

DATE: September 30, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-04412

ECISION OF ADMINISTRATIVE JUDGE

MARTIN H. MOGUL

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Michael D. McGlinn, Esq.

SYNOPSIS

Applicant has had a long history of alcohol abuse. His alcohol abuse has resulted in three alcohol-related arrests for Driving Under the Influence (DUI), occurring in 1991, 1995, and 2000. Applicant received a number of alcohol abuse treatments, in which he was not ultimately successful because he continued consuming alcohol. His last treatment in 2000, including living in a sober living home for a year and continuing to attend two or three Alcoholics Anonymous (AA) meetings a week, has been successful, because Applicant is more committed to sobriety. He has abstained from alcohol consumption since April 2000. Evidence of Applicant's alcohol rehabilitation is sufficient to mitigate his alcohol related history. Clearance is granted.

STATEMENT OF THE CASE

On November 13, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the 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 a clearance should be denied or revoked.

Applicant, through his attorney, filed a signed and sworn, notarized response, dated January 8, 2004, to the allegations set forth in the SOR. He requested a clearance decision based on a hearing record before a DOHA Administrative Judge.

On March 30, 2004, this case was assigned to another Administrative Judge. On April 26, 2004, the case was reassigned to this Administrative Judge to conduct a hearing and issue a written decision. A Notice of Hearing was issued to the parties on June 7, 2004, and the hearing was held on June 30, 2004.

At the hearing, Department Counsel offered five documentary exhibits (Exhibits 1 - 5) and no witnesses were called.

Applicant, through his counsel, offered eight documentary exhibits (Exhibits A - H) and his own testimony and that of five other witnesses. The transcript (TR) was received on July 15, 2004.

FINDINGS OF FACT

The Government opposes Applicant's request for a security clearance, based upon the allegations set forth in the SOR. In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline G and Guideline J of the Directive. The SOR contains seven allegations, 1.a. through 1.g., under Guideline G (Alcohol Consumption) and one allegation, 2.a., under Guideline J (Criminal Conduct). Applicant admits all of the allegations. The admitted allegations are incorporated as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the admitted documents and the live testimony, and upon due consideration of that evidence, I make the following findings of fact:

Applicant is 56 years old. He is married, but is in the process of a divorce, and he has a 37 year old daughter. He has been employed by the same defense contractor since 1976 and held a security clearance for the same period, and he seeks to retain a DoD security clearance in connection with his employment in the defense sector.

Paragraph 1 (Guideline G - Alcohol consumption).

The Government alleges in this paragraph that the Applicant is ineligible for clearance because he abuses alcohol to excess.

Applicant has consumed alcohol since he was 18 years of age in 1966. His drinking increased during the six years that he was in the United States Navy, from 1966 until 1972. Over the years, his consumption had escalated for periods of time until he became a binge drinker, consuming alcohol to excess for periods of time and then abstaining from consuming alcohol (Tr at 77) (Exhibit 3).

Applicant's drinking has resulted in three alcohol related incidents where he was arrested and found or pled guilty to charges of DUI. They occurred in 1991, 1995, and 2000.

The first alcohol related incident, in which Applicant was involved, occurred in February 1991. He was arrested and pled guilty to DUI. He was sentenced to serve 6 days in jail, placed on probation for three years, and fined \$1,030. He also had to complete a three month first conviction offender program, where he attended classes, lectures, and counseling regarding the use of alcohol (Tr at 78-80) (Exhibit 3).

The second arrest occurred on September 1995. He was arrested and pled guilty to DUI. He was placed on summary probation for five years and fined \$1,760. For this arrest he had to complete an eighteen month multiple offender program, where he again attended classes, lectures, and counseling regarding the use of alcohol, and he could not consume any alcohol for the eighteen month period (Tr at 80-83) (Exhibit 3).

The most recent arrest occurred in February 2000. He was arrested and pled guilty to DUI. He was again placed on summary probation for five years and fined \$1,435. For this arrest he had to complete an additional eighteen month multiple offender program, and his driver's license was restricted for eighteen months (Tr at 84-86) (Exhibit 3).

In 1998, Applicant referred himself for treatment for his alcohol problems and entered a four week in-house treatment program at a hospital. After completing the program he remained sober for one year, and then he began to consume alcohol again.

In April 2000, he again entered the same treatment program at the same hospital. He was diagnosed as being Alcohol dependent. The treatment consisted of four weeks of in-house treatment, with individual and group counseling, attending aftercare sessions for six months, living for one year in a sober living home, and attending two AA meetings a week. Applicant successfully completed this program and has abstained from consuming alcohol since April 4, 2000. Upon his discharge on May 5, 2004, his primary physician wrote about Applicant, "I think his prognosis is excellent and

he has responded in an extremely positive way to treatment at this time." He ". . . made excellent progress throughout the course of his treatment. He shows evidence of sincere commitment to remaining alcohol-free, including continuing in a residential sober living environment following completion of this program so that he can gain additional support for remaining completely alcohol-free following discharge."(Exhibits 3 and 4).

Applicant now concedes that he is an alcoholic, but he did not come to that realization until he was undergoing his treatment in 2000. At the hearing he testified that he now realizes, "I cannot drink. I will die if I drink." (TR at 75). He currently attends two or three AA meetings a week, and he has completed the 12 Step program of AA on two occasions.

Four character witnesses testified on behalf of Applicant. Three have known him primarily through work related interaction, although there has been some social interaction as well. They were all aware of the employment related problems that resulted from Applicant's alcohol abuse, but all of them believed Applicant no longer consumed alcohol and that he had resolved all of his alcohol related difficulties. The fourth witness knew Applicant from his one year in a sober living home. Her testimony was extremely positive about all Applicant did during his year at the facility to get and stay sober.

Paragraph 2 (Guideline J - Criminal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in criminal acts. Applicant's conduct that occurred in 2000, 1995, and 1991, and which has been alleged in the SOR as 1.a., 1.b. and 1.c. respectively, is included in this paragraph as criminal conduct.

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case.

As set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence.

The eligibility guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an

Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in acts of alcohol abuse and criminal conduct that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue 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. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case, the Government has met its initial burden of proving by substantial evidence that Applicant has used alcohol to excess (Guideline G) and has engaged in criminal conduct (Guideline J). Applicant, on the other hand, has introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's case against him.

Paragraph 1 (Guideline G - Alcohol Consumption)

While Applicant has had a long history of consuming alcohol to excess, he was credible when he testified that he last consumed alcohol on April 4, 2000, and there has been no evidence to contradict his testimony.

All of Applicant's treatment has been as a result of his own initiative. While his earlier treatment ultimately resulted in his drinking again, the evidence has been extremely persuasive that he is far more committed to sobriety, and that he has a better overall support team, including AA, to help him to remain sober.

The Government established, by substantial evidence, that Applicant was involved in alcohol-related incidents away from work, such as driving under the influence, which is Disqualifying Condition (DC) (E2.A7.1.2.1.), and that Applicant has received an diagnosis of alcohol dependence by a credentialed medical professional which is Disqualifying Condition (DC) (E2.A7.1.2.3.). It has also been established by substantial evidence that Applicant has engaged in habitual or binge consumption of alcohol to the point of impaired judgment which is which is DC (E2.A7.1.2.5.).

Mitigating Condition (MC) (E2.A7.1.3.3.) applies because of the positive changes in Applicant's behavior supportive of sobriety. Also, MC (E2.A7.1.3.4.) is applicable because Applicant has successfully completed an outpatient rehabilitation program, including aftercare, and has been extremely committed to AA; he has abstained from alcohol for greater than twelve months; and he has received a favorable prognosis by a credentialed medical professional. Overall, the mitigating conditions outweigh the disqualifying conditions, and Paragraph 1 is concluded for Applicant.

(Guideline J -Criminal Conduct)

The Government also established by substantial evidence that Applicant engaged in criminal conduct in the years 2000, 1995, and 1991, as he was arrested for, and convicted of, DUIs. DC (E2.A10.1.2.1.), allegations or admissions of criminal conduct, regardless of whether the person was formally charged, and DC (E2.A10.1.2.2), a single serious crime or multiple lesser offenses, apply in this case. MC (E2.A10.1.3.1.) applies because the last criminal conduct occurred on February 8, 2000, more than 4 years ago. Also, MC (E2.A10.1.3.6.) is applicable because Applicant has successfully completed an extensive rehabilitation program. Paragraph 3 is found for Applicant.

On balance, it is concluded that the Applicant has overcome the Government's information opposing his request for a security clearance. Accordingly, the evidence supports a finding for Applicant as expressed in Paragraphs 1 and 2 of the Government's SOR.

FORMAL FINDINGS

Guideline G: FOR APPLICANT

Subparagraph 1.a.: For Applicant.

Subparagraph 1.b.: For Applicant.

Subparagraph 1.c.: For Applicant.

Subparagraph 1.d.: For Applicant.

Subparagraph 1.e.: For Applicant.

Guideline J: FOR APPLICANT

Subparagraph 2.a.: For 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 the Applicant.

Martin H. Mogul

Administrative Judge