

DATE: April 26, 2006

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 04-09557

DECISION OF ADMINISTRATIVE JUDGE

DARLENE LOKEY ANDERSON

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's history of criminal conduct, that includes two arrests involving violent conduct, two arrests for DUI, and two arrests for criminal sexual behavior, non-judicial punishment, with alcohol abuse over a period of many years has not been mitigated by sufficient evidence of reform and rehabilitation. Clearance is denied.

STATEMENT OF THE CASE

On June 22, 2005, 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, 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 the Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

The Applicant responded to the SOR in writing on June 30, 2005, and requested a hearing before a DOHA Administrative Judge. This case was assigned to the undersigned on September 19, 2005. A notice of hearing was issued on October 12, 2005, and the hearing was scheduled for November 9, 2005. At the hearing the Government presented eleven exhibits. The Applicant presented nine exhibits and testified on his own behalf. The record was left open to allow the Applicant an opportunity to submit additional supporting documentation. The Applicant submitted one Post-Hearing Exhibit consisting of three pages. The official transcript (Tr.) was received on November 23, 2005.

FINDINGS OF FACT

The following Findings of Facts are based on the Applicant's Answer to the SOR, the documents and the testimony. The Applicant is 42 years old, married and holds a Bachelor's Degree in Workforce Education and Training and Development. He is employed as a Senior Training Specialist for a defense contractor. He seeks to obtain a security clearance in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a security clearance, on the basis of allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR:

Paragraph 1 (Guideline J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he engaged in criminal conduct.

The Applicant served in the United States Navy for twenty-two years, from 1980 until he retired as a Chief Petty Officer in 2002. During this period he was arrested, charged and convicted on six separate occasions and/or received non-judicial punishment for episodes of violent behavior, criminal sexual misconduct and driving under the influence of alcohol.

In January 1988, the Applicant was arrested and charged with Battery. He was found guilty and sentenced to summary probation for three years and twenty days in jail.

Ten years later, in March 1999, he was arrested and charged with Counts (1) and (2) Indecent Exposure and Count (3) Lewd Conduct. He pleaded guilty to Count (3) and was sentenced to ten days public service, pay restitution fine of \$200.00, have no contact with victims and ordered to comply with Special Offender Conditions.

Later that same year, the Applicant received non-judicial punishment in August 1999, under Article 15 of the Uniform Code of Military Justice, for the offenses of Article 92, Failure to Obey a Lawful Order, Article 128, Assault With A Dangerous Weapon and Article 134, Disorderly Conduct. He was sentenced to serve 45 days restriction and extra duty, ordered to forfeit \$1,412.00 for two months, and was given an oral admonition and a written reprimand.

The Applicant explained that in 1999, his brother was murdered, stabbed seventeen times in the back. The Applicant began to consume large amounts of alcohol, including whiskey, to numb the pain.

In July 2001, the Applicant was arrested for Count (1) Lewd Conduct in Public which occurred in about June 2001. Counts (2) and (3) Lewd Conduct in Public and Count (4) Public Nudity which occurred in July 2001. The Applicant pled guilty to Count (2) and imposition of sentence was suspended for three years. He was ordered to serve 150 days in jail, pay \$100.00 fine and comply with Special Offenders Conditions.

Later that same month, the Applicant was arrested again, and charged with Count (1) Driving Under the Influence of Alcohol and Drugs, Count (2) Driving Under the Influence of Alcohol 0.08% or more, Count (3) Reckless Driving-Driving Under the Influence Reduction. The Applicant pled guilty to Count (3) and was sentenced to summary probation, 90 days in jail suspended for three years, attend and complete the First Conviction Program for three months, attend MADD Program, and pay approximately \$300.00 in fines. The remaining counts were dismissed.

In September 2003, the Applicant was arrested and charged with Count (1) Driving Under the Influence of Alcohol and or Drugs, Count (2) Driving Under the Influence of Alcohol 0.08% or more. He pled guilty to Count (1) and imposition of sentence was suspended. He was sentenced to a 90 days Drinking Driver Program (First Conviction Program), 90 days drivers license restriction, pay approximately \$2,623.00 in court fines and fees, 48 hours in jail and 36 months formal probation. Count (2) was dismissed.

Paragraph 2 (Guideline D -Sexual Behavior). The Government alleges that the Applicant is ineligible for clearance because he has engaged sexual behavior that involved a criminal offense, indicates a personality disorder, subjects the individual to undue influence or coercion, or reflects a lack of judgment or discretion.

The Applicant's arrests and convictions in March 1999, for Indecent Exposure and Lewd Conduct and in July 2001, for Lewd Conduct in Public and Public Nudity are discussed above.

The Applicant's wife is the only person who knows about these arrests, charges and convictions involving sexual misconduct. Neither his coworkers nor his children are aware of these charges or convictions.

Paragraph 3 (Guideline G - Alcohol Consumption). The Government alleges that the Applicant is ineligible for clearance because he abuses intoxicants.

The Applicant admits that he is an alcoholic. He consumed alcohol to excess and to the point of intoxication from about the early 1990's to at least October 14, 2003. As a result of his abusive drinking he was arrested on at least two separate occasions for Driving Under the Influence of Alcohol, as discussed above. The Applicant testified that following his last alcohol related arrest, he stopped consuming whiskey on a permanent basis. He still has a beer with his friends on a Saturday about twice a month or so. As a result of his convictions, the Applicant was ordered to receive counseling for his alcohol condition. From March 2002 until at least January 2003, the Applicant received counseling for his alcohol condition. He also voluntarily attended Alcoholics Anonymous meetings to help him with his drinking problem. The Applicant believes that he now has his drinking under control.

A collection of Certificates of Commendation, letters of appreciation and awards indicate that the Applicant has volunteered his time to working in the field of community service. He has also obtained his Bachelor's Degree and other academic achievements and awards. (See Applicant's Exhibits B and C).

The Applicant received the Navy Commendation Medal on June 13, 1996, and various other awards, commendations, and letters of appreciation for his outstanding service in the military. (See Applicant's Exhibit C).

Another collection of letters of recommendation from professional colleagues attest to the Applicant's reliability and trustworthiness. (See Applicant's Exhibit D).

Applicant's Training Critique sheets and Performance Reviews and other related documents for the time period from 2002 through 2004 reflect ratings of "good" "outstanding" or "exceeds requirements" in every category. (See Applicant's Exhibit E).

Letters of recommendation from his supervisor, coworkers and friends who know him well indicate that he is a person of integrity, good character, honesty and trustworthiness. He is considered to be a person with excellent work ethics, demeanor and attitude. He is also well respected as a husband and father. (See Applicant's Exhibit F).

Excerpts from the Applicant's military personnel file, namely his interviewer's appraisal sheets from 1992 through 1999 indicate that the Applicant was considered to be highly motivated, articulate, impeccable, and of excellent and outstanding character. (See Applicant's Exhibit G).

Fitness Reports and Counseling Records from the Navy reflects that the Applicant rated "above" standards or "greatly exceeds" standards in every category. The Applicant was consistently acknowledged as a valuable member of the Armed Service. (See Applicant's Exhibit H).

POLICIES

Enclosure 2 and Section E.2.2. of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

Guideline J (Criminal Conduct)

Conditions that could raise a security concern:

1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;
2. A single serious crime or multiple lesser offenses.

Condition that could mitigate security concerns:

None.

Guideline D (Sexual Behavior)

Conditions that could raise a security concern:

1. Sexual behavior of a criminal nature, whether or not the individual has been prosecuted.
3. Sexual behavior that causes an individual to be vulnerable to undue influence or coercion;
4. Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.

Condition that could mitigate security concerns:

None.

Guideline G (Alcohol Consumption)

Conditions that could raise a security concern:

1. alcohol-related incidents away from work, such as driving under the influence . . . ;
4. habitual or binge consumption of alcohol to the point of impaired judgement.

Condition that could mitigate security concerns:

None.

In addition, 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 general factors:

- a. The nature and seriousness of the conduct and surrounding circumstances
- 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 criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have 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

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 per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for clearance may be involved in criminal conduct, criminal sexual behavior and alcohol abuse that demonstrates poor judgment or unreliability.

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 a security clearance.

In this case the Government has met its initial burden of proving that the Applicant has engaged in criminal conduct (Guideline J); sexual misconduct (Guideline D) and alcohol abuse (Guideline G). This evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with his security clearance eligibility.

Considering all of the evidence, the Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case under Guidelines J, D and G of the SOR.

The Applicant's criminal history occurred over a span of seventeen years from 1988 through 2003, that includes six arrests, charges and/or convictions for violence, criminal sexual behavior and driving while under the influence of alcohol. He also received non-judicial punishment while in the military. Taken together, Applicant history and pattern of criminal conduct establishes that the exercise of poor judgment by him is not an aberration, but has been a basic part of Applicant's character for almost all of his adult life.

Under Guideline J (Criminal Conduct), Disqualifying Conditions *(1) any criminal conduct, regardless of whether the person has been formally charged and (2) a single serious crime or multiple lesser offenses* are clearly applicable. None of the mitigating conditions apply. The Applicant's behavior indicates a pattern of intentional illegal or irresponsible conduct that raises serious doubt about his judgment, reliability and trustworthiness. The Applicant's last arrest for criminal conduct occurred in 2003, just three years ago. However, in the context of so many criminal acts over so long a period, there is no substantive indication of a fundamental change in the Applicant's thinking process or character. On this basis, I conclude that the criminal conduct remains current and is clearly not an isolated incident (Mitigating Condition 1 and 2). There is also no clear indication of the Applicant's rehabilitation. Accordingly Guideline J is found against the Applicant.

With regard to the Applicant's sexual misconduct, he has no reasonable explanation. Admittedly, his brother's murder had a devastating effect on him. He was obviously stressed out and grieving. But to strip to the nude and expose oneself to the public does not seem consistent with the grieving process. Under Guideline D, (Sexual Behavior) Disqualifying Conditions *(1) Sexual behavior of a criminal nature, whether or not the individual has been prosecuted, (3) Sexual behavior that causes an individual to be vulnerable to undue influence or coercion and, (4) Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment* apply. None of the mitigating factors are applicable. Accordingly, Guideline D is found against the Applicant.

Under Guideline G (Alcohol Consumption) Applicant's extensive history of alcohol abuse began in the early 1990's and continued until at least 2003. He admits that he is an alcoholic but believes that he can now control his drinking. He states that he has stopped using whiskey but continues to drink beer. What is the difference? He continues to consume alcohol and has not stopped drinking. Given his long year history of alcohol abuse, and the fact that he is still drinking, he has not come to grips with his real problem. His inability to stay completely sober or to rehabilitate himself prevents the government from determining whether he will be reliable in the future or return to his regular pattern of abusive

drinking. Disqualifying Conditions (1) *alcohol-related incidents away from work, such as driving under the influence . . . ; and (4) habitual or binge consumption of alcohol to the point of impaired judgement* apply. Furthermore, there is evidence that he has undergone an alcohol treatment program to help him with his condition but he continued to consume alcohol. In any case, more time is needed in an alcohol free lifestyle to be assured that the Applicant will not revert to his old self. None of the mitigating conditions are applicable. Accordingly, I find against the Applicant under Guideline J (Alcohol Abuse).

On balance, it is concluded that the Applicant has failed to overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1, 2, and 3 of the SOR.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: Against the Applicant.

Subpara. 1.a.: Against the Applicant.

Subpara. 1.b.: Against the Applicant.

Subpara. 1.c.: Against the Applicant.

Subpara. 1.d.: Against the Applicant.

Subpara. 1.e.: Against the Applicant.

Subpara. 1.f.: Against the Applicant.

Paragraph 2: Against the Applicant.

Subpara. 2.a.: Against the Applicant.

Paragraph 3: Against the Applicant.

Subpara. 3.a.: Against the Applicant.

Subpara. 3.b.: Against the Applicant.

Subpara. 3. 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 or continue a security clearance for the Applicant.

Darlene Lokey Anderson

Administrative Judge