

DATE: September 30, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-04388

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Deputy Chief Department Counsel

FOR APPLICANT

Robert S. Gardner, Esq.

SYNOPSIS

Applicant was charged and convicted of three misdemeanor incidents over an eight-year period covering high school and his Navy enlistment. Applicant attributes his encounters to poor judgment and (with his last encounter) a desire to help his younger brother avoid felony prosecution. His judgment lapses resulted in Navy separation (albeit with an honorable discharge), in addition to civil penalties. But from his adverse experiences, he has learned and grown, adding important educational, professional and family accomplishments since his last arrest/conviction. To his credit for personal and professional growth is added his sustained commitment to abstinence. His combined efforts to date produce enough rehabilitation to mitigate security concerns associated with his past record of criminal conduct and alcohol abuse. Clearance is granted.

STATEMENT OF THE CASE

On April 1, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), 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 April 19, 2003, and requested a hearing. I was assigned this case on July 2, 2003, and scheduled it for hearing on August 27, 2003. A hearing was convened on August 27 and 28, 2003, as scheduled, 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. At hearing, the Government's case consisted of six exhibits; Applicant relied on five witnesses (himself) and eight exhibits. The transcripts (R.T.) of the proceedings were received on September 8, 2003.

STATEMENT OF FACTS

Applicant is a 32-year-old aircraft field engineer for a defense contractor who seeks to retain his security clearance.

Summary of Allegations and Responses

Under Guideline J, Applicant is alleged to have been cited or arrested on three different occasions between April 1988 and November 1996: an arrest for burglary in April 1988 in State A, in which he was found guilty of auto burglary, placed on six months probation and ordered to attend counseling; an arrest for DWI in June 1995 in State B, in which he was found guilty, fined \$1,500.00, placed on probation for five years, ordered to participate in a public service program for 30 days, and ordered to complete an alcohol education course from the Navy; and an arrest in November 1996 in State B, in which he was found guilty and sentenced to one day in prison, three years probation and ordered to make restitution of \$25.00 (sic).

Under Guideline G, Applicant was alleged to have (1) consumed alcohol, at times to excess and to the point of intoxication, from 1989 to at least November 2001 and (2) been involved in an alcohol-related incident in June 1995.

For his response to the SOR, Applicant admitted his three arrests. But he denied being (a) found guilty of his 1996 burglary charges and sentenced to one day in prison (claiming jail not prison), (b) found guilty of his June 1995 DWI charges, fined \$1,500.00, placed on five years probation, and ordered to participate in a public service program and complete an alcohol education program (claiming he pleaded no contest, received three years of probation and not five years and was permitted to perform 30 days of public service in lieu of paying a \$1,500.00 fine); and (c) found guilty of auto burglary (claiming somewhat inexplicably the charge of possession of burglary tools was dismissed upon acceptance of his guilty plea to auto burglary and acceptance of six months of probation and counseling).

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.

Background

Applicant and his younger half-brother (E) grew up under difficult circumstances. After their mother's second divorce, Applicant assumed the role of a family provider. Still under 16 at the time, he entered the work force to provide financial assistance to his mother and his older sister, who had become pregnant and returned home with her baby (*see* R.T., at 26-27).

While in high school, Applicant met his current wife (W). Shortly after his high school graduation in 1989, he enlisted in the Navy. Soon after joining the Navy, he married W (in 1990), who bore him two children: ages 8 and 4. Like Applicant, W grew up in a dysfunctional family setting: Applicant's dominated by economic problems and W's by her father's alcoholism and abuse towards her.

During his eight-year Navy enlistment, Applicant served as an aircraft engine mechanic. Following his involuntary separation in early 1997, he worked in various jobs in the aircraft field as a mechanic and quality evaluator before accepting a position as a field service representative with his current employer in arch 2001.

Since completing his Navy service, Applicant has returned to school and obtained undergraduate degrees in aeronautical science from an accredited university. In addition to his formal education, he has completed corporate training courses, as well as assorted training courses in aircraft engine maintenance and repairs (*see ex. H*).

Applicant's arrests and convictions

While a 17-year old high school student in State A, Applicant was arrested in April 1988 for burglary and possession of burglary tools. As part of a plea agreement with the State, in which he pleaded guilty to auto burglary, the charges of possession of burglary tools were dismissed. Applicant was placed on probation for six months and ordered to attend counseling. By all accounts, he completed his probation conditions. The circumstances of his arrest are as follows: He had helped a friend break into a car, to which he offered no excuse and accepted full responsibility for his role in the

burglary

While stationed in State B, Applicant was arrested in June 1995 for DWI. He pleaded guilty and was placed on probation for three years. Offered the option of paying a \$1,500.00 fine or participating in a public service program, Applicant accepted the latter, and completed the course. He was also required to complete an alcohol education course, which he did. Before his arrest, he had accepted a shipmate's invitation to attend a wedding off-ship. At the wedding, he consumed several drinks and was driving back to the ship when he was pulled over by local police for suspected speeding. In a Breathalyzer test administered by police at the scene, Applicant blew a .10 BAC and was arrested for DWI (*see* II R.T., at 29-30). Although he didn't believe he was impaired at the time, he pleaded guilty, nonetheless, to DWI charges. His explanations are not enough to surmount the record evidence of his conviction. Applicant's 1995 arrest is treated, accordingly, as an alcohol-related incident.

Still in the Navy, Applicant was arrested in November 1996 in State B for burglary. Applicant had been on terminal leave from Navy duty and repaired with his brother (E) and a 19-year old acquaintance on a short trip across the border for some souvenir collection. While attending bars in this border town, both B and E consumed excessive amounts of alcohol and became intoxicated; Applicant consumed no alcohol (*see* II R.T., at 33). On their walk across the border to reach their parked vehicle, B tossed a bottle through the window of a parked car just behind Applicant's (*see* II R.T., at 32). Applicant (who had been walking behind B) grabbed B and tossed him in the back seat of his car (Applicant's).

Somewhat varied accounts of the actual break-in of the parked car ensued. In his answer, Applicant attributed the break-in to B, who first vandalized the car. In the police report (*see* ex. 4), the arresting officers (after finding B in the back seat of Applicant's car) provided corroborating accounts from border patrol agents at the scene who observed Applicant and E exit the victim's car from the driver's side and passenger's side, respectively. Applicant (corroborated by E) dispute both the officers' account and implicitly the account included in his answer. E joins Applicant at hearing in assigning full responsibility for the break-in to the former (*compare* I R.T., at 26-27 with II R.T., at 34). These three different accounts cannot be fully reconciled without attributing some continuing desire by Applicant to want to cover for E.

Upon his being arrested at the scene, Applicant, E and B were transported to the local police station for processing. Once at the station, B was referred for detoxification and later released without being charged. E immediately accepted responsibility for the break-in and was reportedly threatened with felony prosecution, unless Applicant agreed to jointly plead with E to misdemeanor burglary charges. Reluctant to expose E to a possible felony burglary conviction, Applicant agreed to jointly-plead to misdemeanor burglary (*see* II R.T., at 35-36). By his plea, he was permitted the opportunity to deny any factual involvement in the burglary.

At his hearing on the 1996 burglary charges, Applicant entered a joint-plea to misdemeanor burglary, which the court accepted. Apparently impressed with Applicant's limited role in the burglary itself (which did not involve his actual breaking into the car), the court imposed no additional jail time on Applicant (crediting him with the day he spent in jail following his arrest), placed him on three years' probation and ordered him to make restitution of \$250.00 (*see* ex. 4).

Applicant's Navy separation

Following his conviction, Applicant was processed for administrative separation from the Navy for misconduct, based on his 1995 and 1996 convictions (*see* ex. 3). Applicant was notified of his administrative separation in April 1997 and afforded the right to have an administrative board review the action before separation processing was finalized. Applicant elected to accept administrative board review.

After reviewing Applicant's entire record (both the convictions and his service record), the board found by vote of 3 to 0 the evidence supported separation for misconduct due to his civilian convictions. However, because of his meritorious service record and the considered circumstances accompanying his 1996 conviction, the same board recommended an honorable discharge for Applicant by a vote of 2 to 1 (*see* exs. 3 ; II R.T., at 38). Applicant's DD 214 confirms his receipt of an honorable discharge upon separation (*see* Ex. D). Applicant's last performance evaluation of April 1997 included a recommended retention. His previous evaluation (*i.e.*, of November 1996) included a must promote recommendation.

Applicant's alcohol history

Applicant consumed alcohol regularly between 1989 and November 2001, but generally not to excess during his Navy service. Pressed by the results of his 1996 conviction and strong influence of his spouse to curtail his drinking, Applicant reduced his alcohol consumption even further following his Navy separation. When he did drink, his daughter would often ask him if it tasted good (*see R.T., at 43*). This confluence of influence by his wife and daughter weighed considerably on his own disposition to curtail his drinking practices, and he did. Following his November 2001 DSS interview, Applicant made a further commitment: to give up drinking altogether. Since December 2001 he has kept his commitment, and has abstained from alcohol (*see R.T., at 42*). Applicant has no intention to resume drinking in the future. Based on his commitments to date, he has a reasonable chance to maintain his abstinence.

Applicant's work record

Applicant is highly regarded by both his prior and current supervisors as a valued and dependable quality evaluator and field service representative. His work colleagues hold him in high regard, too, as a reliable and trustworthy colleague.

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:

Criminal Conduct

The Concern: A history or pattern of criminal activity creates doubt about a person's judgement, reliability and trustworthiness.

Disqualifying Conditions:

DC 1. Allegations or admission of criminal conduct.

DC 2. A single serious crime or multiple lesser offenses.

Mitigating Conditions:

MC 1: The criminal behavior was not recent.

MC 6. There is clear evidence of rehabilitation

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 1. The alcohol related incidents do not indicate a pattern.

MC 2. The problem occurred a number of years ago and there is no indication fo a recent problem.

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 mere 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 material bearing on the applicant's eligibility to obtain or maintain a security clearance. The required showing of materiality, 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

her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

CONCLUSIONS

Applicant has a history of misdemeanor arrests and convictions (three in all) over a eight-year period: one in high school and the other two during his Navy service. He attributes his arrests to adolescent mistakes of judgment and an attempt (in the last incident) to help a brother avert a felony burglary charge by agreeing to a joint-plead to misdemeanor burglary.

Except for his role in the 1996 incident, Applicant accepts full responsibility for his judgment lapses associated with his arrest/convictions. His explanation for helping his brother is acceptable to a point, but not to the extent of exonerating him from responsibility for the underlying offense. Both the court, who accepted his joint plea and sentenced him for his part in the 1996 incident, and the Navy who convened an administrative board of inquiry and recommended his separation considered the circumstances of his involvement in the 1996 incident. Neither body was willing to excuse Applicant for his role in the incident. Even though Applicant may not have had any direct part in the actual burglary, his willingness to cover for his brother, both in the adjudication phases of the incident, and by his explanations in this proceeding make him an accessory to the burglary and properly judged under all the circumstances known by the decision-making bodies who heard and passed on his plea and claims.

Taken together, the three separate arrests/convictions have security significance and are covered by two of the disqualifying conditions (DC) of the Adjudicative Guidelines for criminal conduct: DC 1 (allegations or admission of criminal conduct) and DC 2 (a single serious or multiple lesser offenses). Applicant's DWI conviction also qualifies as an alcohol-related incident ans is separately covered by DC 1 (alcohol-related incidents away from work) of the Adjudication Guidelines for alcohol.

Nonetheless, Applicant's post-conviction rehabilitation efforts warrant considerable credit in mitigation. Not only has he

been successful in overcoming a difficult childhood, but he has achieved significant professional success, both during his military tour and in the aviation field he has pursued with his defense contractors (including his current employer). He has enjoyed much success and demonstrated maturity as well in his personal relationships with his wife and young children. His professional and personal development are marked by almost seven years of trouble-free behavior. On the strength of his demonstrated successes in his professional and personal pursuits, Applicant may invoke several mitigating conditions (MC) covered by the Adjudicative Guidelines for criminal conduct: MC 1 (behavior not recent) and MC 6 (there is clear evidence of rehabilitation). Favorable conclusions warrant with respect to the allegations covered by Guideline J of the SOR.

Applicant's alcohol history also raises security concerns. Besides his 1995 DWI arrest/conviction, he admits to drinking sometimes to excess between 1989 and November 2001. However, he has not consumed alcohol since December 2001 (following his DSS interview) and assures he has no intention of resuming drinking in the future. He has strong spousal support to aid him in keeping his commitment.

Assessment of Applicant's alcohol-related incident and drinking history 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 alcohol abuse and ensuing counseling and abstinence efforts. In making an overall assessment of Applicant's clearance eligibility, major emphasis must be accorded his most recent drinking history, job performance and support he receives from his supervisors (past and present) and work colleagues. In Applicant's case, his support base remains very strong among those who know him professionally and personally.

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 past problems with alcohol abuse. His mitigation efforts not only reflect important curtailing of his drinking, and more recently, abstinence (without any further reports of legal problems), but some sustaining family reinforcement of his abstinence commitments to ensure that he does not experience any recurrent alcohol abuse relapses in the future. In his mitigation efforts, Applicant may take advantage of several mitigation conditions for alcohol: MC 1 (alcohol-related incidents do not indicate a pattern), MC 2 (lack of recency of the problem) and MC 3 (positive changes in behavior supportive of sobriety).

Taking into account all of the evidence and considerations in the record, favorable conclusions warrant with respect to the allegations covered by Guideline G of the SOR.

In reaching my decision, I have considered the evidence as a whole, including each of the factors and conditions enumerated in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR in the context of the FINDINGS OF FACT, CONCLUSIONS and the FACTORS and CONDITIONS listed above, this Administrative Judge makes the following separate FORMAL FINDINGS with respect to Appellant's eligibility for a security clearance.

GUIDELINE J (CRIMINAL CONDUCT): FOR APPLICANT

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: FOR APPLICANT

Sub-para. 1.c: FOR APPLICANT

GUIDELINE G: FOR APPLICANT

Sub-para. 2.a: FOR APPLICANT

Sub-para. 2.b: 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