

DATE: November 12, 1996

In re:

SSN:

Applicant for Security Clearance

ISCR OSD Case No. 96-0409

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR THE GOVERNMENT

Teresa A. Kolb, Esq.

Department Counsel

FOR THE APPLICANT

Kenneth L. Perkes, Esq.

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 June 7, 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 July 3, 1996, Applicant responded to the allegations set forth in the SOR and requested a hearing. The case was assigned accordingly to this Administrative Judge on July 31, 1996, and on August 5, 1996, a hearing was scheduled for August 26, 1996. On August 20, 1996, Applicant, acting *pro se*, requested a continuance. On August 23, 1996, a brief continuance was granted as retained counsel had a schedule conflict. On September 5, 1996, the hearing was rescheduled for September 26, 1996. At the hearing held as rescheduled, seven Government exhibits and two Applicant exhibits were admitted into evidence. Testimony was taken from Applicant and his spouse. A transcript of the hearing was received by this office on October 22, 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 32 year old ----- who has worked for his current employer (company A) since May 30, 1989. He possesses a Secret security clearance which was granted to him by the Defense Industrial Security Clearance Office on

January 1, 1990, and seeks an upgrade to Top Secret.

Applicant started drinking alcohol in about 1980 while still in high school. Approximately every other weekend he drank with friends in the low income housing project in state B where he grew up, on rare occasion to visible intoxication. Applicant experienced legal difficulties on one occasion related to drinking as he was arrested on May 14, 1982, and charged with juvenile operating under the influence of alcohol. Unsure of whether he was over the legal limit, Applicant did not submit to a breath test. Not wanting to leave for college with charges pending against him, Applicant met with a judge at the courthouse who imposed a \$100.00 fine for the offense, to be suspended if Applicant attended a semester of college. Applicant never allowed alcohol to negatively impact his education and he graduated as the highest ranking student in his class.

As a college student from September 1982 to May 10, 1986, academics held similarly high priority. Applicant would not drink if he had homework to do or a test upcoming. One night out of most weekends, Applicant would go to a party in the dormitory or at a fraternity house where he would drink "enough to feel it." About two to three times per year, he would consume alcohol to heavy intoxication. On rare occasion, he would drive when sufficiently under the influence of alcohol to where he should not have operated a vehicle. On May 14, 1984, he was arrested in state B for operating under the influence of alcohol (OUIL) after he had consumed alcohol at a bar with his brother. [\(1\)](#) Applicant pleaded guilty to a reduced charge of drinking to endanger and he was fined \$300.00 and his license was suspended for 75 days. On May 10, 1986, Applicant was awarded a Bachelor of Science in Electrical Engineering with Highest Distinction, having maintained an overall grade point average of ----- out of a possible 4.0.

Applicant got married on -----, 1986. That September, he entered a Master's Degree program in Electrical Engineering. Due largely to the fact he was married and lived off-campus and to the demanding nature of his graduate studies, Applicant consumed alcohol only once in awhile and then in moderate quantity. A couple of times per year, he imbibed more alcohol when socializing with friends. Applicant was awarded his Master's Degree in Electrical Engineering in May 1989.

On May 30, 1989, he commenced employment with company A at a situs in state C, which state borders on his native state. He and his spouse took up residence in state C, but had the opportunity to visit family and friends in state B. He started drinking a couple of beers every other night or so, usually two or three additional per night for a total of four to six on weekend days. On occasion, he consumed in greater quantity, especially when socializing with friends at events such as football games. On June 23, 1990, Applicant attended a bachelor party for a friend in state B where he consumed eight to ten beers. Applicant left the bar of the rental hall to purchase more beer to take to a local hotel room where he had arranged to stay for the evening. En route, he drove the wrong way down a one way street for which he was stopped by police. Applicant was arrested for OUIL and refusing chemical test to which he subsequently pleaded guilty and was sentenced to ninety days suspension of driver's license, to 72 hours community service, fined \$385.00 and ordered to complete a state B driver education evaluation program.

Pursuant to his conviction for the OUIL, Applicant attended three sessions (on September 29, 1990, October 6, 1990 and October 13, 1990) of a driver intervention program in state C. The program was designed to educate those convicted of OUIL of the dangers of alcohol and to assess the level of alcohol dependency. A certified drug and alcohol abuse counselor affiliated with the program was of the opinion Applicant showed symptoms of problem drinking, but she felt she had insufficient evidence to assess alcoholism. At the completion of the three sessions, she recommended further counseling to determine the depth of Applicant's alcohol involvement and a minimum of two Alcoholics Anonymous (AA) meetings per week for three months. While Applicant recognized that it was not wise to drive after drinking, he thought the recommended follow-up too harsh and he did not pursue it. His primary motivation at that time was to get his driver's license reinstated and he thought counseling would delay return of his license. Applicant continued to drink socially in the same pattern as before.

Unbeknownst to Applicant, his right to operate in state B remained suspended for his failure to pursue the driver intervention program's recommendations in 1990. When he went to renew his driver's license in state C in 1993, he learned that state B mandated follow-up and that he would not be able to renew his license in state C without proceeding with the evaluation recommended three years earlier. In order to get his license renewed, Applicant received treatment for three weeks in the summer of 1993 for alcohol abuse. Applicant remained abstinent during the program only to get

back in his original routine thereafter (one or two beers every other night, to intoxication when "out with the guys" twice per year).

When out playing pool with friends at an establishment in state B on May 13, 1995, Applicant consumed about six beers when he went up to the bar for last call and ordered a couple more, paying for the drinks. Someone took the drinks he had paid for and he asked the bartender for replacements. When asked to pay for these drinks, Applicant became angry at the bartender who told him to leave. Applicant then picked up a beer off the counter and exited the establishment where he was followed by the bartender and a bouncer. Applicant refused their requests to return the beer. Instead, he raised the bottle to the bouncer, who fearing attack, sprayed Applicant with mace. Applicant wrestled with the responding officer and was tackled to the ground where he was then placed under arrest for assault, reckless conduct, disorderly conduct and criminal trespass. The charges were dropped, but the disorderly conduct and criminal trespass counts were reinstated in August 1995. No conviction resulted from the incident.

Upset by the incident of May 13, 1995, Applicant sought counseling to get a professional opinion as to his alcohol problem. The counselor suggested Applicant was in the early stage of alcoholism and he recommended total abstinence. Applicant received outpatient counseling and attended AA once per week to August 1995. (2) He remained alcohol-free from May 1995 to early/mid July 1995, when he learned that the charges had been dropped from the May incident. Applicant talked himself into thinking that his use of alcohol was not that much of a problem, and over the next three week period, he drank on five to six occasions, usually a couple of beers each time. After further discussions with his counselor and spouse, Applicant stopped drinking by early August 1995. Although he continued to go to AA meetings, he felt that the program had little to offer as alcohol had not adversely affected his life to the same degree as other participants. For example, he had challenging work which he enjoys and performs well and a family (spouse and two children).

In October 1995, Applicant stopped going to AA and he gradually resumed drinking in the same pattern as he had in the past, i.e., a beer on most nights and maybe four to six beers once every week or two weeks if he went out bowling or playing pool.

On December 21, 1995, Applicant met some friends after work at a bar in state C where they regularly shot pool. Applicant consumed six to eight beers from 9:00 p.m. to about 1:00 a.m. En route home, his vehicle slid off the road into a snowbank where he was found by an officer who offered assistance. Detecting the odor of alcohol about Applicant, the officer administered field sobriety tests from which he determined Applicant was over the legal limit. Applicant was then arrested for driving while intoxicated, subsequent offense, to which he pleaded guilty in about April 1996. He was sentenced to one year suspension of his driver's license, directed to complete an alcohol awareness program, and fined \$600.00.

The incident convinced Applicant that he had a problem with alcohol for which he needed counseling. Because he wanted to be committed to counseling long-term, Applicant sought assistance through his health maintenance organization medical insurance program at work. Abstinent from December 22, 1995, Applicant attended a couple of AA meetings within the next week with his brother who is a recovering alcoholic and active in AA. He continued to go to meetings twice per week to about mid March 1996. On January 23, 1996, he entered an outpatient therapy program. With the arrest fresh in his mind, Applicant resolved never to drink again. Following two individual sessions with a certified drug and alcohol counselor, Applicant, diagnosed as suffering from alcohol abuse, began the first stage relapse prevention group at facility D which he attended once weekly through May 21, 1996. No longer attending AA, Applicant consumed alcohol on two occasions while on travel in April 1996 when he had a couple of beers on the plane and then a couple of beers at a hotel.

While away with his spouse for the weekend celebrating their tenth anniversary, Applicant on ----- 1996, advised his spouse of his intention to have a drink and he admitted to her that he had not been completely abstinent since December 22, 1995, in that he had consumed beer while on travel. Concerned that this would eventually lead to him resuming his old drinking habits and fearing another adverse incident, Applicant's spouse was visibly upset with him and told him it was not a good idea. Applicant consumed a couple of beers despite her obvious disapproval. After the incident, his spouse continued to confront him about his reason for drinking. Not clear of his intentions at that point, Applicant advised her he still needed to think about it. Shortly thereafter, Applicant recommitted himself to abstinence.

After a planned four week hiatus, Applicant moved into the second stage recovery program at facility D on June 25, 1996. It was his counselor's assessment that Applicant had begun to internalize positive habits of a lifestyle which involves abstinence. Applicant completed the eight week session and on September 24, 1996, he returned for a second eight week segment. As of that date, it was the counselor's opinion that Applicant was doing well, with excellent participation and a determination to strengthen his abstinent lifestyle.

In order to get his license reinstated in state C, Applicant was mandated to attend a seven day residence program from September 9, 1996 to September 16, 1996. Over the course of that week, Applicant was required to go to two AA meetings a day. Recommended follow-up was either two AA meetings per week for two months or to obtain a second opinion from a certified alcohol counselor. While Applicant could have requested a letter from his counselor at facility D, he elected to instead attend the AA meetings. In the week since his discharge from the residence program, Applicant went to three AA meetings. He does not have a sponsor in AA, but has support in his brother and the relapse recovery outpatient program at facility D.

Applicant has not consumed alcohol since May 24, 1996, but the concept of drinking continues to cross his mind about once per week.⁽³⁾ With the aid of his ongoing outpatient counseling, Applicant is making an effort to develop other activities such as biking that are not associated with drinking. He has given up playing pool in a bar and is doing less with those friends with whom he consumed alcohol in the past.

Applicant has proven to be a reliable and productive worker for company A. He has maintained a Secret security clearance for over six and a half years without adverse incident. Applicant on two occasions over the last seven years reported to work suffering from a hangover but it did not negatively impact his work performance. Applicant's supervisor has detected no impairment.

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. . .or other criminal incidents related to alcohol use

(4) 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

* * *

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, and having assessed the credibility and demeanor of those who testified, this Judge concludes that the Government has established its case with regard to Criterion G.

Applicant presents a history of social drinking with friends on weekends from his junior year of high school (circa 1980) through graduate school (May 1989). Two to three times per year, he consumed alcohol to heavy intoxication and he experienced adverse legal consequences due to his OUIL offenses in May 1982 and May 1984. Once he entered the working world, his use of alcohol gradually increased in frequency to one or two beers every other night with up to four to six beers on weekend days. On occasion over the next six and a half years, when socializing with friends he drank to significant impairment. Undisputably, Applicant exhibited a lack of responsible control over his consumption when he operated a motor vehicle under the influence. Following the June 23, 1990 incident, Applicant was required to attend a driver education evaluation program. While he went to the three sessions mandated, he refused recommended follow-up treatment as he had convinced himself the only change necessary was to his drinking and driving behavior. Motivated by his desire to have his driver's license renewed, Applicant participated in outpatient counseling during the summer of 1993. Although he abstained during the program, it led to no appreciable understanding of his problem, and he resumed drinking in his prior pattern. While the subsequent incident in May 1995 did not involve driving while impaired, Applicant admits he would not have acted as he did had he not consumed six beers on that occasion. Concerned that he might have a problem, Applicant sought a professional opinion and enrolled in outpatient counseling. For four months, Applicant participated in counseling, attended AA and maintained abstinence. Once the charges pending from the May 1995 incident were dismissed, Applicant resumed drinking in the prior pattern, culminating in a DWI offense on December 22, 1995.

Those to whom classified information is entrusted must be relied on to safeguard this material both during business and

non-business hours. The off-duty abuse of alcohol is incompatible with this duty due to the obvious potential for intentional or inadvertent disclosure when one is under the influence. The nexus between his abuse and his fitness for access to classified information is furthermore not attenuated by the fact he has not allowed alcohol to negatively impact his work performance.⁽⁴⁾ Given the recency of Applicant's last consumption to intoxication (December 1995) 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 afford serious consideration to the Adjudicative Guidelines pertaining to alcohol consumption. Of the five potentially security disqualifying conditions (DC), DCs 1. and 4. are applicable. On the occasions of his drunk driving offense at least, Applicant can be said to have engaged in binge drinking.⁽⁵⁾ There is no evidence that Applicant was diagnosed by a credentialed medical professional as that term is defined in the guidelines.⁽⁶⁾ Hence, neither DC 3. or 5. are apposite.

To Applicant's credit, after his last alcohol-related incident and before he appeared in court for the December offense, he enrolled through his health insurance in an outpatient program because he recognized the need for long-term counseling. Despite more than two months of outpatient group therapy and abstinence since December 22, 1995, Applicant consumed a few beers when on travel in April 1996 and two beers in celebration of his wedding anniversary on -----, 1996. His drinking on those occasions, albeit not to intoxication, was against professional advice and demonstrates the fragility at that time of his commitment to maintain an alcohol-free lifestyle. Shortly thereafter, Applicant recommitted himself to abstinence, and as of June 26, 1996, he had begun to internalize positive habits of a lifestyle which involves abstinence. Recent changes in his behavior supportive of sobriety include no longer playing pool in bars with his friends, and pursuing activities not related to alcohol such as biking. Given Applicant's history includes abusive drinking following completion of outpatient counseling, the Government's concerns about the brevity of Applicant's four month abstinence are justified.⁽⁷⁾ In Applicant's favor, however, he did not relapse as he had in the past into his past drinking pattern. Instead, he continued to pursue his outpatient group counseling. Applicant voluntarily started on September 24, 1996, another eight week segment of the Second Stage Recovery Group. The assessment of his counselor, dated September 24, 1996, is that Applicant is doing well. In addition to the support of his outpatient therapy group, since his completion of a seven day residential program on September 16, 1996, Applicant has a new appreciation for AA and he intends to continue to go to meetings. In order to get his license back, Applicant was given the alternative in follow-up of two months of AA meetings or of obtaining a letter from his counselor at facility D. In foregoing the easier option, Applicant demonstrates the strength of his commitment to ensure no recurrence of alcohol problems. Moreover, Applicant's strong desire to retain his current employment and security clearance serves as an additional deterrent. Applicant's efforts in reform undertaken since January 23, 1996, are sufficient to overcome the concerns engendered by his abusive use of alcohol on repeat occasion.⁽⁸⁾ Accordingly, subparagraphs 1.a., 1.b., 1.c., 1.d., 1.e., 1.f., 1.g., 1.h., 1.i. and 1.j. are resolved for the Applicant.

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: 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

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.

Elizabeth M. Matchinski

Administrative Judge

1. Applicant was administered field sobriety tests which he apparently failed.
2. Although Applicant was going to AA once per week, he did not become involved in the program.
3. Asked at his hearing by this Administrative Judge when was the last time he thought about drinking, Applicant testified, "Probably--I mean, the concept of drinking crosses my mind, you know, maybe once a week or something. Just the whole idea of, 'Am I going to go the rest of my life without drinking?' you know, 'Is life not going to be fun anymore?' that kind of thing, but as far as the compulsion to go out and have a drink, I don't get that. I don't think I've ever gotten that, but it's been--probably shortly after the incidents in May, you know, where I was at that point where I said, 'All right. Do I continue along this path of having a few beers here and there or do I continue to abstain?' That's when I had those thoughts and kind of squelched them back then. (Tr. p. 111).
4. At the time the Government granted Applicant his initial Secret clearance in January 1990, it had been more than four years since his last alcohol-related incident. Applicant's candor about the subsequent incidents does not render them insignificant from a security standpoint. Notwithstanding his unblemished record with regard to handling classified information, the Government may well have concerns about his security worthiness because of the 1995 incidents.
5. The Directive does not define the terms habitual or binge. The predominant definition of the noun binge is "a drunken revel," and the term is commonly used in reference to drinking heavily. *See Webster's Ninth New Collegiate Dictionary* (1985). With respect to his 1990 and 1995 offenses, Applicant consumed at least six beers on each occasion and was clearly intoxicated.
6. The Government alleged in subparagraph 1.h. that Applicant was treated from May 1995 to August 1995 for a condition diagnosed as alcohol dependency. Applicant indicated in his Answer that the counselor suggested he was in the early stage of alcoholism. However, the only document pertaining to that treatment in the file identifies the counselor as a "CADAC-NCAC II." (Govt. Exhibit 7). Moreover, while Applicant has been treated since January 23, 1996, for a condition diagnosed as alcohol abuse, that diagnosis was rendered by a licensed alcohol counselor. While this does not mean that Applicant does not have a problem, in order for DC (3) or (5) to apply, the diagnosis must be rendered by a licensed physician, a licensed clinical psychologist or a board certified psychiatrist.
7. This Administrative Judge is not persuaded by Government counsel's argument that Applicant must satisfy mitigating condition (MC) 4 which requires at least twelve months of abstinence. As noted in footnote 6, there is no diagnosis by a credentialed medical professional.
8. Although Applicant has a history of abusing alcohol and he thinks he may be an alcoholic, there is no medical record evidence reflecting Applicant suffers from alcohol dependence. His counselor since January 23, 1996, has diagnosed him as suffering from alcohol abuse.