

DATE: September 5, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-21738

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was found guilty of his third alcohol-related driving offense in April 2001 and sentenced to two years, with the sentence suspended after 120 days. Because Applicant was sentenced to a prison term exceeding a year, 10 USC 986 (Smith Amendment) prohibits the granting or renewal of a security clearance, regardless of the amount of time he actually served. Even without the Smith Amendment, Applicant's criminal conduct is not mitigated. Given the pattern of alcohol consumption and alcohol-related incidents that extended from 1991 to 2000, and Applicant's continued alcohol consumption while on probation and during his treatment, Applicant has not mitigated his alcohol consumption either. Clearance is denied.

STATEMENT OF CASE

On January 16, 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, 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's undated Answer to the SOR was received in a timely fashion. 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 31, 2003. Applicant received the FORM on April 21, 2003. His undated response was received on May 20, 2003, and within the 30 day period allowed for receipt of a response. The case was received by the undersigned for decision on June 3, 2003.

FINDINGS OF FACT

The SOR alleges criminal conduct (Guideline J) and alcohol involvement (Guideline G). Applicant admitted all factual allegations except for subparagraph 2.b., explaining he had stopped drinking alcohol and was attending Alcoholics

Anonymous (AA).

Criminal Conduct

There are no supporting records or legal documents to establish that in November 1970 Applicant was convicted of illegal possession of alcohol and contributing to the delinquency of a minor. Applicant's admission to the arrest and charge, does not mean he was adjudged guilty of the charge. Without more specificity in the SOR allegation, or journalized entries of guilt, a simple arrest has negligible relevance under the criminal conduct guideline. A similar lack of specificity and/or supporting documentation showing a finding of guilt in subparagraph 1.b. requires a finding for Applicant under both 1.a. and 1.b.

In 1991, Applicant was charged with driving while intoxicated (DWI). He was fined \$300.00, and required to attend alcohol education classes which he completed in 1992. (Item 5) His license was also suspended for 90 days.

In February 1994, Applicant was driving on an icy street and slid into the car in front of him. After the collision, Appellant claimed he checked the occupants of the other car, then resumed driving on the road for an unknown distance before abandoning his vehicle. The next day the police called and asked him to come to the police station where he was charged with being involved in an accident. After weighing the information he provided in his sworn statement (Item 5) with his answer to the SOR, I find Applicant falsely reported his auto stolen (1.d.). I also find he was found guilty of causing the accident; he was sentenced to unsupervised probation and ordered to pay restitution.

In January 1995, after consuming about 5 beers, Applicant was pulled over for speeding. The arresting officer smelled alcohol on Applicant's breath and charged him with DWI. Applicant pled guilty, was required to perform community service, and, was placed on probation for 90 days.

In February 2000, after consuming four or five beers, Applicant was driving to a grocery store and was stopped after police received a complaint about his driving. Applicant was asked to perform field sobriety tests. Applicant claimed he declined to participate in the tests after the arresting officer became angry. Applicant was arrested for driving while under the influence of alcohol (DUI) and pled no contest. He was fined \$1,000.00 and received a sentence of 2 years at the state correctional center, beginning in April 2001, with the sentence suspended after 120 days. Applicant was then placed on probation for 2 years, required to perform 100 hours of community service, and also required to obtain court-ordered counseling. Applicant completed all conditions of his sentence.

Alcohol Consumption

According to his sworn statement dated February 6, 2002, Applicant was drinking three to four beers three to four times a week prior to his DUI in February 2000. After the DUI, his consumption decreased to three or four beers about twice weekly. Applicant claimed he could reduce his drinking even more without professional assistance. In his answer to the SOR, he claimed he had quit drinking and was attending Alcoholics Anonymous (AA).

Character Evidence

Applicant's manager has known Applicant since he was hired in 1996. The manager believes Applicant performs his tasks in a professional and timely manner. When the manager discovered the alcohol-related problems, he recommended Applicant obtain counseling and join AA. According to the manager, Applicant completed all court-ordered conditions and continues participation in AA.

Applicant's friend for 36 years believes Applicant's trustworthiness is based on highest standards of integrity.

Applicant's two coworkers consider Applicant a real professional.

Applicant received an Honorable Discharge from the United States Army in November 1973. The discharge document discloses Applicant received the Bronze Star for his service.

A certificate of completion indicates Applicant completed the 11-week therapy course in March 2002.

POLICIES

Enclosure 2, page 16 of the Directive, sets forth disqualifying and mitigating conditions which must be given binding consideration in making security clearance determinations. 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:

Criminal Conduct (Guideline J)

Disqualifying Conditions (DC):

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

Mitigating Conditions (MC):

1. The criminal behavior was not recent;
2. The criminal behavior was an isolated incident;
6. There is clear evidence of successful rehabilitation;

Alcohol Consumption (Guideline G)

Disqualifying Conditions (DC):

1. Alcohol-related incidents away from work;
5. Habitual or binge consumption of alcohol to the point of impaired judgment.

Mitigating Conditions (MC):

1. The alcohol-related 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 supportive of sobriety.

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; and, (8) The potential for pressure, coercion, exploitation, or duress; (9) and, 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 against Applicant under criminal conduct (Guideline J) and alcohol involvement (Guideline G) which establishes doubt about Applicant's judgment, reliability, and trustworthiness. Then, the Applicant has the ultimate burden of demonstrating with evidence in refutation, explanation, mitigation, or extenuation that it is clearly consistent with the national interest to grant or continue his security clearance.

CONCLUSIONS

Criminal Conduct

Criminal conduct raises security concerns about a person's judgment, reliability and trustworthiness. The circumstances of this case make disqualifying condition (DC) 2 and DC 3 applicable. DC 2 encompasses a single serious crime or multiple lesser offenses. ⁽¹⁾ The four criminal offenses were similar in nature with Applicant placing others at risk by driving a vehicle while under the influence of alcohol. The alcohol-related accident in 1994 is aggravated by the unexplained false police report Applicant filed. Also, the four offenses occurred inside a 10 year period between 1991 and February 2000. The similarity of the offenses and their frequency within a brief period represent a pattern of disqualifying criminal conduct within the scope of DC 2.

DC 3 (Smith Amendment, 10 USC 986) of the criminal conduct guideline requires that a person who has been convicted in federal or state court, including trial by courts-martial, and sentenced for a term exceeding one year shall not be granted or have renewed access to classified information. The Smith Amendment bars the granting or renewal of Applicant's security clearance because Applicant was sentenced to prison in April 2001 for a term of 2 years, and even though the original sentence was suspended after 120 days, and Applicant was placed on probation for 2 years.

The only exception to the mandatory application of the Smith Amendment is in a meritorious case the Secretary of Defense may authorize waiver of the statutory prohibition. (MC 7) Even though a recommendation for waiver cannot be made, Applicant's evidence in mitigation would not otherwise meet the mitigating conditions under the criminal conduct guideline. Because the most recent criminal behavior was in 2000, MC 1 is not applicable. Since Applicant's criminal behavior constitutes a pattern of conduct that was not isolated, MC 2 is unavailable.

MC 6 under the criminal conduct guideline is available for mitigation when there is clear evidence of successful rehabilitation. The absence of criminal conduct since February 2000 is entitled to very little weight in Applicant's favor because he was on probation until April 2003, and clearly aware of the distinct possibility of incarceration should he violate any of the probation terms. Applicant's completion of probation, without more, is insufficient evidence of successful rehabilitation under MC 6. Given the pattern of criminal conduct between 1991 and 2000, the evidence in rehabilitation is insufficient to meet his ultimate burden of persuasion under the criminal conduct guideline.

Alcohol Consumption

Excessive alcohol consumption often increases the risk of security violations simply because the individual is under the influence of a mind-altering drug that impairs judgment. Impaired judgment can lead to alcohol-related incidents such as DWI or DUI. Although the alcohol-related incidents take place away from work (DC 1), they still raise security concerns because possessing a security clearance is a 24-hour-a-day responsibility even when the security clearance holder is not at work. Between 1991 and February 2000, Applicant was convicted of two DWI offenses, one DUI offense, and one offense of causing an accident, in addition to falsely reporting his vehicle stolen. Prior to each offense, Applicant had consumed varying amounts of alcohol. After the DWI in February 2000, Applicant continued to consume alcohol approximately twice a week, even during the counseling sessions that began in December 2001.

While the first three mitigating conditions under the alcohol guideline have potential application to the facts of this case, they must be removed from consideration because of the lack of probative evidence in rehabilitation. MC 1 is not applicable as the four alcohol-related incidents over 10 years represent a pattern of adverse, alcohol-related conduct. MC 2 may mitigate if the problem occurred a number of years ago and there is no indication of a recent problem. I am unable to apply this condition due to the recent DWI and the fact Applicant continued to consumed alcohol at least until February 2002, and probably up to the time he submitted his undated answer to the SOR in 2003.

MC 3 of the alcohol guideline should receive considerable attention when the evidence shows positive changes supportive of sobriety. Applicant's character evidence from his coworkers and supervisor paints a favorable picture of a productive and trustworthy employee, however, the evidence sheds little light on the status of Applicant's abstinence and/or his level of participation in AA. In sum, Applicant has not met his ultimate burden of furnishing substantial evidence in support of any applicable mitigating condition under alcohol consumption. In reaching my findings under the criminal conduct and alcohol consumption guidelines, I have considered the general factors of the whole person concept.

FORMAL FINDINGS

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

Paragraph 1 (criminal conduct): AGAINST THE APPLICANT.

- a. For the Applicant.
- b. For the Applicant.
- c. Against the Applicant.
- d. Against the Applicant.
- e. Against the Applicant.
- f. Against the Applicant.
- g. Against the Applicant.

Paragraph 2 (alcohol consumption): AGAINST THE APPLICANT.

- a. Against the Applicant.
- b. Against the Applicant.
- c. 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 Applicant a security clearance.

Paul J. Mason

Administrative Judge

1. The allegations in subparagraphs 1.a. and 1.b. are found for Applicant due to the lack of supporting documentation, or other information explaining the ultimate outcome of each offense.