

DATE: April 30, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-26137

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

William S. Fields, Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

Pursuant to the National Industrial Security Program Operating Manual (NISPOM), it is the responsibility of security clearance holders to report events which negatively affect the status of the security clearance holder or the facility. As a general rule, any information under the National Industrial Program Operating Manual (NISPOM) [\(U\)](#) that reflects adversely on the integrity or character of a security clearance holder, should be reported to security personnel to avoid compromising situations that make the security clearance holder vulnerable to coercion, exploitation, or duress. Through an error of omission, Applicant did not immediately report his DUI arrest to security in January 2001. Although Applicant provided a sworn statement in October 2001, advising an Agent from the Defense Security Service (DSS) he had not informed his employer of the January 2001 DUI, there is no evidence in the record Applicant told his Senior Vice President and Facility Security Officer of the alcohol-related incident until April 2002. Even though both individuals make reference to the incident, there is still no indication of what Applicant told them. Because Applicant waited over a year to report the alcohol-related incident, the favorable character evidence is insufficient to overcome the negative evidence under the personal conduct guideline and the whole person concept. Clearance is denied.

STATEMENT OF CASE

On February 6, 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, amended through 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 February 19, 2002. Applicant elected to have his case decided on a written record. The Government provided a copy of the File of Relevant Material (FORM) on March 20, 2002. Applicant received the FORM on March 28, 2002. His response was received on April 15, 2002. The case was assigned to the undersigned for decision on April 24, 2002.

FINDINGS OF FACT

The SOR alleges rule violations/poor judgment and intentional falsification of information provided in an interview with the Defense Security Service (DSS). Applicant admitted both allegations

Applicant is 41 years old and employed as a vice president of a defense contractor. He seeks a secret level clearance. He has held a secret security clearance since 1991.

On January 17, 2002 (1.a.), Applicant was arrested for driving while under the influence (DUI). Applicant was found guilty of DUI, first offense, and fined \$300.00. Applicant's driver's license was suspended for a year and he received a suspended jail sentence. Applicant attended the alcohol safety action program (ASAP) from April to June 2001. There was no requirement to attend Alcoholics Anonymous (AA).

Subparagraph 1.b. alleges Applicant was required to report adverse information in compliance with the National Industrial Program Operating Manual (NISPOM).⁽²⁾ As of the interview (October 10, 2001) with a Special Agent from the Defense Security Service (DSS), Applicant had not told his Facility Security Officer (FSO) about the January 2001 DUI.

After admitting both allegations, Applicant pointed to his excellent performance record over the past 20 years. Embarrassment with the January 2001 DUI offense was a major reason Applicant intentionally failed to report the DUI to his FSO.

Applicant provided a history of his alcohol use. He stated:

Regarding my consumption of alcohol, I started to drink alcohol when I was nineteen years old, and from then until Jun[e] 79, when I joined the Navy, I probably drank five or six beers at weekends with friends. From Jun[e] 79 to Jan 85, during my Navy career, I probably drank alcohol two to four times a week, drinking four or five beers, although maybe once or twice a year I may have consumed enough to get intoxicated. From Jan[uary] 85 to Jun[e] 94 my consumption would be at weekends when I would be socializing with my wife and friends, and drink three or four bees. From Jun[e] 94, when our son was born, until Jan[uary] 2001, the DUI, I might have had a glass of beer after work in the evening at home, or two or three times a month socialize² with friends at the weekend. My consumption was usually four or five beers. Since Jan[uary] 01, I do not drink and drive. My consumption has decreased to drinking two or three beers once or twice a month at home, or while visiting neighbors. I do not think I have, or had, a drinking problem, an no one has ever suggested this. (Item 5)

Applicant realizes his failure to immediately disclose the January 2001 DUI has placed him in a compromising position but he assures he would not compromise data the United States (US) has entrusted him with. He firmly believes his ultimate disclosure to the appropriate officials removes any possibility he could be considered a compromise target. Applicant's disclosure of his DUI more than a year after the alcohol-related conduct occurred, does not remove the negative inferences raised by his failure to act.

The senior vice president has been working with Applicant since 1989, and Applicant has been reporting directly to him for the past eight years. The senior vice president observed on April 4, 2002:

I do not condone the offense that occurred and additionally I am disappointed in Mr. [Applicant's] failure to report the incident in a timely manner. Quite frankly, Mr. [Applicant] knew better. However, I do not believe that this event, or associated embarrassment, would ever result in Mr. [Applicant] compromising the security of this country that he has loyally served for 23 years. (response to FORM)

The facility security officer (FSO) has worked with Applicant since 1993. The FSO considers Applicant completely trustworthy. Finally, the FSO believes Applicant should keep the security clearance he has and be eligible for an upgraded clearance at a later date.

Both character appraisals reflect favorable evidence of Applicant's loyalty and his trustworthiness. However, as the ultimate fact finder, I am unable to automatically accept their observations of Applicant without any information about

when he informed them about the DUI and what he said to them about his alcohol-related incident. Item 6 provides uncontroverted evidence Applicant knew he should have reported the incident.

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:

Personal Conduct

Disqualifying Conditions:

1. Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances ;
4. Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail.;
5. A pattern of dishonesty or rules violations, including violation of any written or recorded agreement made between the individual and the agency.

Mitigating Conditions:

1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability;
5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion exploitation and duress.

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 all the factual allegations under personal conduct (Guideline E) 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

Personal conduct is a security concern when a person demonstrates poor judgment by engaging in alcohol-related incidents. One way a person demonstrates poor judgment is after he drinks and decides he wants to drive his automobile. A person who holds a security clearance has a duty to comply with all regulations associated with safeguarding classified information. When a security clearance holder does not report adverse information, i.e., driving while under the influence of alcohol, he raises legitimate doubts about whether he has the requisite judgment to properly handle classified information at all times.

Instead of exercising better judgment by having a friend selected to do the driving and not the drinking, Applicant consumed about five or six beers in a four hour time frame and inadvisably believed he could handle the drive home. He was stopped approximately a mile from his house, when the arresting officer observed Applicant weaving.

The record reflects Applicant paid the court fine for the DUI, and also paid the costs for the alcohol rehabilitation course. His license and jail time was suspended for a year.

Applicant did not self-report the DUI to security immediately in January 2001, and he compounded the original act of commission (committing the DUI) with his intentional act of omission. This failure to disclose his DUI to security, as required by NISPOM, falls within the scope of Disqualifying Condition (DC) 5 (rules violation) under the personal conduct guideline.

Applicant's intentional concealment of the DUI offense from his FSO increases Applicant's vulnerability to coercion as described by DC 4 of the personal conduct guideline. A third person could learn about the alcohol-related information and exploit Applicant for an ulterior purpose. Such exploitation, were it to occur, could affect Applicant's personal, professional or community standing and/or render him susceptible to blackmail.

Since there are no corresponding factors to weigh against DC 5 of the personal conduct guideline, Applicant's rule violations shall be reviewed under the general conditions of the whole person concept. Applicant's failure to immediately disclose his alcohol-related conduct to the security department was serious. Nine months later in October 2001, Applicant still had not reported the DUI to his employer although he told DSS. Because there is no evidence to infer or suggest otherwise, I must conclude Applicant did not brief the FSO and Senior Vice President about the alcohol-related conduct until April 2002 when they acknowledged he was delinquent in his disclosure.

Applicant was 42 years old when he committed the DUI in January 2001. He had received security briefings about reporting requirements under the NISPOM since 1998. Applicant has held a security clearance since 1991. Applicant violated the reporting rules in January 2001 and continued to violate the rules in October 2001 by not reporting the alcohol-related conduct to security. Although Applicant exercised some good judgment by disclosing the DUI to DSS, and also by disclosing his employer was not aware of the DUI, this good judgment is dramatically weakened by Applicant's failure to act until April 2002, after he received the SOR.

In reviewing the motive for Applicant's decision not to reveal the alcohol-related conduct, Applicant mentioned embarrassment. Applicant's embarrassment for not disclosing the DUI until April 2002 constitutes no defense to intentionally hiding material information about an alcohol-related activity, and suggests Applicant may have a problem in the future in complying with security rules which have a negative impact or are contrary to his objectives and interests.

Security rules and regulations are promulgated and implemented to maintain accountability over classified information in storage, use or transmission. Security briefings are designed to periodically advise and remind the security clearance

holder to inform security about negative information or suspicious contacts. When the person with access fails to notify security, one very critical component of the security briefing system fails. Applicant's failure to advise his security of the DUI until after he received the SOR, raises a strong suggestion he may not have divulged the alcohol-related conduct had he not received the SOR. Though the positive opinions of Applicant from his Senior Vice President and the FSO weigh in Applicant's favor, those opinions are insufficient evidence in rehabilitation to ultimately find for Applicant at this time.

FORMAL FINDINGS

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

Paragraph 1 (personal 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. Item #6 contains the security briefing certification statement for 1998, 1999, and 2000. For each of the listed years, Applicant certified he had received the appropriated security briefings as required by NISPOM.
2. Item #6 contains the security briefing certification statement for 1998, 1999, and 2000. For each of the listed years, Applicant certified he had received the appropriated security briefings as required by NISPOM.