

DATE: _September 11, 1997

In Re:

Applicant for Security Clearance

ISCR OSD Case No. 97-0202

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

Appearances

FOR GOVERNMENT

Matthew E. Malone, Esq.

Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On March 19, 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, 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 granted, continued, denied or revoked.

Applicant responded to the SOR on April 7, 1997, and initially was ambivalent about his desires for a hearing. After the case was assigned for hearing, Applicant clarified his intentions and expressly elected to have his case decided on the basis of the written record. Applicant was furnished copies of the File of Relevant Materials (FORM) on July 14, 1997 and is credited with receiving them on July 24, 1997. He provided a written response to the materials on August 9, 1997, well within the 30 days allotted to him for response. The case was assigned initially to another Administrative Judge and reassigned to this Administrative Judge on August 20, 1997.

PROCEDURAL ISSUES

Department Counsel interposed several objections to Applicant submissions. Objections were made to Applicant's April 7, 1997 letters from his superiors for reasons the letters address ultimate issues pertaining to Applicant's gaining control of his alcohol problem and fitness to hold a security clearance. The sources of these objections were deleted in Applicant's revised versions, which are not objected to by Department Counsel. Department Counsel's objection to the undated letter from Applicant's therapist (Ms. C) cites date omissions and the absence of any record reliance. Such defects affect mostly the weight of the memorandum and not its reliability and is subject to relaxation of the F.R.Evi, in any case, in this an administrative proceeding on the record. Applicant's letters from his supervisors and therapist may be received and considered in evidence.

STATEMENT OF FACTS

Applicant is 42 years of age and has been employed by his current defense contractor (Company A) since July 1992. He has held a security clearance in connection with his employment and seeks to retain it.

Summary of Allegations and Responses

Applicant is alleged to have (1) consumed alcohol, at times to excess and to the point of intoxication, from approximately 1968 to at least June 1996, (2) had non-judicial punishment imposed on him on June 8, 1997 under Article 15 of UCMJ for the offense of failure to maintain control and drunken driving (posting a BAL of 1.93mg per 1.0ml of whole blood); he was fined approximately \$800.00 per month for two months, restricted for 60 days, suffered the revocation of his driving privileges for one year, received a general officer letter of reprimand, and was enrolled in the Track II alcohol abuse course for 12 months, (3) been arrested on May 25, 1991 in State A for disobeying a lawful order, provoking speeches and gestures, indecent language, dereliction of duty, conduct unbecoming a member of the military service, disorderly conduct, interfering with the duties of a security police officer and false official statements, after which he was released to his unit and subsequently received a letter of reprimand; he had consumed alcohol prior to this incident, (4) been arrested on March 4, 1994 in State B and charged with DuI, with a registered BAC of .236%; he was found guilty and sentenced to 30 days in jail (suspended), 12 months of probation, fined \$400.00, and ordered to attend the highway intoxication seminar and an AA meeting, (5) been arrested on February 7, 1995 in State C and charged with public intoxication; he pleaded no contest and was fined \$150.00, and (6) received counseling from about April 1995 to October 1995 from Ms. X (a credentialed counselor) for alcohol problems related to his February 1995 arrest. And he allegedly continues to consume alcohol.

Responding to the SOR, Applicant admits each of the allegations. He offers several explanations related to his admitted counseling for alcohol problems and his continuing use of alcohol. He credits his counselor for (a) identifying underlying attitudinal traits which he attributes to being contributing factors to his behavioral and drinking problems and (b) recommending the self-management techniques that have made such lasting positive impact on his approach to life and interaction with others. Applicant claims very limited social drinking since his receipt of counseling (either with his wife or work associates) and rarely even one alcoholic beverage with his meal when dining out. He confines his social activities outside the home to events that include his wife and family. Applicant claims complete loyalty to the Government and dedicated service as a military officer and civilian employee.

Relevant and material Findings

Applicant's SOR admissions are incorporated herein as findings of fact. Additional findings follow.

Applicant was introduced to alcohol in 1968 at the age of 14. He began drinking on a regular basis after joining the Air Force in 1973, generally on social occasions with friends on Friday afternoons. He never developed any serious drinking patterns over the years that can be documented in the record. Since March 1994, his drinking has varied from two to three beers a week to tri-monthly periods of sustained abstinence, and never more than 6 to 8 drinks a month. Applicant has no known addiction problems with alcohol or alcohol-related problems in his job or business relationships.

Applicant was involved in a number of incidents over a ten-year period (spanning 1987 and 1995), which were preceded by after-work drinking with co-workers, all of which are covered in the SOR, admitted and incorporated by reference earlier. The information in the record covering each of these incidents is somewhat sketchy and for the most part is developed from Applicant's own DIS statements (*viz.*, in July 1994 and again in June 1996). Two of the admitted incidents (*i.e.*, his 1987 and 1994 incidents) clearly are documented with BAC levels above the legal limit in the referenced states and can be appropriately characterized as alcohol-related incidents. Less certain are Applicant's established alcohol levels in connection with both his 1991 and 1995 incidents. Applicant's admitted consumption of five beers over a two-hour time span relative to the 1995 incident may or may not have produced above a BAC above the legal limit. Absent breathalyser testing at the scene, adverse inferences cannot be drawn. Still, Applicant's admission to the 1995 charge of public intoxication is enough to attribute alcohol as a causal effect of his arrest and conviction as a passenger unable to take control of the vehicle his driver was in no condition to operate when stopped by arresting police. Without more in the record to gauge the extent of his drinking prior to this 1991 incident, though, inferences cannot be drawn of any causal connections between his drinking sufficient to warrant characterization of this incident as

alcohol-related.

For sure, there are three covered incidents in the SOR (*i.e.*, his 1987, 1991 and 1994 incidents) which are demonstrably alcohol-related and security significant. For these incidents, Applicant acknowledges judgment lapses and maturity deficiencies, which he has addressed with counseling and AA sessions over the past two plus years. His court ordered disposition of his 1994 DuI included prescribed attendance at a highway intoxication seminar and an AA meeting. By applicant's accepted evidentiary account, he enrolled in a Track II counseling program and attended group meetings once a month for 12 months. His treatment counselor (Ms. C) could not recall the specific dates of his counseling, but stressed that Applicant was not in need of any "intensive alcohol and drug treatment" at the time. She assigned no abuse or dependence diagnosis and concluded that (a) his problems with alcohol could be successfully addressed with self-management techniques and (b) he did not appear to be at any risk to himself or others. Applicant completed his course of therapy with Ms. C successfully.

Applicant is highly regarded by his management superiors, who characterize him as a dedicated and conscientious performer. He is credited with exhibiting considerable maturing since the occurrence of the covered incidents and demonstrates stabilizing improvements in both his professional and personal lives. The assessments of Applicant's superiors are not controverted in the record and are entitled to acceptance. While in the Army, Applicant earned numerous citations (including the bronze star, commendation and meritorious service medals) and awards for his contributions to the defense effort.

POLICY

Both F.3 of the Directive's Change 2 and the Adjudication Guidelines ("Guidelines") of the Change 3 amendments to the Directive (effective January 1, 1996) list adjudicative guidelines for determining eligibility for access to classified information. In addition to the relevant adjudicative guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in the preamble of the Guidelines: Nature, extent and seriousness of the conduct, the circumstances surrounding the conduct, the frequency and recency of the conduct, the individual's age and maturity at the time of the conduct, the voluntariness of the participation, the presence or absence of rehabilitation, other pertinent behavioral changes, the motivation for the conduct, the potential for pressure, coercion, exploitation or duress and the likelihood of recurrence.

Viewing the issues raised and evidence as a whole, the following adjudicative guidelines are pertinent herein:

Alcohol Consumption

Disqualifying Conditions

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 use.
4. Habitual or binge consumption of alcohol to the point of impaired judgment.

Mitigating Conditions

3. Positive changes in behavior supportive of sobriety.

Burdens of Proof

By dint of the precepts framed by the Directive, a decision to grant or continue an Applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's suitability for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Put another way, the Judge cannot draw inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controversial fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a nexus to the applicant's inability to obtain or maintain a security clearance. The required showing of nexus, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of accessible risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of proof shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

CONCLUSIONS

Long a regular consumer of alcoholic beverages (primarily beer), Applicant experienced several alcohol-related incidents in recent years. Between 1987 and 1995, he was involved in four separate enforcement incidents, three of which are characterized as alcohol-related. While spaced over a ten-year period, they bear sufficient connection to each other to be considered pattern incidents. Applicant's amount of alcohol consumption varied in each of the incidents (from non-abusive levels to established BACs in excess of legal limits), but together must be considered security significant abusive drinking. Several of the pertinent Adjudication Guidelines are applicable herein: DC 1 (alcohol-related incidents away from work) and DC 4 (habitual or binge consumption of alcohol). Government carries its initial proof burden.

Not to discount the seriousness of his drinking in circumstances that placed him at risk to others using the same public roadways, Applicant complied with his counseling conditions and impressed his treatment counselor with having a controllable drinking problem that could be addressed with self-management techniques. To his credit, he completed his prescribed counseling program and has avoided any further abuses of alcohol since February 1995, a period of almost two and one-half years. Both his treatment counselor and employment superiors praise Applicant for his exhibited maturity and positive steps he has taken in dealing with his alcohol problems of the past. He is a proven reliable and trustworthy employee who has distinguished himself both in his military and civilian service and impresses his present superiors as a conscientious contributor who relates well with his customers and shows no signs of alcohol problems in the discharging of his professional duties. On the strength of these conclusions, he may take advantage of the mitigating benefits of MC 3 of the Adjudicative Guidelines (positive changes in behavior).

Appraising an applicant's security worthiness is a whole-person process. Just as an applicant's on-the-job performance and associated impressions are not dispositive of the applicant's clearance suitability, neither may imputed risks of alcohol abuse be totally isolated from trust and reliability impressions generated in the employee's work environment. *See* DISCR OSD Case No. 91-0929 (March 1, 1993, citing other Board decisions). That an applicant's drinking may not have adversely affected his job performance is not by itself sufficient to absolve him of disclosure risks. *See* DISCR OSD Case No. 92-0404 (May 25, 1993). Off-duty abusive drinking can surely present a risk of deliberate or inadvertent disclosure of classified information and must be carefully scrutinized for risk-bearing recurrence potential. *See Cole v. Young*, 351 U.S. 536, 550n.13 (1956). But just because an applicant's past drinking abuses might have created security risks in the past, it does not follow that the same applicant is at foreseeable risk of recurrence in the future. Demonstrated self-help in addressing alcohol problems and exhibited reliability and trustworthiness in the workplace are relevant factors to be considered in weighing the risks associated with the applicant's prior abuse of alcohol in public settings (such as driving or accompanying another in a vehicle placed in service on a highway).

Looking at the present administrative record, Applicant's restorative efforts (which include successful counseling and reduction of alcohol consumption since 1994, consistent with the advice of his treating counselor) merit particular attention and weight. His life-style changes have impressed his superiors familiar with his covered alcohol-related incidents, who uniformly characterized Applicant as reliable and trustworthy in the dispatching of his responsibilities. Applicant's overall mitigation showing is fully sufficient, especially in the face of the absence of any chronic abuse or dependence diagnosis, and elapsed time in sustained recovery (some 2 1/2 years) since his last such alcohol-related incident (in February 1995), to persuade that he has learned from his mistakes and is not likely to place himself in public danger in the foreseeable future by abusing alcohol.

Applicant carries his overall burden in demonstrating he is absolved from any reasonable risks of resuming alcohol in potentially abusive situations, or in any other way that might place him in harm's way of disclosure risks (whether deliberate or inadvertent. Applicant meets his overall evidentiary burden on the record presented and is entitled to favorable conclusions with respect to sub-paragraphs 1.a through 1.g.

In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in F.3 of the Directive and Directive's Change 3 Guidelines in the preamble.

FORMAL FINDINGS

In reviewing the allegations of the SOR in the context of the FINDINGS OF FACT, CONCLUSIONS and the FACTORS listed above, this Administrative Judge makes the following FORMAL FINDINGS:

CRITERION G: FOR APPLICANT

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: FOR APPLICANT

Sub-para. 1.c: FOR APPLICANT

Sub-para. 1.d: FOR APPLICANT

Sub-para. 1.e: FOR APPLICANT

Sub-para. 1.f: FOR APPLICANT

Sub-para. 1.g: 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 Applicant's security clearance.

Roger C. Wesley

Administrative Judge