

DATE: May 8, 2002

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

CR Case No. 01-18151

## DECISION OF ADMINISTRATIVE JUDGE

**PAUL J. MASON**

### APPEARANCES

#### FOR GOVERNMENT

Rita O'Brien, Esq., Department Counsel

#### OR APPLICANT

*Pro se*

### SYNOPSIS

While in college from 1994 until December 1998, Applicant periodically drank alcohol to excess. Approximately a month after he graduated from college, he was arrested for driving while under the influence (DWI) in January 1999. One of the conditions of Applicant's 18 month probation before judgment sentence in April 1999 was no alcohol consumption. Applicant violated the abstinence condition on eight to ten occasions, and his alcohol-related conduct is not extenuated by the peer pressure applied his coworkers to drink or the adjustments he made to restrict drinking to taverns within walking distance of his house. Applicant's intentional falsification of question 30 of the SF-86 form under the personal conduct guideline also establishes criminal conduct under 18 USC 1001. Given Applicant's ongoing denial he falsified the security form, Applicant's favorable evidence about his trustworthiness and dedication on the job does not meet his ultimate burden of persuasion under the specific guidelines or the factors of the whole person concept.

### STATEMENT OF CASE

On September 27, 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, amended by Change 4, April 20, 1999, 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 denied or revoked. Applicant's answer is not dated, but was timely received by DOHA on October 22, 2001.

The case was transferred to the undersigned on October 26, 2001. A notice of hearing was issued on February 2, 2002, and the case was heard on February 8, 2002. The Government submitted documentary evidence. Testimony was taken from Applicant and four witnesses. The transcript was received on February 17, 2002.

### FINDINGS OF FACT

The SOR alleges alcohol involvement, personal conduct and criminal conduct. Applicant admitted all subparagraphs

under alcohol involvement. He denied an intentional falsification of question 30 (2.b.) of his Questionnaire for National Security Positions, Standard Form 86, as alleged under paragraph 2 of the SOR. He admitted the alcohol-related incident (1.b.) also constitutes criminal conduct (3.a.) but denied his omission under 2.b. demonstrates felonious criminal conduct as alleged under 3.b.

Applicant is 26 years old and has been employed as a graphics designer by a defense contractor since February 1999. He seeks a secret security clearance.

Applicant began college in 1994 and was awarded his Bachelor of Arts (BA) in December 1998. (GE 2) During college, Applicant was a member of a fraternity and consumed alcohol approximately once every week. In a four hour period, Applicant drank between six to eight glasses of beer. Applicant's weekly alcohol consumption resulted in alcohol intake at times to excess and to the point of intoxication (1.a.) from 1994 to about January 1999.

On January 28, 1999 (1.b.), Applicant was with a few friends celebrating his hire by his present employer. He consumed approximately three bottles of beer at one restaurant and then four to five containers of beer, along with a couple of shots of whiskey, at another restaurant. On his way home, he was arrested by the police after they noticed him weaving. Applicant was also arrested for possessing more than one driver's license, unsafe lane change, DWI, and negligent driving.

Before his sentencing date on April 1, 1999, Applicant enrolled in an alcohol awareness class. The class met from March to April 1999, once a week for six weeks. At the beginning and end of the six week classes, it was determined Applicant was an occasional binge drinker. The course addressed the overall effects of drugs (Tr. 95), and was not really structured as a counseling course. (Tr. 94) Applicant successfully completed the alcohol awareness program.

On April 1, 1999, Applicant was sentenced for the DWI charge. On the DWI charge, he received probation before judgment, which results in the criminal charge being dismissed on condition all the terms of probation are complied with. (1) One of the conditions of Applicant's 18 month probation was to totally abstain from alcohol and abusive use of any drug. The other three charges were dismissed.

Applicant violated the abstinence condition of probation by consuming alcohol eight to ten times. In GE 4, Applicant stated, "I have had an occasional beer now and then, but usually I consume only water and lime or iced tea." In GE 5, Applicant stated:

During my probation period, I did knowingly violate the conditions of the probation by consuming alcoholic beverages between eight and ten times. I generally consumed one beer while attending after work office parties with my new coworkers. The reason I consumed alcohol during this period was because I wanted to fit in with my new co-workers and I did not want them to know I had an alcohol related arrest. I never drank to excess, and I only consumed one beer and made it last during the entire event. I also m[a]y have consumed a glass of wine during a family holiday party on the 4<sup>th</sup> of Jul 00. (2) I never drove home after these events, because the bar we went to was within walking distance of my home." (GE 5) (3)

In explaining how responsible and dedicated Applicant is, his mother recalled a prestigious position Applicant held in his senior year in high school while simultaneously trying to win selection to the local military academy. The mother believed Applicant did not start using alcohol until he was 21 years of age. Applicant told both his mother and father he had been drinking while on probation. (Tr. 56)

Applicant's father does not know when Applicant started using alcohol. Applicant's father does not believe Applicant lied on the security form. The father believed Applicant had two drinking assessments, and neither the court system or the uncle's friend found Applicant had a drinking problem.

Applicant's uncle has seen Applicant about six or seven times a year since Applicant was 22 years old. The uncle is the chief operating officer of five drug and alcohol facilities with 400 beds. These facilities also do assessments and supervise outpatient facilities. The uncle knows nothing about Applicant's sentence for the DWI in January 1999. Finally, Applicant's uncle has seen Applicant consume one or two drinks at social functions. (Tr.45)

Applicant drinks one or two drinks about twice a month at the present time. (Tr. 79) His roommates keep alcohol in the house and Applicant has sometimes purchased beer to keep in the house. (Tr. 92)

On April 5, 1999, Applicant falsified his answer to question 30 (2.b.) of his Questionnaire for National Security Positions, Standard Form 86, by answering "no" to the question whether in the last seven years his use of alcoholic beverages resulted in any alcohol-related treatment or counseling. Applicant's first explanation was he misunderstood the question. He stated in unequivocal language, "...I misunderstood the question. I did not intentionally conceal this information." (GE 5) On the next page of GE 5, Applicant indicated he read the statement and initialed all pages and corrections, and believed the statement to be true as written. (GE 5)

He did not come forward with his most recent explanation until the hearing. Applicant accused faulty software and the confusing nature of the security form for the "no" answer which appears alongside question 30 (the drug treatment question). Applicant stated:

As far as I stated earlier, no way, shape or form would I have intentionally left [it] off. If it had - if it was left off, it was by accident purely. I do remember going back and answering that question and even putting in the name of the place, [alcohol program's name]. I can still remember to this day, but it got left out for some reason, something happened to the disk, I mean it was very easy to do. It was a very confusing form. (Tr. 78)

Having carefully inspected the exhibits and the testimony from external sources, there is no evidence to back Applicant's claims of confusion and defective software. While Applicant testified strenuously regarding the reasons for the "no" answer appearing beside question 30 of the SF-86, his parents' testimony regarding the defective software is still not corroboration because he is the source of their information regarding the defective software. (Tr. 64-66)

According to Applicant's coworker of one and one-half years, Applicant demonstrates a strong work ethic and is a dedicated and trustworthy employee. His coworker has never seen Applicant drink until his judgment was questionable or he was unable to control his impulses. (Tr. 30)

Considering the evidence as a whole, I find Applicant intentionally falsified the security form (2.b.) because I find no independent evidence to support Applicant's claim the false information resulted from a defect in the electronic processing of the security form.

## **POLICIES**

Enclosure 2 of the Directive sets forth policy factors which must be given binding consideration in making security clearance determinations. These factors must be considered in every case according to the pertinent criterion; however, the factors are in no way automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the entire realm of human experience or that the factors apply equally in every case. In addition, the Judge, as the trier of fact, must make critical judgments as to the credibility of witnesses. Factors most pertinent to evaluation of the facts in this case are:

### **Alcohol Consumption**

Disqualifying conditions:

1. Alcohol-related incidents away from work;
5. Habitual or binge consumption of alcohol.

Mitigating Conditions:

1. The alcohol-related incidents do not indicate a pattern;
2. The problem occurred a number of years ago and there is no indication of a recent problem;

## **Personal Judgment**

### Disqualifying Conditions:

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;
5. A pattern of dishonesty or rules violations, including a violation of any written or recorded agreement between the individual and the agency.

### Mitigating Conditions:

2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily.

## **Criminal Conduct**

### Disqualifying Conditions:

1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
2. A single crime or multiple lesser offenses.

### Mitigating Conditions:

1. The criminal behavior was not recent;
2. The crime was an isolated event;
6. There is clear evidence of rehabilitation.

## **General Policy Factors (Whole Person Concept)**

Every security clearance case must also be evaluated under additional policy factors that make up the whole person concept. Those factors (found at page 16 of Enclosure 2 of the Directive) include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 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.

## **Burden of Proof**

As set forth in the Directive, every personnel security determination must be a fair and impartial overall commonsense decision based upon all available information, both favorable and unfavorable, and must be arrived at by applying the standard that the granting (or continuance) of a security clearance under this Directive may only be done upon a finding that to do so is clearly consistent with the national interest. In reaching determinations under the Directive, careful consideration must be directed to the actual as well as the potential risk involved that an applicant may fail to properly safeguard classified information in the future. The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature.

The Government must establish all the factual allegations under alcohol consumption (Guideline G), personal conduct (Guideline E), and criminal conduct (Guideline J) which establishes doubt about a person's judgment, reliability and

trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to the sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation which demonstrates that the past adverse conduct is unlikely to repeat itself and Applicant presently qualifies for a security clearance.

### CONCLUSIONS

Excessive consumption of alcohol can result in the exercise of poor judgment, and unavoidably raise the risk of unauthorized disclosure of classified information. There are two disqualifying conditions (DC) which are relevant in determining whether a case has been made against Applicant under the alcohol consumption guideline. The first disqualifying condition (DC) 1 is alcohol-related incidents, i.e., driving while under the influence of alcohol, away from work. This condition is entitled to a significant amount of weight as demonstrating poor judgment because the driver is placing his own life as well as the lives of others in harm's way. With a history of periodic abuse of alcohol to excess (described as binge drinking (DC 5) at the beginning and end of the alcohol awareness program) while in college between 1994 and his graduation in December 1998, Applicant was arrested for DWI in late January 1999, a few days before he began working at this present job. On April 1, 1999, Applicant was sentenced to probation before judgment, allowing him a chance to start over again with a clean record, on condition he successfully comply with all conditions during 18 months of probation.

One of those conditions was to abstain from alcohol for 18 months. Within six months after the condition was imposed, Applicant decided to violate the condition by drinking eight or 10 times between August 1999 and October 2000, when he was discharged from probation. The manner in which Applicant violated his probationary condition warrants some discussion. Applicant described his drinking while on probation as minimal and only at those establishments which were within walking distance of his home. Regardless of the amount of his drinking and where he chose to violate his probation, he still demonstrated poor judgment, which is not sufficiently allayed by his voluntary admission of drinking during the probationary period. His decision to resume drinking despite the probation condition, indicates Applicant is willing to break the law if he has to, in order to achieve his objectives.

The alcohol consumption guideline identifies two pertinent mitigating conditions (MC) which may remove or substantially lessen the security concerns associated with Applicant's alcohol abuse. MC 1 applies in those situations where the alcohol-related incidents do not indicate a pattern. The circumstances of this case are unusual in that a pattern of alcohol abuse began in January 1999 when Applicant committed the DWI offense. Applicant's alcohol-related incidents resumed in August 1999 when he resumed consuming alcohol eight or ten times until October 2000, even though he was ordered to abstain for the full probationary period. Applicant's decision to ignore the court condition by continuing to drink, allows residual concerns to linger regarding the level of Applicant's drinking after October 2000; even though he claims he has been drinking only two or three beers a month since then. (MC 2) Accordingly, the evidence in mitigation and rehabilitation is insufficient to rebut the adverse evidence under the alcohol consumption guideline.

Personal conduct is a security concern when a person demonstrates a lack of candor or unwillingness to comply with rules and regulations. Intentionally falsifying a security form or deliberately disobeying rules and regulations may indicate the person cannot properly safeguard classified information. Applicant's intentional falsification of his SF-86 falls within the scope of DC 2 as demonstrating a deliberate falsification of a relevant and material facts from a security form used to determine security clearance eligibility. The Government has a legitimate right to know about "material information" to make an informed decision regarding an applicant's security suitability. Therefore, the Government has right to know about alcohol counseling which may provide insight into the nature and scope of Applicant's alcohol consumption.

After the intentional falsification has been established, an applicant may still meet his burden of persuasion if he can show he made prompt, good-faith efforts to correct the falsification before being confronted with the facts. (MC 3) Applicant has not met his burden under MC 3 because he continues to deny he falsified the security form. In sum,

Applicant has not met his ultimate burden of persuasion under DC 2 of the personal conduct guideline.

DC 5 of the personal conduct guideline refers to a pattern of dishonesty or rule violations, including a violation of any written or recorded agreement made between the individual and the agency. Applicant's repeated and intentional violation of the rules of his probation falls within the purview of DC 5.

Because there are no corresponding mitigating conditions for rule violations, attention must be directed to the general factors of the whole person concept to ascertain whether an applicant has mitigated the adverse security concerns of his rule violations. The facts and circumstances of Applicant's repeated violations of his probation establish the seriousness of the conduct. The probation violations did not end until October 2000, less than two years ago. Even though Applicant was only 23 at the time he committed the DWI, he chose to drink on eight to ten occasions even though he knew he was violating the conditions of his probation.

Applicant claims he continued to drink because of the coworker peer pressure as described by the first witness. Applicant's decision to knowingly violate the abstinence condition of his probation to accommodate his friends on eight to ten occasions demonstrates poor judgment. Applicant's willingness to sidestep rules over a fourteen month period as he did with the abstinence condition suggests Applicant may adopt the same attitude towards those security rules and regulations he chooses not to follow. Because of the recency of Applicant's drinking violations, residual doubts still linger regarding Applicant's security suitability, and those doubts are resolved against Applicant under the whole person concept.

Criminal conduct is defined as a pattern of criminal activity which establishes doubt about person's judgment, reliability and trustworthiness. Applicant's intentional falsification of his SF-86 in April 1999 also constitutes felonious criminal conduct under 18 USC 1001 (DC 1, DC 2), even though Applicant was never formally charged. Applicant intentionally falsified the security form by not revealing material information about his alcohol use. Although the falsification occurred more than three years ago (MC 1), Applicant continues to deny he falsified the form. In his sworn statement (GE 5) dated June 20, 2001, Applicant claimed he misunderstood the question. Hence, if the "no" answer to question 30 resulted from misunderstanding the question, then the "no" answer could not result from (as Applicant testified) defective software or simply not knowing how the "no" answer to question 30 got on the form.

Criminal conduct may also be mitigated when there is clear evidence of rehabilitation. (MC 6) Given Applicant's refusal to admit he falsified the security form in April 1999, Applicant's favorable character evidence from his coworker and family does not overcome the intentional falsification of his security form in April 1999.

Although Applicant's DWI in January 1999 reflects criminal conduct, an ultimate finding in Applicant's favor under 2.a. is based on the absence of similar misconduct since then.

Having evaluated all the evidence under the specific guidelines, the evidence shall be weighed under the general factors of the whole person concept. Applicant's alcohol abuse in college was serious and was aggravated by the DWI received shortly after college and his intention to continue drinking during probation, thereby risking a revocation of probation on eight to ten occasions. Rather than being forthright on the security form in April 1999, Applicant chose to falsify. His decision not to acknowledge the falsification casts doubt over Applicant's credibility and whether he would respond to a similar situation in the future in a similar fashion. At this time, those doubts must be resolved against Applicant under the whole person concept.

### **FORMAL FINDINGS**

Formal Findings required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1 (alcohol involvement): AGAINST THE APPLICANT.

a. Against the Applicant.

b. Against the Applicant.

c. Against the Applicant.

Paragraph 2 (Personal conduct): AGAINST THE APPLICANT.

a. Against the Applicant.

b. Against the Applicant.

Paragraph 3 (criminal conduct): AGAINST THE APPLICANT.

a. For the Applicant.

b. 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 or continue a security clearance for Applicant.

---

Paul J. Mason

Administrative Judge

1. Applicant also signed an acknowledgment form indicating, "I further understand that by consenting to and receiving a probation before judgment I waive my right to appeal and that my failure to abide by the conditions set by the Court may result in judgment being entered against me and the Court proceeding as if I had been found guilty."
2. Applicant consumed alcohol at family settings because there were other people present he did not want to know about his DWI involvement. (Tr. 106)
3. After talking with Applicant about the drinking issue in social settings with his coworkers, Applicant's father indicated there were times Applicant probably violated probation by drinking alcohol. (Tr. 65-66)