

DATE: May 9, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-28872

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has a history of three alcohol-related incidents over a seven-year period between 1994 and 2001 and continued drinking without any documented diagnosis or prognosis of his condition. His restorative efforts to date, while encouraging, are insufficient to enable safe predictive assessments about his ability to avoid recurrence in the foreseeable future. Security concerns are raised, too, over Applicant's determined deliberate omission of a 1995 criminal offense from his security clearance application. Applicant fails to fully mitigate government security concerns about his alcohol offenses and arrest omissions as well. Clearance is denied.

STATEMENT OF CASE

On March 10, 2004, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant. The SOR 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, and recommended referral to an administrative judge for determination whether clearance should be granted or continued.

Applicant responded to the SOR on April 21, 2004, and elected to have his case decided on the basis of the written record. Applicant received the File of Relevant Material (FORM) on October 10, 2004. Applicant failed to respond to the FORM within the 30 days afforded him to provide supplement documentation regarding the issues. The case was assigned to me December 29, 2004.

SUMMARY OF PLEADINGS

Under Guideline G, Applicant is alleged to have (a) consumed alcohol, at times to excess and to the point of intoxication, from Approximately 1993 or 1994 to at least June 2002 and (b) been arrested (while intoxicated) on three occasions over a seven-year period spanning 1994 and 2001: in October 1994 and charged with breaking and entering and grand larceny (felonies), in July 1998 and charged with DuI and refusal of a blood/breath test, and in July 2001 and

charged with resisting arrest and public intoxication.

Under Guideline E, Applicant is alleged to have falsified his security clearance application (SF-86) by omitting his March 1995 arrest for credit card fraud and larceny/steal property (charges not prosecuted). Under Guideline J, Applicant's arrests and SF-86 omission are incorporated by reference.

For his response to the SOR, Applicant admitted most of the allegations, denying only that he falsified material facts (*viz.*, his March 1995 arrest) in his November 2000 SF-86. Applicant added explanations to his answer. He claimed he has ceased alcohol consumption for some time. He claimed to have sought counseling (not specific about who and when), attended alcohol safety programs (dates, course materials and results omitted), and still voluntarily visits a counselor on a regular basis (specifics not provided). He claimed to have learned his lessons about alcohol and shed his habit since becoming professionally engaged, and to have been unaware that his SF-86 arrest omission was a matter of importance to his security application.

FINDINGS AND FACTS

Applicant is a 38-year software engineer for a defense contractor who seeks a security clearance. 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 consumed beer in high school, mostly on weekends where he would typically consume two to three beers at parties and social situations. Upon entering college, he increased his alcohol consumption to six to eight beers on weekends, primarily at fraternity parties and Greek social activities.

Between 1994 and 2001, Applicant was involved in three alcohol-related incidents. The first of these incidents occurred in October 1994, while Applicant and several college friends were out socializing. Applicant had consumed some five beers at various bars and was intoxicated when police arrived to investigate an early-morning break-in of a local music store. Applicant was arrested and charged with breaking and entering and grand larceny (both felonies). The court deferred adjudication of his breaking and entering count and took his grand larceny count under 12-month advisement, subject to Applicant's completing 200 hours of community service, donating \$3,000.00 to a local narcotics fund, paying restitution, and keeping the peace for the 12-month period under advisement. Upon satisfactorily completing the court's requirements, both counts were dismissed. Applicant complied with the court's conditions (including 200 hours of community service at his university) and is credited with excellent evaluations.

Applicant was arrested again several months after his 1994 arrest (in March 1995) and charged with credit card fraud and larceny steal property. The charges were not prosecuted.

During an evening with friends in a local restaurant in July 1998, Applicant consumed several beers and sideswiped two cars on his way home. Investigating police asked him to take a breath test, but he refused both the test and the offered treatment from paramedics on the scene. Applicant was promptly arrested and charged with DuI and refusal of a blood/breath test. At his court hearing, he was found guilty of an amended charge of reckless driving and sentenced to 30 days in jail (suspended), fined \$250.00 plus court costs, and required to attend a local Alcohol Safety Action Program (ASAP). The refusal of a blood/breath test charge was not prosecuted.

In his third and last alcohol-related incident of record, Applicant was arrested in July 2001 and charged with resisting arrest and public intoxication. He had consumed about five beers in a local restaurant and had been riding his bicycle when he was stopped by local police for riding in a restricted trolley lane. The arresting officer dropped the resisting arrest charge, and the public intoxication charge was subsequently dismissed.

Besides completing a court-ordered alcohol safety action program (ASAP) in connection with his 1998 DuI incident, Applicant has attended some alcohol-related counseling. The dates and nature of the counseling and qualifications of the counselors are not documented, however, and cannot be presumed. Nor does Applicant indicate the level of his drinking (if any) since his last alcohol-related incident in 2001. Absent a diagnosis and prognosis in the record, a factual assessment of the nature and extent of Applicant's involvement with alcohol cannot be made. Applicant's three alcohol-related incidents over a seven-year period and overall history of alcohol consumption suggest a problem with alcohol,

enough to warrant inferences of alcohol abuse associated with his drinking and and related incidents.

Asked to complete a security clearance application in November 2000, Applicant omitted his March 1995 arrest when answering question 26's inquiry into non-felony offenses within the previous seven years. Applicant doesn't attribute his omission to confusion over the question or memory lapse. He omitted the arrest because he didn't consider the arrest important to his background investigation relative to a security clearance eligibility assessment. While Applicant's explanation is a credible one, it is not enough to avert inferences of knowing and wilful omission.

Prior to his scheduled DSS interview in June 2002, Applicant made no known effort to contact DSS to make any corrections to his SF-86. When interviewed by a DSS agent in June 2002, Applicant failed to disclose his 1995 credit card fraud arrest when asked about his prior arrests. Applicant's reasons for not volunteering details pertaining to this arrest are not clear from either his DSS statement or answer.

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require 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.

Personal Conduct

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Criminal Conduct

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

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's 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 material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, 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.

CONCLUSIONS

Applicant brings to these proceedings a history of excessive drinking and alcohol-related incidents, as well as a security significant omission in his SF-86 of a past alcohol-related arrest. These incidences of alcohol abuse and determined intentional omission in his SF-86 serve to impair the confidence in his judgment, reliability and trustworthiness required for eligibility to access classified information.

Applicant's history of alcohol-related incidents and drinking excesses reflect a pattern of alcohol abuse that is security significant. On the strength of the evidence presented, several disqualifying conditions (DC) of the Adjudication Guidelines for alcohol consumption may be applied: E2.A7.1.2.1 (*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*) and E2.A7.1.2.5 (*Habitual or binge consumption of alcohol to the point of impaired judgment*).

To his credit, Applicant has sought counseling. However, he provides no information about his drinking practices (if any) since his last alcohol-related incident. Without documented information about any previous diagnosis and prognosis and updated data about his current drinking, not assessment of his rehabilitative efforts can be made at this time.

All in all, Applicant's mitigation efforts to date reflect too little documented support to credit him with mitigation of the Government's security concerns associated with his past abuses of alcohol. Without more information and professional assessments about his past and current drinking practices, it would be imprudent to credit Applicant generally with successful rehabilitation. Considering the record as a whole, Applicant fails to make 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 to warrant safe predictions he is no longer at risk to judgment impairment associated with such conduct. Unfavorable conclusions warrant with respect to the alcohol-related allegations covered by subparagraphs 1.a through 1.d of Guideline G.

Potentially serious and difficult to reconcile with the trust and reliability requirements for holding a security clearance are the timing and circumstances of Applicant's alcohol-related arrest omission in his November 2000 SF-86. By omitting his 2001 arrest in his clearance application, Applicant concealed materially important background information needed for the government to properly process and evaluate his security updates. He makes no claim of misunderstanding the question, which was posed in a straightforward way in the questionnaire. Applicant attributes his omission to his belief the arrest didn't represent material information the Government needed to make an assessment of his clearance suitability: an explanation that has been historically considered by the Appeal Board to be insufficient to avert drawn conclusions of knowing and wilful concealment.

Applicant's arrest omission was knowing, deliberate, and material to a determination about his clearance suitability. It invites application of one of the Disqualifying Conditions (DC) for personal conduct of the Adjudicative Guidelines: E2.A5.1.2.2 (*The deliberate omission, concealment, falsification or misrepresentation 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*).

Mitigation is difficult to credit Applicant with, since he failed to take advantage of the first obvious opportunity afforded him to correct his earlier SF-86 omission in his DSS interview following completion of his SF-86. Not only has the

Appeal Board found the use of Mitigating Condition (MC) E2.A5.1.3.2 of the Adjudicative Guidelines for personal conduct (isolated, corrected falsification) to be unavailable to applicants seeking mitigation by treating the omission as isolated, but it has denied applicants availability of MC E2.A5.1.3.3 (prompt, good faith disclosure) as well in circumstances (as here) where the applicant has failed to take advantage of an earlier DSS interview opportunity. *Compare* ISCR Case No. 97-0289 (January 1998) with DISCR Case No. 93-1390 (January 1995).

Considering all of the evidence produced in this record and the available guidelines in the Directive (inclusive of the E.2.2 factors), unfavorable conclusions warrant with respect to subparagraph 2.a of Guideline E.

To be sure, each of Applicant's three alcohol-related arrests and dispositions (covered by allegations 1.b through 1.d) and SF-86 omission, are neither isolated nor totally unrelated to the period associated with his alcohol-related incidents. Still, they require separate consideration under the Adjudicative Guidelines covering criminal conduct. Both Applicant's arrests and SF-86 omission reflect mistakes of judgment (even if they didn't all result in convictions), which are security significant. The Appeal Board has repeatedly stated that the government can prove applicant engagement in criminal conduct, even in the absence of a criminal conviction. *Cf.* ISCR Case No. 94-1213 (June 7, 1996). Accordingly, two of the disqualifying conditions of the Adjudication Guidelines for criminal conduct may be invoked: E2.A10.1.2.1 (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged*) and E2.A10.1.2.2 (*A single serious crime or multiple lesser offenses*).

Unlike Guideline-covered alcohol-related arrests and Guideline E-covered omissions, Guideline J is designed to afford more recognition to an applicant's overall judgment and reliability history. Still, an applicant must meet the requirements of at least some of the mitigation conditions if he is to successfully mitigate the separate criminal conduct concerns associated with his arrests and omission.

Both the number of alcohol-related arrests and dispositions involved and failure to correct and imputed deliberate and material arrest omission elated coming forward with his full disclosure required at the very least a demonstrated positive shift in attitude by Applicant regarding the collective severity of his alcohol-arrest history and arrest omission and willingness to make documented changes in both his alcohol use and attitude regarding the importance of prompt corrections of omissions. This Applicant has failed to do. As a result, he is not positioned to avail himself of any of the mitigation conditions of the Guidelines for criminal conduct. More time is needed before Applicant is able to make a convincing case his rehabilitation efforts are sufficient to mitigate the criminally-related features of his arrest history and corresponding SF-86 omission. Based on a full review of the evidence and drawn inferences from the developed record, unfavorable conclusions warrant with respect to subparagraphs 3.a and 3.b of Guideline J.

In reaching my decision, I have considered the evidence as a whole, including each of the E 2.2.1 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): 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

GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT

Sub-para. 2.a: AGAINST APPLICANT

GUIDELINE J (CRIMINAL CONDUCT): AGAINST APPLICANT

Sub-para. 3.a: AGAINST APPLICANT

Sub-para. 3.b: AGAINST 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. Clearance is denied.

Roger C. Wesley

Administrative Judge