

DATE: January 22, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-20832

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Rita O'Brien, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The pattern of alcohol-related incidents from 1991 to 1997, followed by insufficient evidence of positive changes in behavior supportive of sobriety precludes a finding for Applicant under the alcohol involvement guideline. Applicant's deliberate falsifications of his alcohol-related record from his November 2000 security clearance application (SCA) and his April 1981 SCA (although unalleged) represent disqualifying conduct that has not been mitigated. Clearance is denied.

STATEMENT OF THE CASE

On May 23, 2003, 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 filed his Answer to the SOR on June 9, 2003.

The case was assigned to me on September 16, 2003. A notice of hearing was issued on October 31, 2003, and the case was heard on November 20, 2003. The Government and Applicant submitted documentary evidence. Testimony was taken from Applicant. The transcript was received on December 3, 2003.

RULINGS ON PROCEDURE

The Government exhibits (GE) will be marked by number, and Applicant's exhibits (AE) will be marked by letter. Transcript (Tr.) references will be followed by the page number of the transcript.

FINDINGS OF FACT

The following Findings of Fact are based on the SOR, Applicant's answer, the exhibits and testimony in the record. Applicant's admissions to all allegations shall be incorporated in the factual findings. The SOR alleges alcohol consumption (Guideline G) and personal conduct (Guideline E).

Applicant is 56 years old and employed by a defense contractor as a field engineer. He seeks a secret clearance.

Alcohol Involvement. Applicant was 19 or 20 years old when he was arrested for public intoxication in 1967; he believed he received a \$25.00 fine. (Tr. 45) Though Applicant was charged with public intoxication in 1971, he actually was cited for sleeping in the back of a car after his neighbor complained; the judge dismissed this charge. (GE 2, 3; Tr. 44) Both offenses are mitigated by the passage of time.

On June 3, 1972, Applicant was found drunk while on duty and received non-judicial punishment under Article 15 of the United States Code of Military Justice (UCMJ). His punishment was forfeiting \$50.00 a month in pay for two months and reduction in grade. Applicant believed the incident was not as serious as alleged; he was actually in the wrong place at the wrong time. (Tr. 58) The 1972 offense is mitigated by approximately 17 years when Applicant used no alcohol.

On August 15, 1991, Applicant was charged with driving while intoxicated (DWI) and failure to yield at a stop sign. Applicant had just left a bar where he consumed about six beers in two hours. The wet pavement caused him to skid through a stop sign into another car. (GE 2) Applicant pled guilty to DWI and was fined \$350.00, and his license was suspended for six months.

On November 6, 1992, Applicant had consumed six beers in three hours, and got lost on the freeway. Applicant pled no contest and was found guilty of DUI. He was sentenced to three days in jail, fined \$300.00, and his license was suspended for a year.

On December 16, 1995, Applicant was charged with driving with a blood alcohol level above the legal limit. He pled guilty and was fined \$300.00.

On October 24, 1997, Applicant was arrested and charged with DWI and refusal to take a blood test. Applicant was driving out of a military installation and was stopped by military police who told him he had crossed the center line (of the road) before leaving the base. While discussing the incident with the military police, he inadvertently made contact with one of the policemen. The civil police arrived on the scene and administered an alcohol test Applicant failed. (GE 2) Applicant was fined \$675.00 and required to attend DWI school that he completed.

Applicant joined the military in 1965 when he was 18 years old, and received his first security clearance in 1966. (Tr. 42) Applicant served in the military as a non-commissioned officer from 1965 to 1980, and as a commissioned officer from December 1980 to January 1991.

He also began drinking regularly when he was 18. (Tr. 43) and consumed alcohol to excess from time to time. Applicant encountered no alcohol-related incidents from 1973 to August 1991 and made a testimonial claim he drank no alcohol between 1975 and the end of 1990 after joining the church and starting a family. ⁽¹⁾ Applicant resumed using alcohol in late 1990 because he missed the military, and as a field engineer, had to spend a lot of time on the road with construction crews who periodically drink beer. (Tr. 35) Although Applicant stated in his sworn statement dated June 28, 2001 that he stopped drinking alcohol altogether in 1997, he did not repeat the abstinence claim in his answer. Instead he stressed a positive change in his drinking habits by not drinking and driving. He testified:

I still make a conscious choice to drink periodically at our company Christmas party. I recently went to a military reunion in September where I drank. But here at home in [city of residence] I don't drink. In my home, my home is alcohol free and smoke free. But I - my drinking habits are a conscious choice. And I felt that since '97, the past six years, that I've been able to control drinking. (Tr. 36)

Personal Conduct. On November 13, 2000, Applicant deliberately answered 'no' to question 24 of the SCA which requests information about being charged with any offense which is alcohol-related. Embarrassment over his alcohol-related driving record convinced him to omit the information. Also, Applicant rationalized his deliberate omission by

remembering the President of the U.S. was faced with the same dilemma and decided not to reveal his DWI. (Tr. 37)

Although unalleged in the SOR, Applicant also deliberately omitted material information from his SCA (GE 10) in April 1981 by answering 'no' to question 18 asking Applicant whether he had ever been arrested, detained or indicted for an offense. (Tr. 54)⁽²⁾ Applicant claims he did not list the offenses in GE 10 because a security official told him not to list any offense over 5 years old. Also, his interpretation of the instructions for the question prompted him to list only those offenses that occurred in the last five years.

Mitigation. Applicant completed officer's school and became a commissioned officer in 1980. Applicant's subsequent promotion in 1984 was followed by two completion certificates for training he received in 1984 and 1985. In addition, Applicant received the meritorious service medal in December 1986 and November 1989. Applicant also received commendation medals in 1984 and 1990. As a commissioned officer, Applicant was a commander for 4 ½ years and was charged with addressing discipline problems as well as other legal issues. Applicant received alcohol and drug counseling every year in the military. He stated, "I'm very well trained to knowing alcohol and drugs as a military commander, and received training every year." (Tr. 61) Applicant also completed six weeks of driver's training ordered by the court in 1991.

In December 1996, July 1997, November 1998, and July 2000, Applicant received excellent performance awards from his employer. Applicant's performance evaluations reflect his wealth of technical knowledge and proficiency with all kinds of tools.

Applicant received his master's of science degree in December 1985.

POLICIES

Enclosure 2 of the Directive sets forth policy conditions that must be given binding consideration in making security clearance determinations. These conditions must be considered in every case according to the pertinent criterion; however, the conditions 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 conditions exhaust the entire realm of human experience or that the conditions apply equally in every case. In addition, the Judge, as the trier of fact, must make critical judgments as to the credibility of witnesses. Conditions most pertinent to evaluation of the facts in this case are:

Alcohol Consumption

Disqualifying Conditions (DC):

1. Alcohol-related incidents away from work;
5. Habitual or binge consumption of alcohol to the point of impaired judgment.

Mitigating Conditions (MC):

1. The alcohol-related incidents do not indicated a pattern;
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.

Personal Conduct

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 (MC):

1. The falsification was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability;
2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily;
3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts.

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 2-1 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; and, (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 a *prima facie* case under alcohol involvement (Guideline G) and personal conduct (Guideline E) that establishes doubt about a person's judgment, reliability and trustworthiness. 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 alcohol consumption often leads to the exercise of questionable judgment and ultimately, security violations. Applicant's history of excessive alcohol consumption falls primarily within the purview of DC 1 (alcohol incidents away from work), DC 2 (alcohol-related incidents at work) and DC 5 (habitual or binge consumption of alcohol to the point of intoxication). Applicant's non-judicial punishment in 1972 for being drunk on duty (DC 2) raises very serious questions about Applicant's judgment. Nonetheless, the incident is extenuated by the passage of approximately fifteen years between 1975 and 1990 when Applicant encountered no alcohol-related incidents.

The alcohol-related incidents resumed after Applicant was discharged the military in 1990. Applicant committed four serious alcohol-related incidents between August 1991 and October 1997. During the period, he was drinking six to ten cans of beer on Friday and Saturday night. The four alcohol-related offenses combined with the frequency of alcohol consumption justify the application of DC 5 through habitual drinking⁽³⁾ to the point of impaired judgment and demonstrated by driving a car after consuming alcohol.

Excessive alcohol consumption may be mitigated when the alcohol-related incidents do not indicate a pattern (MC 1), when the problem occurred a number of years ago and there is no indication of a recent problem, and when the record reflects positive changes supportive of sobriety (MC 3). Four serious alcohol-related driving offenses between 1991 and

October 1997 represent a

pattern of conduct that can receive only limited mitigation under MC 1 and MC 2 because Applicant continues to drink.

The key word under MC 3 of the alcohol guideline is 'sobriety.' Persuasive evidence under MC 3 should demonstrate the individual has implemented substantive lifestyle changes that facilitate sobriety. Applicant has exercised good judgment by not attempting to drive a car after consuming alcohol. However, other than his claim he no longer drinks at home, the record shows no corroborated efforts toward changed behavior that supports sobriety. Furthermore, Applicant has been less than forthright in disclosing the full account of his alcohol history as well as alcohol-related incidents over the years. Considering the evidence as a whole, Applicant's evidence falls short of overturning the adverse evidence under the alcohol involvement guideline.

Personal Conduct. Behavior that shows questionable judgment or dishonesty may indicate the individual cannot properly safeguard classified information. DC 2 of the personal conduct refers to deliberately supplying false information on security forms used to gather information during investigations. On November 13, 2000, Applicant deliberately omitted material information regarding his alcohol-related driving record. The DUI offenses and other alcohol-related offenses are material information regarding an individual's history. The Government has a legitimate right to know about this alcohol-related history in order to make an informed decision regarding his security qualifications.

Deliberate falsifications under the personal conduct guideline may be mitigated when the information was unsubstantiated or not pertinent to a determination of judgment. Independent judicial records substantiate most of the alcohol-related offenses, specifically the ones that occurred between 1991 and 1997. In addition, an individual's alcohol-related traffic record is always relevant to his overall fitness to possess a security clearance.

MC 2 is unavailable to mitigate the falsification in November 2000 even though the falsification occurred over 3 years ago. Unfortunately, the falsification was not an isolated event as Applicant furnished an SCA in 1981 and deliberately did not disclose his alcohol-related record.

MC 3 of the personal conduct guideline does not mitigate the November 2000 falsification because Applicant did not come forward with his alcohol-related record until the investigator confronted him with the omitted information.

Applicant also defends the (unalleged) intentional falsification of his 1981 SCA by pointing to his security officials at time who told him he did not have to include any information that was over five years. Applicant's claim is not supported by a reasonable interpretation of the SCA question at issue or any other evidence. Assuming Applicant relied on the advice of the security officials, MC 5 will not mitigate the deliberate falsification because the reliance was not made in good-faith.

Applicant's selection to Officer's Training School in 1980, the commendation medals, the meritorious service medals, and Applicant's 4 ½ years as commander of his unit portray an individual who applied himself to his military responsibilities and was consistently recognized for his laudable service. His performance awards since leaving the service also represent strong character evidence. However, the praiseworthy recognition does little to mitigate Applicant' excessive alcohol consumption and pattern of alcohol-related incidents since his discharge from the service. Moreover, the positive character references do not mitigate the deliberate falsification of material information from his security forms in 1981 and 2000. The deliberate falsification has not been mitigated.

This decision has included an evaluation of the general factors of the whole person concept. The absence of pertinent behavioral changes and Applicant's falsification of his alcohol-related record precludes a finding in Applicant's favor under the alcohol involvement and personal conduct guidelines.

FORMAL FINDINGS

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

Paragraph 1 (alcohol involvement, Guideline G): AGAINST THE APPLICANT.

- a. Against the Applicant.
- b. Against the Applicant.
- c. Against the Applicant.
- d. Against the Applicant.
- e. For the Applicant.
- f. For the Applicant.
- g. For the Applicant.

Paragraph 2 (personal conduct, Guideline E): AGAINST THE APPLICANT.

- a. 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 stated in his sworn statement of August 1981 (GE 3) he stopped using alcohol in 1975.
2. Although not listed under paragraph 2 of the SOR, the April 1981 SCA falsification negatively impacts Applicant's overall credibility.
3. While the Appeal Board has not provided a definition of habitual or binge drinking, Applicant's pattern of regular drinking in the amounts identified represent heavy alcohol use.