

DATE: December 30, 1996

In re:

SSN:

Applicant for Security Clearance

ISCR OSD Case No. 96-0071

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR THE GOVERNMENT

Barry M. Sax, Esq.

Department Counsel

FOR THE APPLICANT

Pro se

STATEMENT OF THE CASE

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) dated March 6, 1996, 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 conduct proceedings and determine whether clearance should be granted, continued, denied or revoked.

A copy of the SOR is attached to this Decision and included herein by reference.

On March 27, 1996, Applicant responded to the allegations set forth in the SOR and requested that his case be determined on the written record in lieu of a hearing. The Government submitted its File of Relevant Material on May 2, 1996, a copy of which was forwarded to the Applicant with instructions to submit material in explanation, extenuation or mitigation within thirty days of receipt. Applicant elected not to file a response and the case was assigned for resolution to the undersigned Administrative Judge on November 19, 1996.

FINDINGS OF FACT

After a thorough review of the evidence in the record, and upon due consideration of same, this Administrative Judge renders the following findings of fact:

Applicant is a 38 year old male who has worked for his current employer (company A) since October 1994. He seeks to retain a Secret clearance which was granted to him by the Defense Industrial Security Clearance Office on September 22, 1994.

Following his graduation from high school at age seventeen, Applicant on June 20, 1976, entered on active duty in a branch of the United States military. Shortly thereafter, he was introduced to alcohol by two friends in the service, consuming two beers. His intake of alcohol increased slowly over the next couple of years. By age nineteen (circa 1977), he was drinking five days a week in quantity of six mixed drinks per occasion. His consumption increased over the next year to nine mixed drinks and twelve beers per day when overseas. Over the period 1979 to 1984, he consumed a case of beer daily and an occasional liquor, experiencing alcohol-related legal difficulties once. While on a trip on May 2, 1981, Applicant and his companions stopped to have a few drinks. After three hours of drinking, they aborted their plans. En route home, Applicant made an abrupt turn when he realized he was proceeding the wrong way down a one-way street. His actions were observed by the local police who subsequently pulled him over for weaving. Arrested for driving under the influence (DUI), Applicant was given a breathalyser which tested under the legal limit. He pleaded guilty to an amended charge of reckless driving, imposition of sentence was suspended and he was placed on three years probation on the condition he pay a fine of \$250.00 and serve two days in jail with credit given for time spent.

On or about March 28, 1985, Applicant was granted a Top Secret security clearance for his military duties. While Applicant continued to imbibe alcohol on a daily basis, it was in reduced amount of four beers per day. That pattern lasted only about a year as over the 1986/1990 time frame, Applicant consumed fifteen to twenty-four beers on a daily basis. Married on -----, 1989, his drinking caused marital difficulties in that Applicant and his spouse quarreled about the financial cost of his alcohol habit.

On October 31, 1989, a fellow serviceman brought a case of beer to the range. After drinking eight to nine beers, Applicant was pulled over by military police and administered a field sobriety test which Applicant claims he passed. However, he submitted to a breathalyser at the provost marshall's office which registered a .16% blood alcohol content. Applicant pleaded guilty to DUI during non-judicial punishment proceedings and he was fined \$500.00 (\$250.00 suspended).

As a result of the October 31, 1989 incident, Applicant was directed by his command on November 7, 1989, to attend a Level II alcohol treatment program. Applicant's work performance as an explosive ordnance disposal technician was described by his superiors as outstanding. On the commencement of the ten day program on November 13, 1989, Applicant agreed to adhere to group and commitments which included two Alcoholics Anonymous (AA) meetings per week and abstinence while in the program. By the third day, Applicant had made no effort to join the group, although at his midway review on day 5, he was assessed as having made fair progress. While in the aftercare phase of the program, Applicant was treated at the base hospital in mid January 1990 after he was attacked and hit over the head with a wrench. Medical records reflect a reported blood alcohol content on that occasion of .34%. On November 5, 1990, Applicant completed the twelve month aftercare period.

For the two year period from 1991 through 1992, Applicant consumed six to eight beers daily. On December 20, 1992, Applicant consumed beer while replacing parts on his car at his residence. While taking the vehicle for a test drive, Applicant accelerated quickly from a stop. His actions were observed by the local police who pulled him over and administered field sobriety tests. Arrested for DUI, Applicant was charged in court with reckless driving, for which he was fined \$250.00.

On learning of the incident, Applicant's command directed him to Level III alcohol treatment. Applicant was treated on an inpatient basis for a condition diagnosed as alcohol dependence from January 31, 1993 to March 12, 1993. On admission, Applicant acknowledged to treating personnel that he was an alcoholic and should cease drinking. Compliant at the outset, Applicant was a less active participant in the second week, appearing rigid and alienated. His progress overall was assessed as "little more than minimal." Aftercare recommendations at discharge included meeting with a substance abuse control officer on a weekly basis during a formal aftercare period, AA at least three times weekly for twelve months, and aftercare group meeting once per week for a minimum of one year.

Applicant met another service member at a bar on December 10, 1993, where he consumed several twelve ounce cans of beer. While walking home, he was observed by an undercover policeman to be staggering on the sidewalk adjacent to the highway. The officer asked Applicant whether he wanted the police to give him a ride home. Applicant refused to cooperate and he was cited for public drunk. Applicant failed to appear in court on the scheduled hearing date of January 24, 1994, and he was adjudged guilty and \$144.00 bond forfeited.

Applicant was granted an honorable discharge from the service at the rank of E7 on October 27, 1993. On April 4, 1994, he commenced employment in the civilian sector with a defense contractor. Two days later, he and his spouse separated. In application for conversion of his security clearance, Applicant on or about April 16, 1994, executed a National Agency Questionnaire (NAQ). In response to inquiry concerning his arrest history, Applicant listed only his December 1992 reckless driving offense. He answered in the affirmative as to any alcohol-related treatment, admitting to having received Level III alcohol treatment from January to March 1993.

In anticipation of his employment with his current employer, Applicant executed a second NAQ on August 27, 1994. Thereon, he listed his 1981 and 1992 reckless driving offenses as well as his Level III alcohol treatment. Applicant omitted his alcohol-related non-judicial punishment which he received for DUI on October 31, 1989, as he was under the impression that since the incident was already of record and he was no longer in the military, he need not report it on his NAQ. Applicant's omission of his more recent December 10, 1993 public intoxication offense is found to have been intentional.⁽¹⁾ On September 27, 1994, Applicant was granted his secret security clearance by the Defense Industrial Security Clearance Office. Shortly thereafter, in October 1994, he went to work for his current employer at a remote overseas location.

On December 15, 1994, Applicant was interviewed by a Special Agent of the Defense Investigative Service (DIS) concerning his alcohol history, to include his related arrests and treatment. Applicant admitted those offenses which occurred prior to his Level III treatment in January 1993, and falsely denied any other arrest by law enforcement, either civilian or military or ever using alcohol excessively. He described himself as a "very moderate social drinker" who does not become intoxicated, and he indicated he did not feel a need to take any action to control his use of alcohol since he was not an abuser.

Applicant was subsequently reinterviewed on August 18, 1995, with inquiry directed to the December 10, 1993, public drunk offense. Applicant admitted during that interview that he had been arrested for public drunkenness, taken to the police station, booked and issued a citation.⁽²⁾

On October 19, 1995, Applicant executed yet another NAQ. Applicant listed his May 1981 and December 1992 reckless driving offenses and his December 1993 public intoxication offenses, omitting his 1989 non-judicial punishment for DUI.

As of March 1996 Applicant was continuing to consume alcohol in unspecified quantity, without adverse incident.

POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the seriousness, recency, frequency and motivation for an applicant's conduct; the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the circumstances or consequences involved; the age of the applicant; the absence or presence of rehabilitation, the potential for coercion or duress, and the probability that the conduct will or will not recur in the future. *See* Directive 5220.6, Section F.3. and Enclosure 2. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

ALCOHOL CONSUMPTION

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 a security concern and may be disqualifying include:

- (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
- (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

Conditions that could mitigate security concerns include:

None.

PERSONAL CONDUCT

Conduct involving questionable judgment, untrustworthiness, unreliability or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

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

- (2) the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.
- (3) deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination.

Conditions that could mitigate security concerns include:

None.

* * *

Under the provisions of Executive Order 10865 and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets its burden and establishes conduct cognizable as a security concern under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of criterion conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against the Applicant.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, this Administrative Judge concludes that the Government established its case with regard to Criteria G and E.

Applicant attributes his alcohol-related difficulties from 1989 to 1993 to his transfer to a duty station which he did not like and to a bad marriage. However, the record reflects Applicant had been consuming alcohol excessively since about 1977 when he was drinking six mixed drinks per occasion, five times a week. His pattern of abusive drinking led to the development of a significant alcohol problem by January 1993, as evidenced by the diagnosis of alcohol dependence rendered by treating personnel in the Level III program. Despite forty days of inpatient rehabilitation, Applicant resumed alcohol use thereafter, to intoxication on at least one occasion (December 10, 1993).

Those to whom classified information is entrusted must be relied on to safeguard this material both during business and non-business hours. The abuse of alcohol to intoxication is incompatible with this duty due to the obvious potential for intentional or inadvertent disclosure when one is under the influence. On admission into the Level III alcohol program, Applicant's military superiors described his duty performance as outstanding. The nexus between Applicant's abuse of alcohol to medically diagnosed dependence and his fitness for access to classified information is not attenuated by the fact it apparently did not adversely affect his work. Given the magnitude of his alcohol problem, he bears a particularly heavy, although not insurmountable, burden to demonstrate reform.

In assessing the current security significance of Applicant's alcohol abuse, this Administrative Judge must consider the Adjudicative Guidelines pertaining to alcohol consumption (criterion G). Of the five potentially security disqualifying conditions (DC), 1., 3., 4., and 5. are applicable. Applicant experienced adverse legal impairment with civilian law enforcement on three occasions⁽³⁾ and was awarded non-judicial punishment once related to alcohol. In addition, there is the incident of January 1990 where Applicant sought treatment at the base hospital and was found to have a blood alcohol content of .34%. DC 1. is apposite because of these incidents. Applicant engaged in habitual drinking to excess from about 1977 to at least January 1993, warranting application of DC 4. Consideration must also be afforded DCs 3. and 5. as Applicant has been diagnosed as suffering from alcohol dependence and continues to drink contrary to medical advice.⁽⁴⁾

On review of the corresponding mitigating conditions (MC), none apply to Applicant's benefit. The repeated alcohol-related incidents are reflective of a pattern of abusive drinking. For MC 2. to apply, there must be no indication of a recent problem. Applicant consumed alcohol to intoxication on at least one occasion (December 10, 1993) after completing forty days of inpatient treatment. His continued consumption thereafter, even in reported moderate amount, cannot be regarded as behavior supportive of sobriety as he had been apprised by treating personnel in the Level III program of the negative consequences of a return to active drinking. Moreover, since Applicant has been diagnosed as suffering from alcohol dependence, he is required for mitigation under MC 4. to successfully complete inpatient or outpatient rehabilitation along with aftercare requirements, participate frequently in AA or similar organization, abstain from alcohol for at least twelve months and receive a favorable prognosis by a credentialed medical professional, *i.e.*, a licensed physician, licensed clinical psychologist, or board certified psychiatrist. Although Applicant received Level III inpatient alcohol treatment for forty days, there is no evidence that he completed the aftercare requirements, to include AA participation. Nor is there the requisite twelve months of abstinence or favorable prognosis.

The failure to satisfy the pertinent mitigating conditions is not necessarily dispositive, as factors such as the nature and seriousness of the conduct, the circumstances, the individual's age, motivation and extent of rehabilitation may

nonetheless warrant a positive outcome. Notwithstanding the absence of any evidence of consumption to intoxication since December 10, 1993, this Administrative Judge is not convinced that Applicant's alcohol problem is safely behind him. During his DIS interview of December 15, 1994, Applicant denied he has an alcohol problem. The value of his rehabilitation programs is undermined due to his failure to display any meaningful insight. In his response of March 27, 1996, to the SOR, Applicant indicates only he has since learned to resolve his problems open and honestly instead of suppressing them. Absent any ongoing participation in counseling or support organization such as AA, the probability of future abuse cannot be discounted, especially where he continues to drink against medical advice. Accordingly, subparagraphs 1.a., 1.b., 1.c., 1.d., 1.e., 1.f., 1.g. and 1.h. are resolved against him.

With respect to Criterion E, this Administrative Judge found Applicant deliberately omitted his most recent alcohol-related offense, the December 10, 1993 public drunk, from his August 27, 1994 NAQ and his December 15, 1994, signed, sworn statement. While Applicant did not conceal the fact of his alcohol treatment from the Government, he concealed the fact that his alcohol difficulties continued after he attended the Level III program. DCs 2. and 3. under the Directive's guidelines pertaining to personal conduct apply to his omissions from his NAQ and sworn statement, respectively.

Of the seven listed mitigating conditions, only the first four have any potential applicability. Information reflective of alcohol-related impairment following an alcohol rehabilitation program is clearly capable of influencing the Government's adjudicative and/or investigative decisions and therefore material to a determination of an individual's judgment, trustworthiness or reliability. Indeed, the record reflects that the DIS Agent conducted a second interview when he learned of the 1993 offense. Where Applicant elected to conceal the information omitted from his NAQ when he was interviewed by DIS on December 15, 1994, his falsifications cannot be regarded as isolated.⁽⁵⁾ There is no evidence that Applicant voluntarily revealed the information before his second interview which was held on August 18, 1995. Hence, MC 3. does not work in his favor. Finally, there is no evidence that he acted on the advice of authorized personnel.

To Applicant's credit, he listed his 1993 public intoxication offense on a subsequent NAQ executed on October 19, 1995. However, this subsequent admission does not negate the seriousness of his failure to be forthright from the outset. Moreover, he continues to exhibit a lack of candor as to the reason for the omission of the offense from the NAQ and sworn statement. On August 18, 1995, he indicated he had omitted the public intoxication offense inadvertently because it was a misdemeanor. It is noted that those offenses which he listed on the form and which he detailed to the Agent were also misdemeanors and more remote in time from the dates of the NAQ and sworn statement. Applicant presented no credible explanation as to why he could recall an incident which occurred in May 1981, but not an incident which took place only eight months before the execution of the NAQ. The Government must be able to rely on the representations of those in whom it places its trust. In choosing for himself the timing and extent of disclosure, Applicant demonstrated an unacceptable tendency to place his interests above those of the Government. Due to the persistent concerns for his judgment, reliability and trustworthiness engendered by his Criterion E conduct, subparagraphs 2.a.⁽⁶⁾ and 2.b. are concluded against him.

FORMAL FINDINGS

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

Paragraph 1. Criterion G: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

Subparagraph 1.d.: Against the Applicant

Subparagraph 1.e.: Against the Applicant

Subparagraph 1.f.: Against the Applicant

Subparagraph 1.g.: Against the Applicant

Subparagraph 1.h.: Against the Applicant

Paragraph 2. Criterion E: AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

Subparagraph 2.b.: 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.

Elizabeth M. Matchinski

Administrative Judge

1. In responding to the allegation of deliberate falsification of his December 15, 1994, signed, sworn statement, Applicant in his Answer of March 27, 1996, referred to his explanation of August 18, 1995, in which he stated, " I did not omit this information in an attempt to cover up my criminal history. I inadvertently omitted this because it was a misdemeanor offense and I treated it the same as a traffic ticket." Exhibit 7, p. 2. He further added that he simply forgot the incident. It stretches credulity that Applicant could recall in detail the events surrounding an incident in May 1981, but not remember a December 1993 offense. Rather, the more plausible explanation is that Applicant did not want the Department of Defense to know that he committed another alcohol-related incident after his Level III alcohol rehabilitation treatment.
2. When asked to explain his failure to reveal the incident previously, Applicant stated in August 1995 that he did not recall ever being told that he had to appear in court nor did he receive a summons. The documentation of record reflects, however, that Applicant was given notification on the citation that he was being summoned to appear before a trial officer on January 24, 1994. Police report of the incident reflects Applicant was arrested and transported to the county jail.
3. With respect to the December 20, 1992 offense, Applicant submits that he had only two or three beers while working on his automobile and that there was insufficient evidence to charge him with DUI. Medical record information reflects Applicant was referred for Level III treatment due to his second DUI and refusal of blood alcohol content testing. Whereas Applicant had consumed alcohol prior to the incident and admits the officer smelled alcohol on his breath, the incident is considered alcohol-related although the Government did not prove that he was legally intoxicated on that occasion.
4. Clinical documentation of his Level III treatment indicates Applicant was aware of the consequences of a return to active alcohol use. Exhibit 10, p. 3.
5. Whereas Applicant did not report either the May 1981 reckless driving or the December 1993 public drunk on his first NAQ executed in April 1994, his falsification is more extensive than alleged by the Government.
6. Subparagraph 2.a. is resolved against Applicant, but only as to the deliberate omission of that information set forth in subparagraph 1.g. Applicant's explanation for his non-disclosure of the non-judicial punishment (that he was under the mistaken notion that he need not report it because it was part of his military record) was accepted. This Administrative Judge is entitled to accept some explanations as credible while rejecting others which are implausible and/or inconsistent.