

DATE: March 18, 1997

In Re:

SSN: -----

Applicant for security clearance

ISCR Case No. 96-0575

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

Appearances

FOR THE GOVERNMENT

Claude R. Heiny, II, Esq.

Department Counsel

FOR THE APPLICANT

Charles M. Shaw, Esq.

STATEMENT OF CASE

On August 13, 1996, 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 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 clearance should be denied or revoked. The SOR is attached. Applicant filed his Answer to the SOR on August 22, 1996.

The case was received by the undersigned on November 18, 1996. A notice of hearing was issued on November 27, 1996, and the case was heard on December 16, 1996. The Government submitted documentary evidence. Testimony was taken from Applicant and two witnesses. The transcript was received on December 27, 1996.

RULINGS ON PROCEDURE

At the hearing, Applicant objected to the introduction of Government Exhibits (GE) #4 through #8 into evidence because the medical records are covered by the doctor-patient privilege. Applicant's objection was overruled on two grounds. The first is that the Defense Investigative Service Special Agent obtained a signed release from Applicant which authorized Agent to secure the original or copy of the actual records or synopsis of record information. (Tr. 14-15). The signed release waives the privilege. The second ground is based on the national interest, which allows the Government to make an inquiry into an applicant's background where the information sought has a legitimate connection to an applicant's fitness for having a security clearance. Applicant's hospitalizations concerning his alcohol dependence/addiction bears a logical and legal connection to his suitability for safeguarding classified information.

Applicant also objected to GE #4, #5, #6, #7, and #8 because the documents are hearsay. Applicant's objection was overruled. Notwithstanding the hearsay nature of medical records, they are admissible on the same basis as other regularly kept business records. Medical records are considered to be inherently reliable because people who seek treatment are likely to furnish truthful information to medical personnel to obtain the most appropriate treatment, and medical personnel regularly record facts (generally called history) concerning the patient, and routinely use these facts in determining a diagnosis, prognosis and/or most appropriate course of treatment for the patient. In addition, there is independent evidence in the record which clearly increases the reliability and probative value of the medical records. (GE #4, #5, #6, #7, #8).

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents and the live testimony. The SOR alleges excessive alcohol consumption (Criterion G). Applicant denied subparagraphs 1a and 1d and admitted subparagraphs 1b and 1c. Applicant's admissions shall be incorporated in the following Findings of Fact.

Applicant is 49 years old and employed as a ----- for a defense contractor. He seeks a secret level clearance.

While there is some conflicting evidence regarding how long Applicant has used alcohol to excess, I find Applicant's excessive alcohol consumption began in at least 1990 and not in January 1996,⁽¹⁾ or November 1994 when he was arrested for driving while under the influence of alcohol (DWI).⁽²⁾ The previous finding is also based on Applicant's intentional omissions of the full nature and scope of his drinking history in GE #2.⁽³⁾

On November 13, 1994, Applicant was arrested for driving while intoxicated (DWI) and improper lane change. Applicant pled guilty to DWI and received a suspended imposition of sentence and was placed on probation for 2 years. Applicant will be discharged from probation in January 1997. (GE #3).

Applicant received treatment from January 16, 1995 to January 21, 1995 for alcohol dependence. About four or five months after his discharge from outpatient treatment, he resumed drinking non-alcoholic drinks and then progressed to mixed drinks but he never drank during the week. (Tr. 43-44). His wife also noted that throughout his alcohol history he never consumed alcohol during the week, just on the weekends and vacations. (Tr. 77).

From January 17, 1996 to January 21, 1996, Applicant received treatment for alcohol dependence, alcohol withdrawal syndrome and alcohol liver disease. Applicant failed to attend aftercare.⁽⁴⁾ In addition, he had no sponsor as of the time of the hearing.⁽⁵⁾ In April 1996, Applicant's treating doctor provided a guarded prognosis because Applicant minimized his condition during the course of treatment and did not follow up with the treating doctor. (GE #7).

Applicant has been employed at his present job for the last 17½ years and has a good relationship with his supervisors. (Tr. 31, 35). Alcohol has never interfered with his job. (Tr. 42).

When Applicant was discharged from detoxification in January 1996, he attended AA three times a week for the first three or four months and now attends once a week. (Tr. 37). He uses the Big Book and knows the Serenity Prayer. (Tr. 56; 63). He has been exposed to all the Steps in the Step Program but is working on Step 1. (Tr. 55; 57).

His wife believes Applicant attends 2 AA meetings a week and she occasionally attends with him although she could not remember what Step Applicant was working. (Tr. 76; 84). Applicant has consumed no alcohol since he left detoxification in January 1996. In addition to being supportive, Applicant's wife attended several outpatient meetings in February 1996. (GE #8).

Applicant's coworker for 17 years considers Applicant has average or above average work habits. (TR. 86). He sees Applicant about four times a week but not on a daily basis and only for short periods of time when they work overtime together or on a shift change. (Tr. 89). Applicant never talked with him about his drinking habits, or that he had treatment, or that he was an alcoholic, until approximately two months before the hearing. (Tr. 89-90).

POLICIES

Enclosure 2 of the Directive sets forth policy factors which must be given binding consideration in making security clearance determinations. These factors must be considered in every case according to the pertinent criterion; however, the factors 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 factors exhaust the entire realm of human experience or that the factors apply equally in every case. In addition, the Judge, as the trier of fact, must make critical judgments as to the credibility of witnesses. Factors most pertinent to evaluation of the facts in this case are:

Excessive Alcohol Consumption (Criterion G)

Factors Against Clearance:

1. Alcohol-related incidents away from work, such as driving while under the influence....
3. diagnosis by a credentialed medical professional of alcohol abuse or alcohol dependence.
4. habitual or binge consumption of alcohol to the point of impaired judgment.
5. Consumption of alcohol, subsequent to a diagnosis of alcoholism by a credentialed medical professional and following completion of an alcohol rehabilitation program.

Factors for Clearance:

None.

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 2-1 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 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 all the factual allegations under Criterion G (excessive alcohol consumption) which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to the sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation which demonstrates that the past adverse conduct is unlikely to repeat itself and Applicant presently qualifies for a security clearance.

CONCLUSIONS

The Government has established a case of excessive alcohol consumption within the scope of Criterion G.⁽⁶⁾ Applicant's alcohol dependence is well documented in the medical records. Applicant pled guilty to DWI (Factor #1 Against Clearance) and was sentenced to a suspended sentence and two years probation in January 1995. He also entered treatment in January 1995 with a diagnosis of alcohol dependence (Factor #3 Against Clearance). Within four or five months of discharge from treatment, Applicant resumed drinking non-alcoholic beverages and, at some point, switched to alcohol (Factor #4 and #5 Against Clearance) until he reached the levels set forth in the medical records of January 1996 which charted his detoxification treatment for alcohol dependence, alcohol withdrawal, and alcohol liver disease. (Factor #5 Against Clearance). More importantly, the treatment records in January 1995 and January 1996, as well as GE #2, are clearly significant in demonstrating the denial Applicant demonstrated in deceiving himself about the reality of his excessive alcohol consumption.

While there is evidence of only one alcohol-related incident in November 1994, Applicant's excessive alcohol consumption has been evident since at least 1990. He has intentionally provided less than the full picture of his alcohol abuse in October 1995, April 1996, and at the hearing. Furthermore, his alcohol abuse did not end until January 17, 1996 when he entered the detoxification program. The favorable evidence of Applicant's AA participation must be balanced against the fact the affiliation has only been for eleven months. In addition, besides the evidence of AA participation, which was confirmed by his wife, there is little evidence of any other changes in Applicant's lifestyle to ensure his past alcohol abuse will not repeat itself in the future.

Given Applicant's excessive alcohol consumption since at least 1990 (even though his excessive abuse occurred entirely on the weekend or vacations), his intentional falsification of the true scope of his problem, and the guarded prognosis from his treating doctor in April 1996, Applicant's complimentary character evidence from his coworker, and his wife, along with his own testimony, is not enough to satisfy his ultimate burden of persuasion under Criterion G.

FORMAL FINDINGS

Formal Findings required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1 (excessive alcohol consumption): AGAINST THE APPLICANT.

- a. Against the Applicant (excessive consumption since 1990).
- b. Against the Applicant.
- c. For the Applicant.
- c. For the Applicant.

Factual support and reasons for the foregoing findings are set forth in FINDINGS OF FACT and CONCLUSIONS above.

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 Applicant.

Paul J. Mason

Administrative Judge

1. See Transcript page 43.
2. In GE #3, Applicant stated he discovered he had a problem in November 1994 when he was arrested for DWI. Even though his wife was aware of an alcohol problem for about five years (Tr. 79), Applicant admitted having a 30 year

history of alcoholism (GE #6) which began just before the alcohol problems associated with his first marriage. (GE #4). In addition, Applicant indicated prior to his admission in January 1996 for detoxification he had a problem with alcohol for years, was having blackouts and shakes, had been drinking 6 beers and 6 mixed drinks per day on the weekend and was drinking constantly while on vacation, and had not eaten in the past 4 days while binge drinking. (GE #8).

3. Applicant's intentional falsifications of GE #2 regarding his alcohol use for 25 years, his gambling debt while on vacation, and the concern both his wife and mother had about his drinking, although unalleged in the SOR, have been considered in assessing Applicant's overall credibility.

4. There is no corroboration for Applicant's explanation he was permitted to substitute 3 Alcoholics Anonymous (AA) meetings for the recommended aftercare. (Tr. 39).

5. Applicant explained his most recent sponsor, and third sponsor overall, relapsed three weeks before the hearing.

6. The only reason I do not find a history of excessive alcohol use since 1966 is because there is no independent corroboration of Applicant's statement in the medical records he had a 30 year history of alcoholism.