

DATE: February 18, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-15321

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's three alcohol related offenses between 1983 and 1985 raise security concerns that have not been mitigated. Applicant's criminal conduct would have been mitigated under the criminal conduct guideline but-for the application of Title 10 United States Code Section 986 (10 U.S.C. 986). Because Applicant's third alcohol-related offense in September 1985 resulted in a prison sentence of more than a year, the provisions of 10 U.S.C. 986 preclude the granting of a security clearance without a waiver by the Secretary of Defense. The personal conduct is found for Applicant as she did not deliberately omit the September 1985 felony from her security clearance application (SCA0 in December 2001). Clearance is denied.

STATEMENT OF CASE

On July 10, 2003, 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 April 4, 1999, 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 for Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

Applicant furnished her answer to the SOR on August 4, 2003. Applicant elected to have her case decided on a written record. The Government provided Applicant a copy of the File of Relevant Material (FORM) on November 18, 2003. Applicant received the FORM on December 2, 2003. Her one page response to the FORM was received on January 7, 2004. This case was assigned to me on January 15, 2004.

FINDINGS OF FACT

The SOR alleges alcohol involvement (Guideline G), criminal conduct (Guideline J), and personal conduct (Guideline E). Applicant admitted the factual allegations under alcohol involvement and criminal conduct, but denied the personal

conduct allegations. Regarding the personal conduct, she did not believe she falsified the security clearance application (SCA). Considering the entire FORM, including Applicant's response, I render the following factual findings:

Applicant is 44 years old and has been employed as an electronic worker by a defense contractor since 2000. She seeks a secret clearance.

Alcohol Involvement, Criminal Conduct. On January 29, 1983, Applicant was charged with driving while intoxicated (DWI). She was convicted and placed on one year probation. Applicant had consumed about seven or eight mixed drinks, then got in her car and was driving home when she was stopped by the police.

On April 30, 1983, Applicant had been drinking five or six mixed drinks with friends, and then got involved in an accident. Applicant was charged with and convicted of DWI. Applicant recalled having to perform community service. Her license was suspended for an unknown period of time.

On September 5, 1985, Applicant was charged with operating a motor vehicle while intoxicated. (OMVWI), a class D felony because of similar prior charges. Applicant pled guilty to OMVWI and was sentenced to a prison sentence of 730 days, 718 suspended, two years' probation, court fine of 104.00 and 96 hours community service. Applicant's license was also suspended for 10 years. She also was required to attend alcohol awareness classes. After seven years into the license suspension, Applicant obtained restricted license privileges that allowed her to drive to and from work for the balance of the suspension term.

Applicant started drinking when she was 23 years old. To reduce contact with an abusive mate, she socialized with her friends one night on the weekends. After the third alcohol-related driving offense in 1985, she claims she reduced her drinking to three or four beers one night a week. Applicant's drinking never caused her problems and she never thought she had a drinking problem. Applicant presented no supporting evidence to substantiate her claims about bringing her alcohol use under control.

Personal Conduct. Applicant completed a SCA on December 19, 2001. In response to question 21 (have you ever been charged with or convicted of any felony offense?), Applicant's reply was "no." Applicant offered several explanations for her negative response, with some being more credible than others. However, as the finder of fact, and even though she admitted subparagraph 1.c. of the SOR, I find she did not intend to falsify the security questionnaire in December 2001, particularly because she supplied details of the offense in response to question 24⁽¹⁾ requiring information of being convicted of an offense involving drugs or alcohol. First, the offense happened almost nineteen years ago when Applicant was 26 years old. Second, as noted by Applicant, her real concern was not going to jail, and all she wanted her attorney to do was to keep her out of jail. Third, her recollection her license was suspended for 10 years does not necessarily impeach the credibility of her claim of not knowing she had been found guilty of a felony. It is more reasonable for her to remember the 10 year license suspension because she had to file a petition to gain privileges to drive to work. I find a reasonable person, 26 years old, facing a long term in jail as Applicant was facing, would be more concerned about her freedom and continuing to be employed than whether or not she was convicted of a felony.

Character evidence. Applicant learned some hard lessons in an abusive relationship and has resolved not to repeat her mistakes.

POLICIES

Enclosure 2 of the Directive sets forth policy disqualifying conditions (DC) and mitigating conditions (MC) that must be given binding consideration in making security clearance decisions. These conditions must be considered in every case according to the pertinent guideline; however, the conditions 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 conditions exhaust the entire realm of human experience or that the conditions apply equally in every case. In addition, the Judge, as the trier of fact, must make critical judgments as to the credibility of witnesses. Conditions most pertinent to evaluation of the facts in this case are:

Alcohol Consumption

Disqualifying Conditions (DC):

1. Alcohol-related incidents away from work, such as driving while under the influence.

Mitigating Conditions (MC):

1. The alcohol incidents do not indicate a pattern;
2. The problem occurred a number of years ago and there is no indication of a recent problem;
3. Positive changes in behavior supportive of sobriety.

Criminal Conduct

Disqualifying Conditions (DC):

2. A single serious crime or multiple lesser offenses;
3. Conviction in a Federal or State court, including court-martial, of a crime and sentenced to imprisonment for a term exceeding a year.

Mitigating Conditions (MC):

1. The criminal behavior was not recent;
2. The crime was an isolated incident;
6. There is clear evidence of successful rehabilitation.
7. Potentially disqualifying conditions 3..., above, may not be mitigated unless, where meritorious circumstances exist, the Secretary of Defense or the Secretary of the Military Department concerned has granted a waiver.

Personal Conduct

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 not substantiated or not pertinent to a determination of judgment, trustworthiness, or reliability;
2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily;
3. The individual made prompt, good-faith efforts to correct the falsification before being confronted by the facts.

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 pages 16 and 17 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; (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 a *prima facie* case under alcohol consumption (Guideline G), criminal conduct (Guideline J) and personal conduct (Guideline E) that establishes doubt about a person's judgment, reliability, and trustworthiness. Then, the Applicant must remove that doubt with evidence in refutation, explanation, mitigation, or extenuation that demonstrates that the past adverse conduct is unlikely to repeat itself and Applicant presently qualifies for a security clearance.

CONCLUSIONS

Alcohol Consumption. Excessive alcohol use often leads to the exercise of poor judgment and increases the risk of security violations. Applicant's alcohol-related incidents indicate excessive alcohol use away from work that comes within the purview of DC 1 of the alcohol consumption guideline. Though MC 1 and MC 2 have limited application to the circumstances, Applicant has not submitted detailed evidence to show she has made substantial changes in her behavior supportive of sobriety. (MC 6) I could infer Applicant has made appropriate changes in her lifestyle to facilitate long-term sobriety. However, this inference would be based on speculation rather than evidence. Applicant was given notice of her responsibility to establish all mitigating circumstances under all three guidelines. Applicant has failed to supply sufficient evidence under MC 6 to find in her favor under the alcohol consumption guideline.

Criminal Conduct. A history or pattern of criminal behavior produces doubt about a person's judgment, reliability and trustworthiness. If a person has a history of violating the criminal laws that are promulgated to protect everyone, then he or she may be included to disregard security regulations relating to the proper safeguarding of classified information.

In addition, under 10 U.S.C. 986, the Department of Defense (DoD) and military departments may not grant or renew a security clearance to an employee, officer, or director of any DoD contractor, when the person has been convicted in any Federal or State court of a crime and sentenced to imprisonment for a term exceeding a year. The statute also provides the Secretary of Defense may, in a meritorious case, authorize an exception (grant a waiver) to the statutory prohibition disallowing clearances to persons who have received sentences exceeding one year.

Based on the regulatory guidance of criminal conduct, Applicant's 3rd alcohol-related driving offense in 1985 falls within the purview of DC 2 as representative of a pattern of adverse behavior. In addition to the normal security concerns of the criminal conduct guideline, the 3rd alcohol-related driving offense comes within the scope of 10 U.S.C. 986 because Applicant was sentenced to a prison term in excess of one year, even though she only served about 12 days in jail.

There are three mitigating conditions under criminal conduct that can potentially applied to these circumstances. First, the alcohol-related felony occurred almost 19 years ago when Applicant was 26 years old. (MC 1) While the 3rd alcohol-related offense constituted a pattern of criminal behavior in a two year period between 1983 and 1985, there has been no recurrence of alcohol-related offenses since 1985. (MC 2) While Applicant has offered scant evidence in rehabilitation, the fact that all Applicant's criminal conduct is alcohol-related, and occurred over nineteen years ago,

would have resulted in a finding for Applicant under the criminal conduct guideline, and absent 10 U.S.C. 986.

Personal Conduct. The guideline involves the deliberate omission, concealment, or falsification of material information in an SCA or similar official document, or in interview or sworn statement with a government investigator. Even though material information was omitted from question 21 of her SCA in December 2001, I find Applicant's denial of deliberately omitting the information credible. Given the totality of the circumstances, she was more concerned about remaining free and gaining authorization to drive to work than whether she was convicted of a felony. When she filled out the SCA 16 years later in December 2001, I do not believe she deliberately tried to omit or falsify her response to question 21. Accordingly, the personal conduct guideline is found for Applicant.

Considering the entire record, I find against Applicant under the alcohol consumption guideline but for her under the personal conduct guideline. Had there been no statutory disqualification under 10 U.S.C.986, I would have found for Applicant under the criminal conduct guideline. In reaching my decisions under each guideline, I have also weighed the evidence under the whole person concept.

FORMAL FINDINGS

Formal Findings required by Section 3, Paragraph 7, of Enclosure 1 of the Directive are:

Paragraph 1 (alcohol consumption, Guideline G): AGAINST THE APPLICANT.

- a. Against Applicant.
- b. Against Applicant.
- c. Against Applicant.

Paragraph 2 (criminal conduct, Guideline J): AGAINST THE APPLICANT.

- a. For Applicant.
- b. Against Applicant.

Paragraph 3 (personal conduct, Guideline E): FOR THE APPLICANT.

- a. 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 Applicant a security clearance. I do not recommend this case for waiver under 10 U.S.C. 986.

Paul J. Mason

Administrative Judge

1. Though the dates she supplied were off by approximately five months. (Item 1, question 24)