

DATE: August 18, 1997

In Re:

Applicant for security clearance

ISCR Case No. 97-0161

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

Appearances

FOR THE GOVERNMENT

William S. Fields, Esq.

Department Counsel

FOR THE APPLICANT

Nicholas D. Garrett, Esq.

STATEMENT OF CASE

On February 25, 1997, 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, and amended by Change 3, February 13, 1996, 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 March 27, 1997.

The case was received by the undersigned on April 28, 1997. A notice of hearing was issued on May 14, 1997, and the case was heard on May 21, 1997. The Government and Applicant submitted documentary evidence. Testimony was taken from Applicant and three witnesses. The transcript was received on June 2, 1997. .

FINDINGS OF FACT

The Following Findings of Fact are based on the documentation and testimony. The SOR alleges alcohol involvement (Criterion G). Applicant admitted all the allegations of the SOR.⁽¹⁾ Applicant admitted consuming alcohol to excess at times between 1972 and December 1996. On August 4, 1976, Applicant (age 21) plead guilty to vehicular assault (1b). He had been drinking prior to the arrest.⁽²⁾ In September 1978, Applicant (age 23) received non-judicial punishment for operating a motor vehicle while intoxicated. The incident took place following a farewell party hosted by his unit. On April 24, 1981, as set forth in subparagraph 1e, Applicant (age 26) was charged with driving while under the influence (dwi) but plead guilty to the lesser included offense of driving while impaired.

After the April 1981 alcohol-related incident, Applicant received counseling (1e).⁽³⁾ On August 4, 1983, Applicant (age 28) was again charged with dwi and received punishment under the Uniform Code of Military Justice (UCMJ) for operating a motor vehicle while drunk.

After receiving counseling a second time (1g), Applicant (age 31) was arrested and plead guilty to dwi on June 27, 1986. While Applicant indicates in his Answer he could recall no injury, the arrest records reflect the vehicle he was driving struck a drainage pipe and Applicant and a passenger suffered some minor injuries.

After receiving counseling a third time following the June 1986 dwi, Applicant (age 33) received non-judicial punishment in January 1989 for not reporting for duty. Applicant's supervisor believed Applicant's failure to report was alcohol-related. In his Answer, Applicant admitted he received non-judicial punishment but blamed his punishment on a personality clash with his supervisor, who Applicant believed was ineffective at his duties. Applicant noted that immediately after this assignment, he was assigned to a key leadership position within the same unit.

Under subparagraph 1k, Applicant (age 37) plead guilty in June 1992 (1l) to dwi and received a deferred judgment for six months.⁽⁴⁾ Subsequent to his fourth required assessment for counseling (1l), Applicant (age 40) was arrested on November 11, 1995 for dwi (1m). He had a blood alcohol level of .15%. He received a deferred sentence. Prior to his arrest in November 1995, Applicant had recently finished his school courses and stopped and had four beers. He did not feel impaired but recognized he made an error. (Answer)

Applicant testified he stopped consuming alcohol altogether over the last few months (1n, TR. 107) because there is no room for alcohol in his life.⁽⁵⁾ Applicant's decision to abstain and the reasons for abstention, must be carefully scrutinized in light of his earlier testimony reflecting he would not engage in excessive consumption of alcohol after participating in two Alcoholics Anonymous (AA) meetings.⁽⁶⁾ Applicant's contradictory positions about his future alcohol use generate a negative impact on Applicant's credibility and the depth of his commitment to maintain abstinence in the future. His credibility is weakened even more by the absence of evidence showing how the other parts of Applicant's life have fortified his decision to refrain from alcohol use in the future.

Witness B, certified for ten years as an alcohol and drug counselor, and also certified for three years to perform drunk driving assessments,⁽⁷⁾ testified that he administered two alcohol tests (during the course of a clinical interview dated May 10, 1997) to Applicant to determine whether Applicant had an alcohol problem and/or whether he needed counseling or therapy. (TR. 53) Although the tests revealed Applicant was a situational abuser of alcohol, the tests did not show chemical dependency, alcoholism, substance abuse, chronic abuse, or even alcohol abuse. Because the first test showed no interference in seven related areas of Applicant's life, witness B opined Applicant did not have a problem with alcohol, and felt neither treatment nor counseling was necessary, only that Applicant should watch his drinking. (TR. 72-73)⁽⁸⁾

Witness A, Applicant's civilian supervisor from September 1991 to December 1992, found Applicant to be one of his best employees, who needed little supervision. The supervisor never saw any sign of an alcohol or security problem before or since Applicant's discharge from the military in December 1992.

Witness C, Applicant's wife, has only seen Applicant drink on social occasions, or once every four or five months in the period between 1990 and 1997. (TR. 81)

Applicant presented numerous commendations for excellent performance in the military. Applicant's Exhibit A contains commendations from 1976, 1979 and 1982. Applicant's Exhibit B contains exceptional performance evaluations for 1994/1995 and 1995/1996 periods of performance. Applicant's Exhibit C contains a handbook Applicant wrote in April 1997, describing a staffing analysis for patrolling the border. Exhibit C also includes a booklet which Applicant wrote in 1995, on the correct handling of a gun. Applicant's Exhibit D is Applicant's scholastic transcript through the Spring of 1996.⁽⁹⁾ Applicant's Exhibit E includes numerous letters and awards Applicant received while in the military.

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:

Alcohol Consumption (Criterion G)

Factors Against Clearance:

1. alcohol-related incidents away from work, such as driving while under the influence...or other criminal acts related to alcohol use;
2. alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition....;
4. Habitual or binge consumption of alcohol to the point of impaired judgment;

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 (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 made a case of alcohol consumption under Criterion G. In the 19 year period between 1976 and November 1995, Applicant has been involved in six dwi or alcohol-related driving offenses. After the alcohol-related offenses in 1981, 1983, 1986, and 1992, Applicant was required to attend counseling for progressively longer periods. Subsequent to the dwi in 1992, Applicant's counseling lasted approximately four to six weeks. Even after his fourth counseling in 1992, Applicant committed another dwi in November 1995. The six alcohol-related offenses between

1976 and 1995 clearly establish a pattern of excessive alcohol consumption that raises questions about Applicant's judgment and reliability.

Even though the record reflects Applicant has not regularly or habitually abused alcohol to the point of impaired judgment, there is ample evidence demonstrating Applicant has consumed alcohol on a binge or episodic basis. Furthermore, under the Directive, the Government is not required to prove an applicant is a hard core alcoholic or a habitual abuser of alcohol before initiating action to revoke or deny clearance. Applicant's pattern of alcohol-related incidents over 19 years is sufficient to demonstrate excessive alcohol consumption under Criterion G, and poses a future risk that Applicant may negligently or deliberately fail to comply with security rules and regulations governing the safeguarding of classified information.

The testimonial opinions provided by witness B are flawed for several reasons. First, the opinions furnished are based on insufficient information or lack sufficient foundation. Second, had witness B reviewed more closely information from the other seven areas of Applicant's life, including the information set forth in the SOR, he would have noted that Applicant's alcohol-related incidents resulted in an attendance problem at work in 1989, and a recommended bar to reenlistment in August 1992. In addition, the six alcohol-related incidents had obvious legal ramifications as reflected by the punishment received after each alcohol-related offense.

Applicant's character evidence covering his tenure in the military is very impressive. In addition, his performance evaluations at his present employer are excellent. However, in view of Applicant's episodic abuse of alcohol over the last 19 years, Applicant's inconsistent intentions about his future alcohol use, and the absence of corroborative evidence to support Applicant's claim of a lifestyle supportive of sobriety, Applicant's evidence in rehabilitation falls short of satisfying his ultimate burden of persuasion in demonstrating he warrants a security clearance.

FORMAL FINDINGS

After a full review of the specific and general (whole person concept) policy factors set forth in POLICIES, Formal Findings required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1 (Alcohol Consumption): AGAINST THE APPLICANT.

- a. Against the Applicant.
- b. Against the Applicant.
- c. Against the Applicant.
- d. Against the Applicant.
- e. For the Applicant.
- f. Against the Applicant.
- g. For the Applicant.
- h. Against the Applicant.
- i. For the Applicant.
- j. Against the Applicant.
- k. Against the Applicant.
- l. For the Applicant.
- m. Against the Applicant.

n. 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 Applicant.

Paul J. Mason

Administrative Judge

1. At the hearing, Applicant explained he did not answer subparagraph 1n because he believed the allegation was too broad or ambiguous. He indicated he quit drinking in December 1996 but decided not to tell anyone because he did not want to bring attention to himself. (TR. 107-108)
2. According to GE #3, he was driving an auto and struck a motorcyclist on a dark, deserted road. He did not believe he injured the cyclist.
3. Applicant explained, "[Military] regulation had been implemented requiring counseling following any alcohol related incident...After meeting with the counseling staff several times, my commander was advised that there was no indication of a problem. At that point I was released from the counseling program. This is the same reason for attending and the same response received each time I attended counseling during this and subsequent events." (Answer) The counseling was basically the same, according to Applicant, with one or two counseling sessions a week for about two weeks. (GE #3) The last treatment consisted of weekly group sessions that lasted four to six weeks with some individual therapy. (TR. 103)
4. Under the Directive, the deferred judgment Applicant received (state statute, section 991c) does not negate the security significance of Applicant's underlying conduct in drinking and being arrested for dwi. Furthermore, as a result of the dwi in June 1992, Applicant was barred from reenlistment on August 28, 1992. (GE #3)
5. Applicant based his decision on his career, good friends (particularly his close friend who persuaded him to attend AA and finally stop drinking) in his farming community, his church community, and his schooling. (TR. 107-109)
6. "In '95 since the incident happened, I've attended a couple of Alcoholics Anonymous (AA) courses just to see the -- actually, the first time it was suggested to me that I do that to see the other side, and I thought well, okay. So I went to one in [the city] and to be honest, I was at first appalled and alternately disgusted with some of the characters that I met there, and it really -- it couldn't be further from me in one sense but to be honest, I've gone to another one since then and the people I see there serve as a good reminder of why excessive consumption is not ever an option." (TR. 105)
7. As an assessor, witness B is certified to perform drunk driving assessments for the state to determine whether a person is an alcoholic or problem drinker and to plan requirements for restoration of driving privileges. He has conducted between 150 and 500 assessments. (TR. 47-48) Witness B was asked to perform the drunk driving assessment by Applicant to determine whether Applicant had a problem with alcohol. (TR. 36)
8. Witness B testified that he administered two tests on Applicant to determine whether Applicant had a problem with alcohol. Witness B considered part of his job to be like a lab technician and stated, "... in part my job is just being the official reporter of the what the test results are;...I take the sample and I say yes, this is what the sample shows." (TR. 66) B's opinions that there is no alcohol problem and treatment and counseling was unnecessary, shall not be considered an expert opinion because of the limited foundation provided for the opinions. First, although B is a substance abuse counselor, he is not a medical doctor qualified to make a diagnosis or prognosis in any area of substance abuse. Second, B's practical experience as a substance abuse counselor appears to be supervising other individuals or in arranging the most appropriate treatment, or making sure the treatment facility has appropriate accreditation. Third, witness B interviewed Applicant and investigated no independent sources to confirm or deny Applicant's information. Finally, witness B administered only 2 alcohol tests during the course of the assessment.

9. Applicant is attending college to obtain a degree in business management. (TR. 90)