three years' probation. Applicant was released from confinement after serving four months, and she later completed her probation requirements, to include attendance at an alcohol treatment program.

Applicant stopped drinking for several years after the fatal 1983 collision. In compliance with sentencing requirements, she attended outpatient alcohol counseling, and she cooperated with the program, to include attendance at Alcoholics Anonymous (AA). Applicant remembers little of the program, and she did not continue AA attendance after fulfilling court-ordered requirements. In 1986, Applicant was discharged with a diagnosis of "alcohol abuse in remission." (Gov. Ex. 6.)

For about seven years, between 1983 and 1990, Applicant abstained from alcohol. She married and became a parent (later divorced), and she attended night college while working at two jobs. She earned a bachelor's degree, and she maintained a good work record with different employers. Applicant has a stable lifestyle, and for several years she was a single parent, before re-marrying and giving birth to another child.

In about 1990 Applicant returned to occasional alcohol consumption. In a recent sworn statement she says, "For a period during the 1991/1993 (approximate) time frame I started to drink again socially and would become intoxicated every once in a while. Since that time, I consume alcohol rarely and when I do it's no more than a drink or two." (Gov. Ex. 4.) As to her future intentions, Applicant states in her answer to interrogatories that she intends to drink alcoholic beverages in the future, but since 1993 she no longer drinks to intoxication. (Gov. Ex. 2.) This is consistent with Applicant's testimony in which she concedes she presently drinks wine with dinner on an occasional basis. (Tr. 67-70.) Her husband testified she does not become intoxicated. (Tr. 80.)

POLICIES

Enclosure 2 of the Directive, as amended by the DoD Memorandum, sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. The guidelines are divided into those that may be considered in deciding whether to deny an Applicant's request for clearance (Disqualifying Conditions, hereafter DC) and those that may be considered in deciding whether to grant the Applicant's request (Mitigating Conditions, hereafter MC).

Based upon a consideration of the entire record, I find the following adjudicative guidelines have application in this case:

Guideline J - Criminal Conduct. *The concern:* A history of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Disqualifying Conditions applicable:

1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
2. A single serious crime or multiple lesser offenses;
3. Conviction in a Federal or State court, including a court-martial, and sentenced to imprisonment for a term exceeding one year. [\(2\)](#)

Mitigating Conditions applicable:

1. The criminal behavior was not recent.
6. There is clear evidence of successful rehabilitation.

Guideline G- 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 applicable:

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 abuse.
4. Evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.
5. Habitual or binge consumption of alcohol to the point of impaired judgment.

Mitigating Conditions applicable:

2. The problem occurred a number of years ago and there is no indication of a recent problem.
3. Positive changes in behavior supportive of sobriety.

The whole person concept. In addition to the above guidelines, the Directive provides in Para. E.2.2.1. that under the "whole person concept" the Administrative Judge shall also consider (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (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 pertinent 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.

Title 10 U.S.C., section 986. Notwithstanding the above DoD policies, under Title 10 U.S.C. Section 986, as implemented by the DoD Memorandum, the Department of Defense may not grant a security clearance to an Applicant who has been convicted of a crime in a State or Federal court and sentenced to imprisonment for a term exceeding one year, regardless of time actually served. However, the Secretary of Defense or the Secretary of the Military Department concerned may authorize a waiver of this prohibition in certain meritorious cases.

CONCLUSIONS

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted upon to safeguard it 24 hours a day, whether on duty or off. The Government is therefore appropriately concerned where reliable information indicates an Applicant for clearance may be involved in alcohol-related criminal activities or excessive alcohol consumption. These unfavorable actions demonstrate poor judgment and disrespect for the law that might easily lead to a disregard of rules and procedures designed to protect classified defense secrets.

With regard to burden of proof in DOHA cases, the Government must prove all controverted facts that tend to demonstrate Applicant is ineligible for clearance. Once this burden is met, the Applicant must overcome the Government's case, if he or she is to prevail, by persuasive evidence in refutation, mitigation, or changed circumstances. However, the Applicant always bears the ultimate and overall burden of proving it is clearly consistent with the national interest to grant him or her a security clearance. Furthermore, the Directive provides "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." (Directive, Para. E2.2.2.) Thus, the Applicant's burden is a heavy one.

In this case, the Government first alleges Applicant is ineligible for clearance because of criminal misconduct, conviction, and sentencing that disqualify her for clearance under Title 10 United States Code section 986. As noted above, this Federal law prohibits the grant of clearance to an applicant who has been convicted of crimes resulting in a sentence to imprisonment for more than one year, absent a meritorious waiver by the Secretary of Defense. Therefore, the statute prohibits DoD from granting a clearance to Applicant, although Applicant's case may be considered for meritorious waiver.

Paragraph 1 (Guideline J- Criminal Conduct). Applicant was convicted of vehicular homicide and DUI, and she was sentenced, *inter alia*, to three years' confinement. Applicant's counsel argues the prohibition of 10 U.S.C. 986 does not apply because Applicant served only a few months of her sentence (Tr. 90-91.) However, the implementing DoD Memorandum makes clear the prohibition is based upon conviction and sentencing, "regardless of the amount of time actually served." (DoD Memorandum, at attachment.)

In order to evaluate whether a case governed by 10 U.S.C. 986 is meritorious for waiver purposes, the evidence is adjudicated in accordance with current regulatory guidance, to include applicable due process procedures. Accordingly, the evidence in this case is considered against the disqualifying conditions and mitigating conditions applicable to Guideline J, as well as the whole person concept.

DC 1 and DC 2 of Guideline J have application and must be considered against the Applicant. The basis for application of these disqualifying conditions is self-evident. During 1982-1983 Applicant was involved in three alcohol-related automobile collisions caused by her illegal operation of a motor vehicle while intoxicated. Applicant only received citations for the first two crimes, but for the third crime she was convicted of vehicular homicide and sentenced to three years' imprisonment. The conviction and sentencing require application of DC 3.

Two mitigating conditions also have application. MC 1 applies because the criminal behavior "was not recent", *i.e.*, Applicant's last disqualifying criminal conduct occurred about twenty years ago. MC 6 is applied because there is "clear evidence of successful rehabilitation" from drunk driving. At the time of Applicant's alcohol-related offenses she was about 19 years old. Since that time she has been married and raised two children, she has been successfully employed for many years, and she has earned a college degree while working full time. Applicant's maturity and experience over twenty years make it clear she has learned a serious lesson from the criminal misconduct of her youth, and it is not likely she will again drive while intoxicated.

The whole person concept has also been considered, and all or part of factors (1); (2); (3-frequency); (5); and (7) must be applied against Applicant. However, factors (3-recency); (4); (6); (8); and (9) are mitigating factors considered in Applicant's favor. There is little likelihood Applicant will again operate a vehicle in a dangerous intoxicated condition as she did twenty years ago. I find Applicant is rehabilitated with respect to driving while intoxicated.

However, this is not a finding that Applicant can safely be relied upon to refrain from alcohol abuse in any setting. DoD security concerns involve evaluations of sober reliability in all areas, not only on the public highways.

Paragraph 2 (Guideline G - Alcohol Consumption). In assessing Applicant's reliability for security purposes, the catastrophic effects of her past alcohol abuse require that her present drinking patterns be examined with great care.

The principal cause of Applicant's destructive behavior during 1982-1983 was her repeated abuse of alcohol, even after causing serious injury to a friend and major damage to property. Applicant's compulsion to drink heavily was undeterred by these events, and she did not stop drinking until her unlawful actions caused a third collision resulting in a fatality.

After her 1984 conviction, Applicant underwent treatment for alcohol abuse, but the record indicates she did not view it as a way to build coping skills for long-term sobriety. Applicant does not remember much about the court-ordered program, and after completion of the program she stopped attending AA meetings. Applicant maintained total sobriety for seven years, but during 1990-1993 she resumed alcohol consumption on an occasional basis, and she sometimes became intoxicated. At present, Applicant drinks wine sparingly, and she has not been intoxicated since 1993. Applicant states it is her intention to continue drinking alcohol on a limited and controlled basis.

While DoD does not require a pledge of lifetime abstinence in order to qualify for a security clearance, it must judge each Applicant's request for clearance against their individual history of alcohol consumption. Applicant's history demonstrates that alcohol abuse can lead to disastrous lapses in judgment. Applicant completed alcohol treatment, but she did not gain an insightful understanding that, in her case, any alcohol consumption might cause her to relapse into extremely reckless behavior.

Considering the depth of Applicant's past alcohol abuse and her intent to continue drinking, DoD can not be confident of Applicant's continued sobriety while in possession of classified information. In view of Applicant's past record and present intentions, she fails to persuade that she will continue alcohol consumption without a relapse into her former abusive patterns.

The whole person concept has also been considered under Criterion G, and Applicant brings herself favorably within several of the enumerated factors. However, her present drinking habits, although benign at the moment, are a serious obstacle in reaching a determination of future security reliability.

On balance, it is concluded the Government has met its burden of proof, but the Applicant has failed to meet her burden of proving it is clearly consistent with the national interest to grant her request for access to the nation's defense secrets. Applicant must be denied clearance under Guideline J (Criminal Conduct) because of operation of 10 U.S.C. 986, and Guideline G (Alcohol Consumption). Applicant has not met her burden of proving a meritorious waiver should be recommended to the Secretary of Defense.

FORMAL FINDINGS

Formal findings For or Against the 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 J: Against the Applicant. .

Subparas. 1.a.-1.b.: Against the Applicant.

Paragraph 2. Guideline G: Against the Applicant.

Subparas. 2.a. - 2.e.: Against the 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 Applicant's request for a security clearance. I do not recommend further consideration of this case for a waiver of 10 U.S.C. 986.

Burt Smith

Administrative Judge

1. *"Implementing of Restrictions on the Granting or Renewal of Security Clearances as Mandated by the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001,"* Deputy Secretary of Defense, June 7, 2001.
2. As added by 10 U.S.C. 986 and the DoD Memorandum.