

DATE: September 29, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-06404

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Juan Rivera, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant encountered numerous arrests and convictions (many involving alcohol-related incidents) over a twenty-year period spanning 1983 and January 2003. With only recent acknowledgments of an alcohol problem to his credit and little counseling or AA involvement to address the problem, Applicant neither extenuates nor mitigates security concerns associated with his history of criminal and alcohol-related arrests and convictions. His omission of his two felony arrests and various alcohol-related arrests are resolved favorable to Applicant based on his convincing showing (a) his felony arrests were the result of a reasonable misreading of the question and (b) his alcohol-related arrests, while knowingly and wilfully omitted from his SF-86, were promptly corrected in good faith when afforded an opportunity in an ensuing DSS interview. Clearance is denied.

STATEMENT OF THE CASE

On February 5, 2003, the Defense Office of Hearings and Appeals, 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 March 20, 2003 and requested a hearing. I was assigned this case on May 21, 2003, and initially scheduled it for hearing on June 26, 2003. The matter was rescheduled for hearing on July 21, 2003. A hearing was convened on July 21, 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 twelve exhibits; Applicant relied on one witness (himself) and three exhibits. The transcript (R.T.) of the proceedings was received on July 29, 2003.

PROCEDURAL ISSUES

At hearing, Applicant asked for leave to amend his answer to respond to sub-paragraph 2.a of the SOR in the affirmative. For good cause shown, Applicant's request was granted.

STATEMENT OF FACTS

Applicant is a 44-year-old 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 twelve different occasions between March 1983 and March 12, 2000: for public drunkenness in March 2000 (fined \$45.00), for operating a vehicle with a revoked driver's license in November 1995 (found guilty, ordered to pay court costs and sentenced to 90 days in jail, with all but 10 days suspended), for operating a vehicle after being declared a habitual offender in October 1995 (dismissed), for public intoxication in December 1994 (fined \$15.00), for driving on a suspended-revoked driver's license in September 1993 (found guilty and fined \$25.00), for DuI and refusal to take a blood test in May 1993 (found guilty, fined \$750.00, sentenced to 30 days in jail, suspended, and loss of driver's license), for DUI and refusal to take a blood test in September 1992 (found guilty of DuI, fined \$500.00, sentenced to 30 days in jail, 28 days suspended, and suspension of driver's license), for DUI in July 1991 (pleaded no contest, fined and spent 24 hours in jail), for DuI in February 1989, for DUI in February 1988, for hit and run personal injury (a felony) in July 1985, and for profane swearing in March 1983.

Also, Applicant's offenses covered by sub-paragraphs 1.a, 1.d, and 1.f through 1.j are alleged to be alcohol-related as well, and covered by Guideline G.

Additionally, Applicant is alleged to have falsified his security clearance application (SF-86) of March 27, 2001 by omitting (a) his felony arrest of 1985 and (b) his alcohol-related offenses of July 1991, February 1989 and February 1988.

For his response to the SOR, Applicant admitted most of the listed allegations. He denied only that he intentionally falsified his SF-86.

Relevant and Material Factual Findings

The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference and adopted as relevant and material findings. Additional findings follow.

Throughout the 80s and 90s, Applicant abused alcohol and was involved in numerous criminal incidents: some alcohol-related. All of his arrests and convictions involved misdemeanors, save for two: a felony hit and run arrest (in 1985), in which he late pleaded guilty to a misdemeanor offense, and a felony operating a motor vehicle after being declared an habitual offender arrest, which was subsequently dismissed (*see* R.T., at 59).

Besides his last covered alcohol-related incident in March 2000, Applicant admits to being arrested for DUI in June 2002. To this offense, he pleaded guilty and was fined \$500.00 and ordered to attend rehabilitation counseling. Prior to being arrested, he had been on business travel for his company and was returning from dinner with friends. At dinner, he consumed between six and seven drinks. He had still another DUI arrest in January 2003 before commencing his ordered professional counseling (in February 2003). Before seeking treating in February 2003, he was accustomed to drinking regularly when on travel (often two to three times a week), often to the point of intoxication (*see* R.T., at 56). After diagnosing him with an alcohol problem, Applicant's treatment provider not only prescribed him antabuse for a couple of months, but he recommended AA participation for him as well (*see* R.T., at 37). Applicant, however, declined ongoing AA participation (believing he didn't need it) after attending just a few meetings (*see* R.T., at 37-38, 49-51). Disposition of his 2003 arrest is still pending. Applicant has since completed his ordered counseling in connection with his 2002 DUI incident. Depending on the disposition of his latest 2003 DuI arrest, though, he could be required to seek additional treatment. Although he has not seen his treatment provider now for several months, he is willing to get into a permanent program that will help him to keep his clearance and job. The SOR he received was a major wake-up call for him and prompted him to quit drinking.

Applicant now believes he has an alcohol problem: a remarkable turnabout from his earlier assurances to an interviewing DSS agent in April 2001 that he had no such problem (*compare* ex. 2 with R.T., at 43-44). Believing at the time he did not have an alcohol problem, he continued to drink. His 2002 DUI convinced him he had an alcohol problem, which required treatment. However, he has resisted Alcoholics Anonymous (AA) participation, considering it too informal for him. He attended only a few AA meetings before discontinuing participation altogether. He never obtained a sponsor and has no earned chips from his brief AA experience. Since joining an informal discussion group, he has no considered returning to AA.

When executing his SF-86 of March 27, 2001, Applicant omitted his 1985 hit and run and 1996 habitual offender arrests (both felony arrests), as well as his alcohol-related arrests in 1988, 1989 and 1991, respectively. He attributes his felony arrest omissions when answering question 21 to his unawareness that his 1985 and 1996 incidents were felony-related (*see* R.T., at 42, 48, 59). His explanation is reasonable and accepted, given both the age of the incidents and ensuing misdemeanor plea and dismissal of the respective charges.

As to his alcohol-related arrests, he claims he simply misread the question (question 24 of his SF-86). This explanation is more difficult to accept as an oversight, given the plain language of the question. However, Applicant promptly provided the details of his omitted alcohol-related arrests when interviewed by a DSS agent several days later (in April 2001), without being first confronted (*see* R.T., at 57). Applicant's credibility is pretty good overall, and he is credited with promptly correcting his alcohol-related omissions without agent confrontation.

Applicant is highly regarded by supervisor and work colleagues as a hardworking, dependable and valued employee (*see* exs. B and C). His ethics and conduct have been considered beyond reproach by members of his company who have worked with him.

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: None.

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.

DC 5. Habitual or binge consumption of alcohol to the point of impaired judgment.

Mitigating Conditions:

MC 3. Positive changes in behavior supportive of sobriety.

Personal Conduct

Basis: conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

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 information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability.

MC 3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts.

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 criminal arrests (twelve in all) over a twenty-year period spanning 1983 and

2003, most of which resulted in convictions. His arrest record includes a felony hit and run arrest as well, with no disposition of record. Six of the covered arrests (including his most recent three offenses) involved alcohol-related incidents. Applicant's confrontations with law enforcement authorities resulted not only in fines, supervised probation and counseling, but imposed suspension of driving privileges as well.

Each of Applicant's arrest/convictions reflect criminal conduct and implicit judgment lapses and raise security concerns covered by the criminal conduct guidelines of the Directive's Adjudicative Guidelines. Both Disqualifying Condition (DC) 1 (alleged or admitted criminal conduct) and DC 2 (single serious crime or multiple lesser offenses) of the criminal conduct guidelines apply to these arrest/convictions. Because many of these arrests and convictions also involve alcohol, they become security significant as alcohol-related incidents covered by the alcohol guidelines of the Adjudicative Guidelines as well. Applicable disqualifying conditions comprise DC 1 (alcohol incidents away from work).

Pattern criminally based alcohol-related incidents not only produce compounding security concerns under the Adjudicative Guidelines, but they are antithetical to any practical use of any of the mitigating conditions for alcohol abuse under the same Guidelines for either criminal conduct or alcohol abuse. With so little time to show any positive changes in his behavior since his last admitted DuI arrest in January 2003, Applicant is poorly situated to take advantage of any of the mitigating conditions covered by either the criminal conduct or alcohol guidelines of the Adjudicative Guidelines.

Without any evidence of Applicant's acknowledgment of any lingering alcohol problems following his last alcohol-related arrest in 2003, it is simply too difficult to quantify or qualify any tangible mitigation. By his own account, he has not sought counseling or AA participation and only recently acknowledged an alcohol problem associated with his numerous alcohol-related arrests and convictions. Medical assessments would be helpful in identifying and correcting any residual alcohol problems of Applicant, but are clearly lacking in this record.

Able to persuasively demonstrate less than seven months of elapsed time without any additional alcohol-related incidents, Applicant may not reasonably claim any of the mitigation conditions of the Administrative Guidelines (for alcohol) or absolve himself of security risks associated with his long history of proven alcohol abuse. Considering the record as a whole, it is too soon to conclude that Applicant's alcohol problems are behind him. Unfavorable conclusions warrant with respect to each of the allegations covered by Guidelines J and G.

Posing potential security concern as well are Applicant's omissions of his lone felony offense (a 1985 hit and run arrest) and his four alcohol-related offenses (*viz.*, his March 2000, December 1994, May 1993 and February 1988 arrests/convictions). Having accepted Applicant's explanation of his misreading question 21, this alleged omission is unsubstantiated (*see* MC 1 of personal conduct guidelines). Developed falsification jurisprudence within DOHA's Appeal Board and the courts nationally have never been tied to reasonable man tenets (save for use in appraising all of the surrounding circumstances) and at the core still require established motive and specific intent to falsify a document. *Cf.* ISCR OSD Case No. 01-06870 (September 13, 2002).

Applicant's explanations for omitting his alcohol-related incidents when answering question 2 are more problematical and leave unresolved doubts about his veracity when addressing question 24 of his SF-86. Government may invoke DC 1 (falsification of a security questionnaire) of the Adjudicative Guidelines for personal conduct. However, Applicant was forthcoming about his omitted alcohol-related arrests when asked about them by an interviewing DSS agent several days later. Before being confronted with any of the arrests, he disclosed his additional alcohol-related ones to the interviewing DSS agent.

On the strength of the evidence presented, Applicant may invoke MC 1 (information unsubstantiated) as to his omitted felony arrests and MC 3 (prompt, good-faith correction as to his alcohol-related arrests) of the Adjudicative guidelines for personal conduct and carries his evidentiary burden in refuting the allegations he falsified his SF-86 by omitting his alcohol-related arrests. Favorable conclusions warrant with respect to both sub-paragraphs 2.a and 2.b of Guideline E.

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 and ensuing conclusions in the context of the FINDINGS OF FACT, CONCLUSIONS and the FACTORS listed above, I make the following separate FORMAL FINDINGS with respect to Applicant's eligibility for a security clearance:

GUIDELINE J: AGAINST APPLICANT

Sub-para. 1.a: AGAINST APPLICANT

Sub-para. 1.b: AGAINST APPLICANT

Sub-para. 1.c: AGAINST APPLICANT

Sub-para. 1.d: AGAINST APPLICANT

Sub-para. 1.e: AGAINST APPLICANT

Sub-para. 1.f: AGAINST APPLICANT

Sub-para. 1.g: AGAINST APPLICANT

Sub-para. 1.h: AGAINST APPLICANT

Sub-para. 1.i: AGAINST APPLICANT

Sub-para. 1.j: AGAINST APPLICANT

Sub-para. 1.k: AGAINST APPLICANT

Sub-para. 1.l: AGAINST APPLICANT

GUIDELINE G: AGAINST APPLICANT

Sub-para. 2.a: AGAINST APPLICANT

GUIDELINE E: FOR APPLICANT

Sub-para. 3.a: FOR APPLICANT

Sub-para. 3.b: FOR 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 Applicant's security clearance.

Roger C. Wesley

Administrative Judge