

DATE: December 17, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-00535

ECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's alcohol-related conduct in 1991 raises security concerns that are mitigated by the absence of alcohol-related behavior since then. Though Appellant was charged with alcohol-related behavior in November 2000, those charges were dismissed at the police station because Applicant's blood tested below the legal limit on two occasions. While Applicant omitted information regarding the November 2000 charge(s) from his security clearance application (SCA) in August 2002, the omission was unintentional. Clearance is granted.

STATEMENT OF CASE

On October 17, 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's answer is undated but is notarized. Applicant elected to have his case decided on a written record. The Government provided Applicant a copy of the File of Relevant Material (FORM) on April 2, 2004. Applicant received the FORM on April 6, 2004 with instructions to respond within 30 days. His response to the FORM was received on or about June 22, 2004 because the postage stamp shows June 21, 2004 as the date his response was mailed. The case was assigned to me on July 14, 2004.

FINDINGS OF FACT

The SOR alleges alcohol consumption and personal conduct. Applicant admitted all the factual allegations. Applicant is 40 years old and employed as a software engineer by a defense contractor. He seeks a secret clearance.

On July 14, 1991 (Applicant's 27th birthday), Applicant was arrested and charged with driving while under the influence of alcohol (DWI). He had been drinking four or five beers over a seven hour period. He took a wrong turn and was stopped by the police. He failed a breath test and was transported to the police station. This alcohol-related offense was his first and the presiding judge ordered him to complete alcohol classes/counseling in lieu of potentially receiving a criminal record. After his successful completion of two months of counseling, the DWI charge was dismissed.

On November 19, 2000, Applicant (age 36) had been drinking two or three drinks over a three hour period. He was tired and swerved his car while driving home because the road was under repair and not illuminated adequately. The police arrested and charged him with driving while under the influence of alcohol (DUI), and transported him to the police station. After passing two alcohol tests, the charges were dismissed. Though the SOR alleges that Applicant was charged with two DUI offenses on November 19, 2000, the language used in Applicant's sworn statement (Item 8) raises a reasonable inference he was charged with only one offense. Other than the state (Item 10) and federal records (Item 9), there is no evidence demonstrating Applicant was charged with two offenses.

On October 23, 2002 (Item 8), Applicant furnished a sworn statement to the government describing his overall alcohol use in the last seven years and when he was stopped by the police. He mentioned he drank to the point of intoxication four times a year but always had a ride home so he would not drive. He never sought treatment nor has anyone ever suggested he seek counseling. ^(U) Finally, he never had any embarrassing moments with friends nor embarrassing incidents involving his alcohol use.

Applicant does not think he represents a problem under the alcohol guideline because the alcohol-related incidents do not represent a pattern and the most recent alcohol-related incident occurred over four years ago. Three reasons Applicant stopped most of his alcohol use are: (1) he tries to avoid drinking if he has to drive; (2) getting older and seeing no need to waste money on alcohol; and, (3) some of his medicines react adversely with alcohol.

On August 24, 2002, about two months before the date of his sworn statement, Applicant signed an SCA. In response to question 24 of the SCA, Applicant answered "yes," indicating he had been charged or convicted of an offense related to alcohol and drugs, and he disclosed the 1991 offense. However, he did not disclose the 2000 DUI offense because he just copied the information from the 1994 SCA (Item 7) to the current SCA. Applicant also mistakenly believed the charges had been wiped out when they were dismissed at the police station.

Character Evidence. From 1989 to 1999, Applicant worked as a software engineer for one employer. He was hired by his current employer in 2000 because of a personal need for advancement in his field. Applicant has participated on the boards of several charitable organizations in the metropolitan area.

POLICIES

Enclosure 2 of the Directive sets forth policy 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:

Alcohol Consumption

Disqualifying Conditions (DC):

1. Alcohol-related incidents away from work;
2. Habitual or binge drinking 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 in a behavior supportive of sobriety.

Personal Conduct

Disqualifying Conditions (DC):

2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire used to determine security clearance eligibility;

Mitigating Conditions (MC):

1. The information was unsubstantiated or not pertinent to the 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 with 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 page 16 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; 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 the alcohol consumption and personal conduct guidelines that establishes doubt about a person's judgment, reliability and trustworthiness. Then, the burden shifts to applicant to refute, explain, mitigate, or extenuate the facts. An applicant has the ultimate burden of persuasion to demonstrate he qualifies for a security clearance.

CONCLUSIONS

Excessive alcohol consumption can lead to questionable judgment in both social and occupational functioning. It is important for security clearance holders to avoid alcohol abuse because of the increased risk of security violations related to excessive alcohol use. Since there is an alcohol-related incident in 1991 and one in 2000, DC 1 is relied on by the government to demonstrate a pattern of alcohol-related conduct away from work that disqualifies Applicant from security clearance access. In the 1991 DWI, Applicant had been drinking four or five beers. The alcohol impaired his behavior when he took a wrong turn and failed a breath test designed to determine if there was more than the legal limit

of alcohol in his blood. While the 1991 DWI conviction suggests excessive consumption of alcohol, there is no evidence in the record to indicate the two-month counseling in 1991 was for alcohol abuse. On the contrary, most states have first offender sentence structures that essentially give the offender a second chance (to keep his record clean) by removing his first offense from his criminal record if he completes alcohol education classes/counseling in lieu of potentially exposing himself to punishment and a permanent criminal record. The 1991 conviction was removed from Applicant's record in February 1992 following his successful completion of the required alcohol classes/counseling.

More than nine years later in November 2000, Applicant's drinking was partially the cause of the alcohol-related charges, however, Applicant's vision was also hampered by a road with poor lighting and under repair. His release and dismissal of the DUI charge(s) after twice passing blood tests in November 2000 distinguishes this case from the 1991 DWI conviction in that Applicant's alcohol level in November 2000 was insufficient to support a charge for DUI. Apparently, there were no other signs persuading the arresting officer to charge Applicant with a DUI or any other driving offense. ⁽²⁾ Furthermore, there are no police reports or meaningful court records to establish either of the supposed DUI charges in November 2000. Finally, Applicant's sworn statement (Item 8) does not establish he was under the influence of alcohol. While he had been drinking, he was also tired and driving on a road under repair and under deficient lighting conditions.

DC 5 refers to the habitual or binge consumption of alcohol to the point of impairment. Drinking two or three beers two or three times a month does not constitute habitual or binge consumption under the circumstances of this case. Getting intoxicated four times a year may however represent disqualifying evidence under DC 5. Assuming that the words/phrases "impairment," "intoxication" and "under the influence" are interpreted generally as reaching a mental status that increases an applicant's chances of committing poor judgment, the last documented time Applicant drank to impairment was in 1991 when he was apprehended for DWI. Having weighed all the evidence in the record, there is insufficient evidence to disqualify Applicant's security access based on DC 5. He has decreased alcohol consumption and is vigilant about other people driving when he has been drinking.

MC 1 of the alcohol guideline is applicable here as there is no indication of pattern of abuse. The 1991 DWI occurred 13 years ago. Significantly, the 2000 DWI, while alcohol-related, was dismissed because Applicant tested under the legal limit. MC 2 weighs in Applicant's favor because the last alcohol-related incident occurred in 2000 when the arresting officer determined there was insufficient evidence to support an alcohol-related charge. MC 3 also works for Applicant as he is drinking less because he does not want to experience another DWI or some similar alcohol-related traffic offense. It is good Applicant realizes the adverse effect of alcohol on his medication. Considering the evidence as a whole, along with the general factors of the whole person concept, I find for Applicant under Guideline G and the whole person concept.

Personal Conduct. Conduct that demonstrates dishonesty and poor judgment could mean that a person may not be able to properly safeguard classified information. While Applicant failed to disclose the 1990 incident in his response to question 24 of the SCA, the surrounding circumstances indicate the omission was unintentional. Applicant's reasons of carelessness caused by haste and believing that the charging process had ended when the DWI charge was dismissed in 2000 are two compelling explanations for concluding the omission was unintentional. Applicant clearly used poor judgment in not taking the appropriate time to provide the information correctly. However, by observing the charges get dismissed after passing two blood tests at the police station in November 2000, his omission of the information from question 24 was a reasonable position for him to take under the circumstances, even though the belief was mistaken. Accordingly, the personal conduct allegation is not supported by the record.

Assuming Applicant's carelessness explanation is considered incongruent with his reasonable belief the charges were dropped, ⁽³⁾ the pertinent behavioral changes Applicant has made under factor 6 (whole person concept) justify the conclusion that Applicant will successfully resist this kind of conduct in the future. If he should consume an impairing amount of alcohol (which is only about four times a year) he will make sure someone else is driving. He has reduced alcohol intake because he understands the deleterious effect on his medications. Having weighed and balanced the entire record, including the favorable evidence of Applicant's participation in charitable causes, I find for Applicant under the personal conduct guideline and the whole person concept of the Directive.

FORMAL FINDINGS

Paragraph 1 (Alcohol Consumption, Guideline G): FOR THE APPLICANT.

- a. For Applicant.
- b. For Applicant.
- c. For Applicant.

Paragraph 2 (Personal Conduct, Guideline E): FOR THE APPLICANT.

- a. For the Applicant.

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Paul J. Mason

Administrative Judge

1. The alcohol classes he took in 1991 were a type of counseling he was ordered to successfully complete in order to remove his exposure to a criminal conviction and possibly incarceration.
2. The circumstances may have supported a traffic charge of reckless driving, failure to stay in the assigned lane, or some other offense demonstrating Applicant temporarily had lost control of his vehicle. It is impossible to tell from the record whether the arresting officer considered Applicant's claim of poor road lighting conditions in his decision to release Applicant altogether.
3. Even though Applicant was at least 36 years old, the dismissed charge would constitute a persuasive reason for the reasonable man (without legal training) to believe he had never been charged. with a crime. In addition, the time between November 2003 and June 21, 2004 has allowed Applicant an extended opportunity to examine all the surrounding circumstances that resulted in information being omitted from the SCA.