

DATE: March 20, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-21526

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Jonathan Byer, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

While Applicant has a history of DuI arrests and convictions over an eighteen-year period spanning 1983 to August 2000 (for which he received counseling and probation, respectively, following his last two such incidents), he has since cut back significantly on his drinking and no longer uses alcohol excessively. Never diagnosed with being either alcohol-dependent or an alcohol abuser, Applicant has averted any alcohol-related incident or abusive situation since his last DuI incident in August 2000. With almost thirty months of abuse avoidance and a seasoned commitment to avoid social situations where the risk of over indulgence is present, Applicant persuades he will be able to sustain his self imposed responsible level of alcohol consumption in the foreseeable future. Clearance is granted.

STATEMENT OF THE CASE

On July 12, 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 August 19, 2002, and requested a hearing. The case was assigned to this Administrative Judge on September 30, 2002. Pursuant to notice, a hearing was initially scheduled for October 29, 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. After an initial continuance, the case was rescheduled for November 14, 2002 and convened on the same date. At the joint request of the parties, the case was continued to facilitate the appearance of a key investigating witness. Re-noticed for January 28, 2003, a hearing was convened as scheduled. At hearing, the Government's case consisted of one witness and six exhibits; Applicant relied on one witness (himself) and no exhibits. The transcript (R.T.) of the November 14 proceeding was received on November 25, 2002; while the

transcript of the January 28 proceeding was received on February 5, 2003.

STATEMENT OF FACTS

Applicant is a 52-year old senior vice-president for a defense contractor who seeks to retain his top secret security clearance.

Summary of Allegations and Responses

Applicant is alleged to (a) consume alcohol, at times to excess and to the point of intoxication, between 1976 and March 2001 and to (b) have been involved in three alcohol-related incidents between February 1983 and August 2000.

In his response to the SOR, Applicant admitted the allegations of the SOR. He claimed to have been a responsible alcohol consumer for the vast majority of the 25-year period covered in the SOR. He claimed to have never breached any security agreements or violated his charged trust. He claimed to have attended alcohol counseling and AA meetings on a regular basis since September 2001. Notwithstanding, he claimed to have no addiction problem.

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.

Applicant was introduced to alcohol in high school, where beer was his choice of drink at high school parties. After matriculating to college, he shifted from beer to mixed drinks. His drinking crested for him between 1983 and 1984, a period in which he often consumed alcohol to excess.

In February 1983, Applicant was arrested and charged with weaving, driving under the influence (DuI), and driving while impaired. Upon his being found guilty of driving while ability impaired, he was sentenced to thirty (30) days in jail (suspended) and fined a total of \$343.00. On the basis of his conviction, he was sentenced to 30 days in jail (suspended) and fined a total of \$343.00. Count 1 was, in turn, dismissed.

Applicant was arrested and charged with a second DuI offense in March 1986. He pleaded guilty to an amended charge of driving while ability impaired and was sentenced to five days in jail, ordered to serve 48 hours of community service, fined \$574.00, and required to undergo an alcohol evaluation. Applicant complied with the terms of the court's order and attended a local counseling service where he was evaluated a problem drinker and required to attend a Level II education and counseling program. Altogether, Applicant attended 40 sessions of education and counseling and is credited with satisfactorily completing his evaluation and counseling requirements.

For several years following his 1986 DuI incident, Applicant severely cut back on his drinking and refrained from any excessive drinking. However, he eventually returned to episodic abusive drinking in social situations, mostly with friends and clients (*see* R.T., at 45-46). While entertaining clients at a social function in August 2000, he and his clients consumed several bottles of wine over several beers (*see* ex. 2; R.T., at 48-49). On his way back to the hotel, he was pulled over by local sheriffs and administered a roadside sobriety test, which he failed. He recollects to have registered a .18 per cent BAC on the Breathalyzer test administered by the arresting officer (*see* R.T., at 49).

Applicant pleaded *nolo contendere* to one DuI charge (*viz.*, driving while having a .08 per cent or higher BAC) arising out of his August 2000 incident and was fined \$1,308.00 by the court and placed on non-monitored summary probation for 36 months. As a part of his plea, the two remaining counts were dismissed. Conditions of his probation include no driving with any alcohol in his blood and no refusal to be tested for alcohol in his blood, urine or breath if arrested for driving under the influence (*see* ex. 5). His probation is not due to expire until November 2004. While Applicant continues to consume alcohol, he does so modestly and does not consider himself to be an alcoholic or abusive drinker (*see* R.T., at 38). Since his DuI conviction, he has attended alcohol counseling sessions and AA meetings for several months, but none within the past few months (*see* ex. 4; R.T., at 51-52).

Never diagnosed as either alcohol dependent or an abusive drinker, Applicant continues to drink in social situations, but

never with clients or to excess. Only recently did he learn of alcoholism in his family on his mother's side (*see* R.T., at 56-57). Applicant's drinking is generally confined to wine with dinner two to three times a week, and occasionally a couple of hard drinks (such as at the last Super Bowl). He assures he hasn't exceeded his two-drink maximum since his August 2000 incident. His assurances are credible ones and accepted. Applicant began attending AA meetings about a year ago, but never regularly, and not within the last several months. He is familiar with the serenity prayer and the 12 steps. Applicant spends more time now with gym workouts and other activities as a substitute for alcohol consumption.

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.

Mitigating Conditions:

MC 3 Positive changes in behavior supportive of sobriety.

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

Applicant presents as a senior vice president for a defense contractor with over 25 years of holding a security clearance. His three alcohol-related incidents over the past eighteen years reflect alcohol abuse by Applicant and documented proof of his having a recurring problem with alcohol through August 2000 (when he was involved in his last-reported DuI incident). Never diagnosed as an abusive drinker or alcohol dependent, Applicant, nonetheless, occasionally drank excessively while in social situations with friends and clients.

Following his 1986 DuI conviction, Applicant was court-ordered to attend education and counseling classes. This counseling afforded him some relief from episodic drinking excesses for a while, but did not prevent recurrent problems. Having resumed his drinking with clients in social situations, he confronted law enforcement authorities on a third occasion: this one in August 2000. Pleading *nolo contendere* to a DuI charge arising out of this incident, he accepted a three years of unmonitored probation, a term which is not due to expire until November 2004. 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).

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 three DuI offenses. In making an overall assessment of Applicant's clearance eligibility, major emphasis must be accorded his most recent drinking history, his accepted reforms in his drinking frequency, aided by both counseling and AA sessions, and the absence of any more alcohol-related incidents since his August 2000 incident.

By his actions and improved understanding, Applicant 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 reflect important cut backs in his mixing of alcohol with business exchanges with clients in social settings. With the aid of counseling and AA meetings (although irregular), Applicant has had some success in substituting other types of social outlets for social drinking (such as gym work outs). During the last thirty plus months, he has been able to avert any alcohol abuse relapses or recurring problems with law enforcement authorities. So while he still has over eighteen months to go on his court-ordered probation, his reformatory efforts provide a good and sufficient foundation for making predictive judgements about his ability to sustain his manageable drinking in the future.

Applicant's demonstrated efforts to remedy his judgment lapses associated with alcohol abuse enable him to take advantage of one of the mitigating conditions (MC) of the Adjudication Guidelines for alcohol consumption: MC 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 alcohol-related allegations covered by Guideline G.

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

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