

DATE: July 8, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-32929

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant pleaded no contest to alcohol-related vehicular homicide in 1982 and received five years of probation, fines and court costs, in addition to ordered counseling. He also pleaded guilty to DuI charges in 1997 and 1998. Applicant falsified his security clearance application (SF-86) by omitting his 1998 court-ordered counseling, when answering question 25 (*sic*), and one of his DuIs when answering question 24. Applicant has mitigated the security concerns over his DuIs but failed to mitigate his falsification of his SF-86. Clearance is denied.

STATEMENT OF THE CASE

On August 11, 2003, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended, 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 September 4, 2003, and elected to have his case decided on the basis of the written record. Applicant received the File of Relevant Material (FORM) on February 26, 2004 and filed no response to the FORM within the 30 days provided. The case was assigned to me March 14, 2004.

SUMMARY OF PLEADINGS

Under Guideline J, Applicant is alleged to have been arrested on three different occasions for alcohol and drug-related offenses: He was arrested in (a) September 1982 in State A for vehicular homicide and received five years of probation, was fined \$2,100.00, was taxed court costs and supervision fees, and was ordered to attend counseling deemed necessary by his probation officer, (b) July 1997 in State B for driving under the influence of a controlled substance, for which he pleaded guilty and was fined \$614.00 and taxed court costs, and (c) June 1998 in State C for driving while impaired and careless operation, for which he pleaded guilty to driving while impaired and was fined \$953.50, placed on

two years of unsupervised probation, ordered to perform community service, and ordered to complete an evaluation by a local substance abuse clinic in September 1998.

Under Guideline E, Applicant is alleged to have falsified his security clearance application (SF-86) of August 2000 by failing to disclose (a) his 1998 court-ordered evaluation in State C which resulted in counseling (consisting of 12 AA sessions and 12 sessions with a local alcohol and drug abuse clinic and (b) his 1997 alcohol-related arrest in State B.

For his response to the SOR, Applicant admitted his substance-related offenses and SF-86 omissions. In explanation, he claimed he did not intentionally omit his drug counseling and 1997 alcohol-related arrest and conviction (claiming it had nothing to do with drugs or drug activity).

FINDINGS OF FACT

Applicant is a 47-year-old aircraft maintenance technician 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 was introduced to alcohol in high school. In 1982 after consuming seven to eight beers during an afternoon of golf in State A, he crossed the center line and hit a motorcyclist, killing him instantly. According to the police report, Applicant registered a blood alcohol content (BAC) of .17 per cent (*see ex. 7*). Answering the ensuing charges of vehicular manslaughter, Applicant pleaded no contest and was placed on five years of probation, fined \$2,100.00, taxed court costs and supervision fees, and ordered to participate in such counseling deemed necessary by his probation officer (*see ex. 7*). Applicant attended alcohol education classes, but nothing of a formal counseling that can be documented. He is credited, though, with satisfying the court's probation conditions.

In July 1997, Applicant was arrested in State B for driving under the influence of a controlled substance after being stopped for crossing the double line and field tested for alcohol abuse (which he failed). Applicant later pleaded guilty to DuI and was fined \$614.00 and taxed court costs (*see ex. 6*).

Applicant was involved in a traffic accident in State C in June 1998. In the process of questioning Applicant at the scene, the investigating officer detected a strong odor of alcohol on his breath, as well as bloodshot eyes and slurred speech. The officer then administered a field sobriety test on Applicant, which produced test results of .19 percent BAC (*see ex. 9*). The investigating officer then placed Applicant under arrest and transferred him to the local jail. Applicant pleaded guilty to a first offense in State C of operating a vehicle while intoxicated and was fined \$953.50. He was placed on two years of unsupervised probation and ordered to perform community service and complete an evaluation by a local substance abuse clinic. Between October 1998 and January 1999, Applicant completed 12 AA sessions (consisting of four education sessions and eight group sessions) and attended 12 AA support group. All of the administered urine screens and breath tests were negative. His counseling group report describes him as cooperative and respectful (*see ex. 11*).

When asked to complete an SF-86 in August 2000, Applicant omitted his 1998 court-ordered counseling sessions when answering question 25. He provides no explanation for his counseling omissions. : only some confusion over whether he previously listed his 1997 arrest in his SF-86. Absent persuasive explanations his omission was not made knowingly and wilfully, he cannot avert inferences his omission was deliberate.

Applicant also omitted his 1997 DuI arrest/conviction from his response to question 24 of his August 2000 SF-86. He attributes his omission of his 1997 incident to confusion over whether he previously listed the arrest in his SF-86. Without a more persuasive explanation of his omissions than what he furnished in his June and September 2000 DSS statements, he cannot avert inferences of knowing and wilful omission of his DuI incidents.

Not until interviewed for the second time by a DSS agent (in September 2002) did Applicant acknowledge the last of his alcohol-related arrests (his 1997 arrest). Conversely, he never acknowledged his court-ordered alcohol counseling associated with his 1998 arrest until he answered the SOR: over three years later.

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) list guidelines to be considered in the decision making process covering DOHA cases. Judges must 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 assessment 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 judgment, 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 5 The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress.

MC 6 There is clear evidence of successful rehabilitation.

Personal Conduct

The Concern: 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, 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.

Mitigating Conditions: None.

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 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

Between September 1982 and June 1998 Applicant accumulated three separate alcohol-related arrests that lead to convictions that resulted in assorted fines, supervised probation and counseling.

Alcohol-related arrests/convictions

Applicant was involved in three alcohol-related incidents over a 16-year period, with the last occurring in 1998. Most serious was his first such incident (in 1982), in which he crossed a double line and killed a passing motorcyclist. He pleaded no contest to vehicular homicide charges and was placed on probation for five years, fined, taxed court costs and supervision fees, and ordered to participate in counseling. By all accounts, he satisfied the court's imposed probation conditions.

After a number of years of avoidance of alcohol-related incidents, Applicant was arrested and charged for DuI in 1997, to which he pleaded guilty and was fined. A year later (in 1998), he was arrested and charged with DuI for the third time in 16 years, pleading guilty to operating a vehicle while intoxicated, for which he was fined, placed on two years of unsupervised probation, ordered to perform community service and complete an evaluation. Applicant is credited with satisfying these probation conditions.

Following his last alcohol-related incident (*viz.*, his June 1998 arrest and conviction), Applicant has avoided any recurrent alcohol-related incidents. On the strength of the evidence presented, two disqualifying conditions (DC) of the Adjudication Guidelines for alcohol consumption may be applied: DC 1 (alcohol-related incidents away from work) and DC 5 (habitual or binge drinking).

By his actions to date, Applicant provides some evidence of learning from his judgment lapses associated with his alcohol-related incidents (one of which involved vehicular manslaughter) by avoiding any further such incidents since 1998. Without any more evidence of problem drinking while driving over the past six years, (a very serious problem for Applicant in the past), Applicant is able to take advantage of mitigating conditions (MC) covered by the Guideline for criminal conduct: MC 1 (the criminal behavior was not recent), MC 5 (the individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress), and MC 6 (there is clear evidence of successful rehabilitation).

All in all, Applicant's mitigation efforts to date are sufficient to absolve him of security concerns associated with his past and current alcohol-related incidents. Considering the record as a whole, particularly the time elapse since his last incident (almost six years), Applicant is able to mitigate the security risks associated with his three prior alcohol-related arrests/convictions over a 16-year period by showing he has both the maturity and resource support at his disposal to avert any recurrent problems associated with alcohol-related judgment lapses in the future. Favorable conclusions warrant with respect to the alcohol-related allegations covered by subparagraphs 1.a through 1.c of Guideline J.

Falsification issues

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 counseling and alcohol arrest omissions in the SF-86 he

executed in August 2000. So much trust is imposed on persons cleared to see classified information that deviation tolerances for incidents of trust betrayal are calibrated narrowly.

By omitting his ordered counseling associated with his 1998 DuI conviction and his 1997 alcohol-related incident (for which he was arrested, convicted and fined) in his 2000 SF-86, Applicant concealed materially important background information needed for the government to properly process and evaluate his security updates. His claims of some confusion over whether he provided the information in his SF-86 relative to his 1997 arrest were resolved factually against him and preclude him from averting deliberate falsification inferences. His omissions invite application of Disqualifying Conditions (DC) of the Adjudicative Guidelines for personal conduct: DC 2 (falsification of a security questionnaire).

Neither the timing of his disclosures (over three years later) nor the circumstances surrounding them permit him to mitigate his ensuing disclosures of his alcohol-related arrests/convictions. Not only has the Appeal Board found the use of Mitigating Condition (MC) 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 3 (prompt, good-faith disclosure) as well in circumstances (as here) where the applicant has failed to volunteer the adverse information in a prompt fashion. *Compare* ISCR Case No. 02-23365 (March 22, 2004) and ISCR Case No. 97-0289 (January 1998) with DISCR Case No. 93-1390 (January 1995). Applicant, accordingly, may not take advantage of either MC 2 (isolated omissions) or MC 3 (prompt, good faith correction of the falsification).

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 subparagraphs 1.a and 1.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 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 E (PERSONAL CONDUCT): AGAINST APPLICANT

Sub-para. 2.a: AGAINST APPLICANT

Sub-para. 2.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