

DATE: April 22, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-05500

REMAND DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esquire, Department Counsel

FOR APPLICANT

John D. Morgan, Esquire

SYNOPSIS

This 52-year-old employee of a defense contractor was arrested and/or convicted of alcohol-related crimes on ten occasions between 1982 and 1998. In March 1999, he entered a two-year alcohol rehabilitation as a result of the 1998 arrest. He completely abstained from alcohol while in the program, began drinking beer again (up to a six pack in two weeks) after the completion of the program in April 2001, and finally stopped completely on December 31, 2001. He has had no problems with the law since 1998, and has a positive work record. He regularly attends AA meetings and has a strong support structure. Applicant has adequately demonstrated rehabilitation. Clearance is granted.

STATEMENT OF THE CASE

On February 26, 2002, 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, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons

why DOHA could not make the preliminary affirmative finding required under the Directive that it

is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and

determine whether a clearance should be granted, denied or revoked.

On May 15, 2002, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made after a hearing before a DOHA Administrative Judge. The matter was assigned to me for resolution on August 19, 2002. A Notice of Hearing was issued on September 12, 2002, setting the matter for October 1, 2002. At the hearing, Applicant testified and called three additional witnesses. The Government did not call any witnesses, but offered seven exhibits, which were marked as Government Exhibits (GX) 1 - 5, to which Applicant did not object. Applicant offered nine exhibits, which were marked for identification as Applicant's Exhibits (AX) A - I. I agreed to keep the record open to

allow Applicant to obtain and submit a specific document. Applicant timely submitted the document to me through Department Counsel. It has been marked as AX J. All exhibits were admitted as marked, without objection. The transcript (Tr) was received at DOHA on October 9, 2002.

I issued a Decision on November 15, 2002, in which I found it was not clearly consistent with the national interest to grant or continue a security clearance for applicant. Applicant appealed the decision and, on April 15, 2003, the DOHA Appeal Board issued an Appeal Board Decision and Remand Order. The case file was returned to me on April 18, 2003, with directions to issue a new decision after correcting the errors identified in the Decision and Remand Order, consistent with my obligations under Directive, Additional Procedural Guidance, Items E3.1.35. and E3.1.25.

As I understand the Appeal Board Decision and Remand Order, the original decision erred by (1) making specified findings of fact that were not supported by the evidence of record; (2) reaching specified conclusions that were either not adequately supported or explained or that were contradictory; (3) failing to consider Applicant's conduct under each Guideline cited in the SOR and then to reach reasonable conclusions under each guideline. In reaching the following Findings of Fact and Conclusions, I have specifically complied with the Board's directions in correcting the errors cited in its Decision and Remand Order.

The Appeal Board did not address Applicant's claims of error by "(e) drawing adverse conclusions about Applicant's history of alcohol abuse despite the record evidence that Applicant has not been involved in an alcohol-related incident since 1998 and has maintained a life of sobriety since March 1999"; and (f) by "not applying various Adjudicative Guidelines mitigating conditions."

I have considered these claims of error in preparing this Remand Decision.

FINDINGS OF FACT

Applicant is a 52-year-old engineering technician, employed by a defense contractor (GX 4). His employer is seeking a security clearance for Applicant in connection with his employment. In his response to the SOR, Appellant admitted all 10 allegations under Guideline J and all three allegations under Guideline G.

After considering the totality of the evidence derived from Applicant's response to the SOR, his testimony and that of his witnesses, and the Government's exhibits, I make the following FINDINGS OF FACT as to each SOR allegation:

GUIDELINE J (Criminal Conduct)

As alleged in detail in the SOR, Applicant was arrested and/or convicted on the following occasions:

- 1.a. - March 1998 - Driving Under the Influence (DUI). Applicant received deferred prosecution, and successfully completed the program, as a result of which the case was dismissed by the court on May 8, 2001. The judge advised Applicant of the serious consequences of any future arrests (GX 2 at page 45 and Tr at 82, 83).
- 1.b. - October 1994 - (1) DUI and (2) Negligent Driving. On March 7, 1996, the case was dismissed without prejudice (GX 1, GX 3, and GX 5). The officer was apparently outside his jurisdiction when he made the arrest (Tr at 81, 82);
- 1.c. - May 1993 - DUI. Applicant was found guilty, sentenced to 10 days in jail, and fined (GX 4 and GX 5);
- 1.d. - June 1991 - DUI. Applicant received deferred prosecution and the case was subsequently dismissed (GX 4 and GX 5);
- 1.e. - March 1988 - Simple Assault. The case was dismissed (GX 5);
- 1.f. - March 1987 - (1) Aggravated Assault and (2) DUI. The case was dismissed (GX 5).
- 1.g. - February 1986 - Battery. The case was dismissed (GX 3). This incident occurred while Applicant was consuming alcohol (Tr ta 81);

1.h. - August 1984 - (1) First Degree Burglary, (2) Second Degree Assault, and (3) Resisting Arrest (GX 3). This incident occurred while Applicant was consuming alcohol (Tr at 81);

1.i. - December 1982 - DUI. Applicant received deferred prosecution and the case was subsequently dismissed (GX 5);

1.j. - April 1981 - DUI. Applicant was fined (GX 5).

All of the above offenses were apparently misdemeanors (Tr at 76).

GUIDELINE G (Alcohol Consumption)

2.a. - Drinking has been a problem for Applicant "off and on all [his] life" since he was a teenager (GX 4 and GX 6). Applicant consumed alcohol from 1965 (age 16) to December 31, 2001 (age 52). He last consumed alcohol to the point of intoxication in March 1998, when he was arrested for DUI, as alleged in SOR 1.a., above.

At the hearing on October 1, 2002, Applicant described himself as having been a "binge drinker" at times, but mostly a "maintenance drinker." He drank "every day . . . [and he] maintained every day before [he] went into alcohol counseling" (Tr at 81). After the rehabilitation program, Applicant stopped going to bars, but did continue drinking at home, buying a six pack of beer, and consuming it within two weeks (Tr at 50).

Applicant "stopped drinking altogether" on New Year's Eve, December 31, 2001, after discovering that he no longer liked the taste. (*Id.*). After that Applicant no longer drank alcohol "at all," nor did he "frequent bars or taverns any more" (Sworn Statement, dated May 15, 2002, attached to second response to SOR).

2.b. - The information as set forth in subparagraphs 1.a., 1.b., 1.c., 1.d., 1.e., 1.f., 1.i., and 1.j.

All of the allegations were alcohol-related.

2.c. - Applicant received outpatient treatment from March 8, 1999 to April 11, 2001 at a recovery center in State A, for a condition diagnosed as alcohol dependence. The treatment plan recommendation included a "complete abstinence from alcohol" (GX 4). Applicant complied with this requirement and stayed sober during the two years he was in the program (Tr at 85, 86), but began drinking again "occasionally" after he completed the program (AX J). He drank beer because "sometimes [he] still [has] a craving for alcohol" and he was afraid that if he "fights the craving completely, it might drive [him] back into a full drunk again" (GX 7). He "drank on only a few occasions [during this period] and found [he] did not enjoy it" (Second response to the SOR, dated May 15, 2002). His last drink of alcohol was on December 31, 2001.

As of the hearing, Appellant had been taking Antabuse since April 2002, even though he was no longer consuming alcohol, "to demonstrate that I will be willing to do anything to show that I will stay sober. If it is taking Antabuse for the rest of my life, that is what I will do." He spoke with his doctor about his use of Antabuse (Tr at 88). It is "just an extra thing to keep me [on the right path]" (*Id.*). On October 4, 2002, a counselor from the 1999 - 2001 treatment program, submitted a document in which she gives a prognosis of "very good" for Applicant's chances for complete recovery (AX J).

Applicant's wife is familiar with Applicant's drinking during their relationship and describes the changes over the past two years, since the treatment program, as "drastic" (Tr at 38). He is more responsible at home, with their finances, and is never tardy at work (Tr at 40, 41). He has been regularly attending "12-step" meetings up through September 2002, shortly before the hearing (AX H).

Applicant's work supervisor has known him for about a year and a half and is not aware of any criminal conduct or use of intoxicants by Applicant during that time (Tr at 56). The security manager at Applicant's place of employment has known Applicant for about 15 years, including the last six and a half years when she has been security manager. She has never seen Applicant in a state of intoxication, nor was she aware of Applicant's problems with the law outside of work (Tr at 64). Until recently, she was not aware of how many arrests Applicant had suffered in the past, but now knowing the number of incidents, it did not change her opinion that Applicant should qualify for a security clearance (Tr at 75).

Another co-worker speaks highly of Applicant (AX D, AX E, and AX F). Applicant has been attending Alcoholics Anonymous (AA) meetings since April 4, 2002 (AX H), and has had negative drug screening results from May to September 2002 (AX I).

POLICIES

Considering the evidence as a whole, I find the following specific adjudicative guidelines to be most pertinent to this case:

GUIDELINE J (Criminal Conduct)

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness.

Conditions that could raise a security concern and may be disqualifying include:

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

Conditions that could mitigate security concerns include:

1. The criminal behavior was not recent, the last act having occurred in 1997;
6. There is clear evidence of successful rehabilitation.

GUIDELINE G (Alcohol Consumption)

The Concern: Excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness.

Conditions that could raise security concerns and may be disqualifying include:

1. Alcohol-related incidents away from work, such as driving while under the influence;
4. Evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program;
5. Habitual or binge consumption of alcohol to the point of impaired judgment.

Conditions that could mitigate security concerns include:

3. Positive changes in behavior supportive of sobriety;
4. Following diagnosis of alcohol abuse or alcohol dependence, Applicant has successfully completed outpatient rehabilitation along with aftercare requirements, participated frequently in meetings of Alcoholics Anonymous or a similar program, has abstained from alcohol for a period of at least 12 months, and has received a favorable prognosis by a licensed clinical social worker who is a staff member of a recognized treatment program.

I have evaluated the totality of the evidence under both the specific additional guidance found in Enclosure 3 to the Directive and the nine general guidelines found in Section E2.2.1. of Enclosure 2 to the Directive.

CONCLUSIONS

Applicant was born in December 1949. He had his first drink of alcohol at age 15 and his first drinking to intoxication

occurred at either age 16 or 18 (about 1965 or 1967) (GX 4 at page 67 and GX 6). The ten arrests from 1981 to 1998 all appear to be alcohol-related (Tr at 31-33). Applicant contends that the ten incidents do not show "a pattern of criminal activity based upon any criminal proclivity I may have when I am not drinking alcoholic beverages" (AX A). Applicant's counsel contends that the hearing was actually about "alcohol consumption as opposed to criminal conduct" (Tr at 17). I find credible the premise that if concerns about Applicant's abuse of alcohol are shown to have been mitigated, then the likelihood of future criminal acts related to alcohol abuse will also have been significantly reduced. However, even though Applicant's past criminal conduct was all alcohol-related, the conduct is alleged under both the Alcohol and Criminal Conduct guidelines, and therefore must be evaluated under both guidelines.

Applicant had been "through treatment centers before," but considered the two-year program to be different and more effective (Tr at 85). Although the treatment program's final report advises Applicant not to drink (Tr at 108), he did continue to drink occasionally, giving in to temptation (Tr at 86, 87), until he stopped for good on December 31, 2001.

Applicant's treatment program counselor submitted a sworn declaration (AX B) that presents a positive view of Applicant's progress. At present, the counselor has a favorable prognosis for Applicant and noted that his physical appearance and demeanor indicated that he had "stayed with the program" (AX J). Applicant had informed the counselor that following his two-year treatment period, he had "occasionally consumed some alcoholic beverages and had stopped consuming them altogether on December 31, 2001" (*Id.*). Nevertheless, the prognosis was that Applicant's "chances for complete recovery, and for maintaining a state of lifetime sobriety are very good" (*Id.*).

In addition, Applicant's use of Antabuse supports his claim of an intention not to use alcohol in the future, but to take Antabuse as long as he has to in order to stay sober (Tr at 87 and AX A). Applicant discussed in detail what he sees as his change in lifestyle for the better (Tr at 91 - 94). I also give considerable weight to Applicant's documented continuing attendance at AA meetings. He attended AA meetings in the past, but he "quit going to the meetings" because he did not want to be a "hypocrite in the sense that [he] could have a few beers and go to meetings . . ." (Tr at 100, 101). He stopped attending in July 2001 and began attending again in April 2002, is still attending, and is working on Step 10 (Tr at 101, 111). He has never had a formal sponsor, but relies on a friend who is also "an active AA person" (Tr at 101, 102 and AX J).

Guideline J (Criminal Conduct)

Disqualifying Condition (DC) 1 applies, since there are admissions of criminal conduct. DC 2 applies since his offenses, all apparently misdemeanors, constitute multiple lesser offenses. Of the possible Mitigating Conditions (MC), MC 1 is applicable, since the last criminal offense occurred in March 1998, which I conclude is not recent. MC 6 also applies since the passage of more than four years without recurrence is a strong indication of successful rehabilitation.

His history of criminal conduct is certainly of concern, but the alcohol-related circumstances of the offenses, the most recent of which occurred five years ago, and his current alcohol free lifestyle, as discussed below, indicates that the criminal conduct is not likely to be repeated. On balance, I conclude that adequate mitigation has been demonstrated.

Guideline G (Alcohol)

DC 1 applies, since there were alcohol-related incidents away from work, such as driving under the influence; DC 4 applies, since there was an evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program; and DC 5 applies, since the evidence suggests habitual or binge consumption of alcohol to the point of impaired judgement. At the same time, MC 1 is applicable since the "problem occurred a number of years ago and there is no indication of a recent problem." MC 2 is applicable, although it is not certain "problem" should be defined nor is it clear what a "number of years" means, in the context of this case. I consider the beginning of Applicant's treatment program in 1999 and the absence of any drinking to intoxication since that time are the most significant factor.

MC 3 is applicable since Applicant has demonstrated positive changes in his behavior supportive of sobriety. MC 4 is also applicable, since following the earlier diagnosis of alcohol abuse or alcohol dependence, Applicant has successfully completed outpatient rehabilitation along with aftercare requirements, participated frequently in meetings of Alcoholics

Anonymous or a similar program, has abstained from alcohol for a period of at least 12 months, and has received a favorable prognosis by a licensed clinical social worker who is a staff member of a recognized

treatment program. He has not been involved in an alcohol-related incident since 1998 and has not been alcohol-intoxicated since March 1999, shortly before he began his two-year treatment program.

Based on the Appeal Board's directions and guidance, I have reevaluated the totality of the evidence. I conclude that Appellant is making a concerted effort to avoid past mistakes with alcohol, that he has a strong support system in his wife, Alcoholics Anonymous and friends who see him frequently. His involvement in his own rehabilitation, although a continuing process, is clearly established. The lessons he has had to learn appear to have taken root and he is aware of the consequences of lapsing into alcohol abuse in the future. His past weaknesses are obvious from the record, but so is his progress. On balance, I conclude that Applicant has adequately mitigated his past alcohol abuse and dependence.

The fact that Applicant's arrests were alcohol-related is not an excuse for a history of poor judgment. However, that same history suggests that the end of his alcohol abuse and dependence also means the end of any criminal conduct. That premise is supported by the absence of any criminal conduct over the past five years. After carefully considering the entire record, I conclude that Applicant has adequately demonstrated rehabilitation and currently possesses the requisite judgment, reliability, and trustworthiness required of someone seeking access to the nation's secrets.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Guideline J (Criminal Conduct) For the Applicant

Subparagraph 1.a. For the Applicant

Subparagraph 1.b. For the Applicant

Subparagraph 1.c. For the Applicant

Subparagraph 1.d. For the Applicant

Subparagraph 1.e. For the Applicant

Subparagraph 1.f. For the Applicant

Subparagraph 1.g. For the Applicant

Subparagraph 1.h. For the Applicant

Subparagraph 1.i. For the Applicant

Subparagraph 1.j. For the Applicant

Guideline G (Alcohol Consumption) For the Applicant

Subparagraph 2.a. For the Applicant

Subparagraph 2.b. For the Applicant

Subparagraph 2.c. For the 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 a security clearance for Applicant.

BARRY M. SAX

ADMINISTRATIVE JUDGE

1. The period of abstention from all alcohol is only about 9 months, rather than 12, but I think some credit is justified by his infrequent use of alcohol before December 31, 2001.