

DATE: December 5, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-12664

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The Applicant has had four alcohol-related arrests, including two for Driving Under the Influence of Alcohol, from 1974 to 2002. He continued to drink until mid-2004. Under the circumstances, insufficient time has passed to show that the Applicant can remain abstinent from alcohol abuse. Adverse inference is not overcome. Clearance is denied.

STATEMENT OF THE CASE

On February 24, 2005, 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 the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on March 18, 2005, and requested a hearing. The case was originally assigned to another Administrative Judge on May 23, 2005. The case was reassigned to the undersigned on June 20, 2005, and a Notice of Hearing was issued on July 5, 2005.

A hearing was held on July 20, 2005, at which the Government presented four documentary exhibits (Government Exhibits 1 through 4). Testimony was taken from the Applicant, who also submitted seven hearing exhibits (Applicant's Exhibits A through G). He also submitted one post-hearing exhibit (Applicant's Exhibit H), consisting of a letter of recommendation. The transcript was received on August 5, 2005.

RULING ON PROCEDURE

During the pendency of this case, it was disclosed that this Administrative Judge had been assigned to a prior case involving the Applicant when I was a Department Counsel. That case, ISCR Case No. 89-1285, did not involve any of

the allegations in the current case. In addition, the prior case did not result in a decision. The Applicant was informed that I do not have any independent recollection of the prior case. The Applicant was fully informed of his right to request a different Administrative Judge to hear the current case. With that knowledge, the Applicant knowingly waived that right. (Transcript at 6-8.)

FINDINGS OF FACT

The Applicant is 52, married and has a Doctorate in Physical Chemistry. He is employed by a defense contractor as a Program Manager, and he seeks to retain a Secret-level DoD security clearance previously granted in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a continued security clearance, based upon the 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. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

Paragraph 1 (Guideline G - Alcohol consumption). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he abuses intoxicants to excess. The Applicant admits all the allegations in the SOR. Those admissions are deemed findings of fact.

The Applicant began drinking alcohol in high school. It was in 1974 that he had his first alcohol-related incident, an arrest for Driving While Intoxicated. He paid a fine for this offense, after pleading Nolo Contendere.

His next alcohol-related arrest took place in November 1989. He and his brother got in an argument with police, while the Applicant had his two year old son with him. The Applicant had been drinking and he states, "During this incident I am unsure how much alcohol I consumed but I was not overly drunk." (Government Exhibit 3 at 2.) He was originally charged with Public Intoxication and Contributing to the Delinquency of a Minor. He plead guilty to an amended charge of Disturbing the Peace and received a suspended fine.

On May 8, 1996, the Applicant and his wife got into an argument. The Applicant left the house and went to a bar where he drank to intoxication. He was eventually arrested and charged with being Under the Influence of Alcohol in Public. He plead guilty and received a fine, was ordered to use alcohol in moderation and placed on court probation for two years. (Government Exhibit 3 at 1-2.)

At this point in time, according to the Applicant, he began changing his drinking habits. He still drank, but he tried to control the situations where he might over drink. (Transcript at 40-42.) According to the Applicant, "I drank still during the week - - a few times during the week, but not as much as I did before." (Transcript at 43.)

The Applicant's attempts to control his drinking at that time were unsuccessful. He was arrested in December 2002 and charged with Driving Under the Influence and Driving With Over 0.08% or Higher Blood Alcohol. The Applicant plead guilty and received a suspended sentence. He was placed on 36 months probation in January 2003. He remained on probation as of the date of the hearing. In addition, he was sentenced to four days in jail, was fined and had to attend DUI School. (Government Exhibit 4.) The Applicant successfully completed the school and attended the required Alcoholics Anonymous (AA) meetings. (Applicant's Exhibits C and D.)

After the 2002 arrest, the Applicant continued to cut down his drinking. He made the commitment not to drink and drive, which was also prohibited by the terms of his probation. The Applicant states, "So, I cut back to a few beers type a week." (Transcript at 44.) This use continued until sometime around the Summer of 2004, when the Applicant made the decision to stop drinking altogether. Since the Summer of 2004, the Applicant drank one beer and had a sip of champagne on New Year's. He has not had anything to drink in 2005, as of the hearing date. (Transcript at 46.) He testified that his intent is not to drink in the future, because he realizes that he has a problem with it.

The Applicant does not believe himself to be an alcoholic. He attended AA meetings because he had to, but he did not feel comfortable there. He has made the decision not to drink, but he has no formal support system in place.

MITIGATION.

The Applicant informed his current employer of the 2002 arrest and conviction when he applied for a job with them. (Applicant's Exhibit E.) His most recent performance review shows that he exceeds expectations. (Applicant's Exhibit G.)

Two of the Applicant's co-workers submitted letters of recommendation on his behalf. Both of these people believe that the Applicant is more than qualified to be granted a security clearance. (Applicant's Exhibits A and H.)

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. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case will be set forth under CONCLUSIONS, below.

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 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 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 the Applicant has a long-term alcohol problem that has resulted in four alcohol-related arrests from 1974 to 2002.

The Applicant, on the other hand, has not introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's case against him. The Applicant has an alcohol problem that he could not, or would not, control from at least 1974 until the middle of 2004. His drinking resulted in four alcohol-related arrests, two for Driving Under the Influence. He continued to drink after each arrest. In mid-2004, he made the decision to stop drinking. However, he has had two slips since then. The Applicant appears sincere in his desire to refrain from alcohol. Given the length of time that he has been a problem drinker, 20 years, the time that has passed since he made the decision to stop drinking is simply not enough to say that he has taken control of his alcohol use.

Under Guideline G, Disqualifying Conditions E2.A7.1.2.1. (*Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol abuse*) and E2.A7.1.2.5. (*Habitual or binge consumption of alcohol to the point of impaired judgment*) apply. In my opinion, none of the Mitigating Conditions apply to this case. His alcohol related incidents do show a pattern (E2.A7.1.3.1.) and his last arrest was recent (E2.A7.1.3.2.). There is some evidence that there have been positive changes in behavior supportive of sobriety (E2.A7.1.3.3.), but he has not been completely abstinent for even a year.

The Applicant's efforts at reform are noted, and he is commended for his decision to refrain from further alcohol use. Under the particular circumstances of this case, this evidence does not overcome the adverse information that has been presented by the Government. If the Applicant continues to remain totally abstinent from alcohol, he may be eligible for a clearance in the future. He is not eligible now.

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

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.

Subparagraphs 1.a. through 1.d.: 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.

Wilford H. Ross

Administrative Judge