

DATE: May 19, 1997

\_\_\_\_\_  
In Re:

-----  
SSN: -----

Applicant for Security Clearance  
\_\_\_\_\_

DOHA Case No. 96-0574

DECISION OF ADMINISTRATIVE JUDGE

JOHN R. ERCK

APPEARANCES

FOR THE GOVERNMENT

Barry M. Sax

Department Counsel

FOR THE APPLICANT

*Pro Se*

STATEMENT OF THE CASE

On August 26, 1996, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, "Safeguarding Classified Information Within Industry," dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6 "Defense Industrial Personnel Security Clearance Review Program" (Directive) dated January 2, 1992, as amended by Change 3, dated February 13, 1996, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make a preliminary determination that it was clearly consistent with the national interest to grant or continue a security clearance for him.

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

The Applicant responded to the SOR on September 6, 1996, and requested that his case be decided without a hearing. Applicant received the Government's File a Relevant Material (FORM) consisting of twelve exhibits on October 16, 1996. He did not respond to the Government's FORM. The case record was closed November 16, 1996, and on April 22, 1997, the case assigned to a DOHA Administrative Judge for decision. Because of case load considerations, the case was reassigned to this Administrative Judge on May 6, 1997.

FINDINGS OF FACT

In his answer to the Statement of Reasons, Applicant admitted the factual allegations set forth in subparagraphs 1.a. and 1.b., but denied the allegations set forth under subparagraphs 1.c. and 1.d. All of the allegations in the SOR are under Criterion G (Alcohol Consumption). After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is 59 years old and has been continuously employed by the same defense contractor for more than 30 years. He is seeking to retain the secret clearance which was granted to him in conjunction with his duties in 1982. A favorable preliminary determination could not be made on Applicant's current suitability for a security clearance because of alcohol consumption.

Applicant's suitability to retain his security clearance is in question because of his culpable involvement in a single, isolated incident of misconduct on the evening of November 27, 1995. On that night, he had consumed a quantity of alcohol before retiring at around 9 P.M. He had not been in bed long when he heard a motorcycle being revved up outside the window of his apartment. The motorcycle noise was particularly irritating to Applicant because less than a week earlier, he had met with the owner of the motorcycle after he had been awakened three times in one night. Applicant had asked the owner not to rev up his motorcycle in the area adjacent to his apartment. The owner had assured him that he would not do it again. Adding to Applicant's irritation was the fact that he had been having trouble sleeping. When he (Applicant) heard the motorcycle being revved up at around 10 P.M. on the evening of November 27, he "snap (ed)." He took his loaded<sup>(1)</sup>, small caliber pistol, went outside, and proceeded to wave the pistol at the victim<sup>(2)</sup>

before thrusting it into his face. The victim became very angry and threatened to kill Applicant, but called the police instead.

When the police arrived and knocked on the door of his apartment, Applicant met them holding a machete, however, he offered no resistance--turning over the machete and the pistol to the police when asked to do so. The police took Applicant to the local detention facility where they held him for four days. He subsequently entered a plea of *nolo contendere* to a charge of aggravated assault with a deadly weapon (Item # 8 of Gov. FORM). The adjudication of guilt was withheld and Applicant was placed on probation for three years.

After being held in the detention facility for four days--immediately following his arrest--Applicant was taken to the community medical center and held in a locked facility for 7 days before being released on house arrest. The only evidence in the record of his treatment in this facility is a brief, one paragraph letter written by Dr. X, the treating physician, to the County Judge on December 8, 1995, the date Applicant was released from custody (Item # 9 of Gov. FORM). According to this letter, Dr. X had treated Applicant for an "unstable mood and alcohol dependence problem." Dr. X prescribed antabuse and other medications to stabilize Applicant's mood.<sup>(3)</sup> Applicant was then treated briefly--as an out-patient--at Facility R where his records include this diagnosis by Mr. Z (LCSW): adjustment disorder with "mixed anxiety and depressed mood" and this ambiguous notation: "deferred ...R/O alcohol abuse" (Item # 10 of Gov. FORM).<sup>(4)</sup> The record does not contain a definitive diagnosis of alcohol abuse or alcohol dependence by either Dr. X or Mr. Z.

Applicant admits that he had consumed alcohol--occasionally to excess--for more than forty years. For at least two years prior to his arrest in November 1995, he had been drinking three double bourbons every night (p. 4, Item # 5 of Gov. FORM). He denies that he has been arrested for an alcohol related incident--other than the November 1995 assault--and there is no evidence in the record to contradict his denial. He stopped drinking alcohol in November 1995--after the arrest--and has not consumed alcohol since that time. He has reconciled with his wife of 28 years, after having separated from her in August 1993.<sup>(5)</sup> When he was interviewed by the Defense Investigative Service (DIS) on June 12, 1996, he had "almost paid off" the fines that were assessed as part of his plea agreement.

## POLICIES

The Adjudicative Guidelines of the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations with reasonable consistency that are clearly consistent with the interests of national security. In making those overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines but in the context of the factors set forth in section F.3. of the Directive as well. In that vein, the government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate that the facts proven have a nexus to an applicant's lack of security worthiness.

The following Adjudicative Guidelines are deemed applicable to the instant matter.

## ALCOHOL CONSUMPTION

(Criterion G)

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.....criminal incidents related to alcohol use.

### **Conditions that could mitigate security concerns include:**

3. Positive changes in behavior supportive of sobriety.

## Burden of Proof

The Government has the burden of proving any controverted facts alleged in the Statement of Reasons. If the Government establishes its case, the burden of persuasion shifts to the applicant to establish his security suitability through evidence which refutes, mitigates, or extenuates the disqualifying conduct and demonstrates that 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 that Court's rationale, doubts are to be resolved against an applicant.

## CONCLUSIONS

Having considered the record evidence in accordance with the appropriate legal precepts and factors, this Administrative Judge concludes that the Government has established its case with regard to Criterion G.

In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in Section F.3, as well as those referred to in the section dealing with the Adjudicative Process, both in the Directive.

The Government has established its case with respect to Criterion G. Applicant has admitted that he consumed alcohol to excess and to the point of intoxication for more than forty years. His commission of an aggravated assault (with a deadly weapon) after consuming alcohol on November 27, 1995 is evidence that--on at least one occasion--alcohol consumption had lead him to exercise questionable judgment and rendered him incapable of controlling his impulses.

There is evidence in the record from which it may be inferred that Applicant had been diagnosed as alcohol dependent by Dr. X, the physician who treated Applicant immediately after he was released from the detention facility. He treated Applicant for "alcohol dependence" and prescribed antabuse; both treatment modes suggest that he had diagnosed him as alcohol dependent. However, Dr. X's brief letter to the County Judge--written at the time of Applicant's release from custody--does not include a definitive diagnosis of either alcohol abuse or alcohol dependence. And the inferences which may have been properly drawn from Dr. X's prescriptions--for Applicant--are called into question by Mr. Z's subsequent, ambiguous notes in which he appears to be deferring his diagnosis of Applicant. Under the circumstances, I am unable to conclude that Applicant has been diagnosed as an alcohol abuser or as alcohol dependent by a credentialed medical professional.

In deciding whether Applicant's glaring lapse of judgment in November 1995 can or should be mitigated, consideration has been given to the fact that this event was an isolated incident in the truest sense of the word. His misconduct on that occasion was not one incident of many in a pattern of alcohol related incidents, and it was not an incident isolated by years or months from another similar incident. The behavior for which Applicant was arrested on November 27, 1995 was a once-in-a-lifetime event. It was the only time Applicant had been involved in alcohol-related misconduct for which he was arrested. And judging from his words and actions since the event, Applicant was distressed and humiliated by his behavior on that occasion. This distress and humiliation provided the motivation for him to stop drinking alcohol after more than 40 years of use and abuse. This change in behavior is more telling about his feelings toward the incident than his words describing his aggressive conduct as "stupid" (Item # 3 of Gov. FORM). His decision to abandon a life-long pattern of alcohol use, and his resolve in living by that decision are evidence that he was/is very concerned with avoiding a recurrence of the behavior that led to his arrest.

Consideration has also been given to the fact that Applicant did not act without provocation. The first time he was disturbed by noise from the loud motorcycle, he approached the owner and obtained the owner's assurances that he would not operate the motorcycle in the area adjacent to Applicant's apartment. Less than a week later, he heard the motorcycle again at a time when he was trying to sleep. He "snap(ed)" and grabbed his pistol. While Applicant's aggressive response to the second disturbance was disproportionate to the aggravation of the moment, it was not a random and irrational act fueled only by too much alcohol. He overreacted--possibly because of alcohol--under circumstances where some lesser response would have been appropriate, and indeed, was probably necessary. Applicant had not gone out of his way to pick a fight; he just wanted to get a good night's sleep.

Mitigation for Applicant's alcohol abuse is found in the measures he has taken since November 1995 to reduce the likelihood that there will be a recurrence of the behavior that led to his arrest. First and foremost, he stopped drinking alcohol; his statements that he has not consumed any alcohol since the assault incident have not been challenged. He received treatment for "unstable mood and alcohol dependence" immediately after the arrest. Within ten days of the arrest, he was stabilized on medication and taking antabuse to help him avoid further consumption of alcohol. As of June 12, 1996 when he was interviewed by the DIS (Item # 5 of Gov. FORM), he had paid most of the fines assessed incident to his arrest and plea agreement. Rehabilitation is further indicated by his accepting responsibility for his behavior and by his reconciling with his wife of 28 years. Although he has described the circumstances which preceded and precipitated his arrest for aggravated assault, he has never argued that his action was justified. Instead he has referred to his behavior on the occasion of the arrest as "that stupid thing on November 27."

Actions taken by Applicant since his arrest persuade me that he has done everything within his power to rehabilitate himself and ensure that there will not be a recurrence of the November 1995 episode. Criterion G is concluded for 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 J) 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

### **DECISION**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant's security clearance.

**John R. Erck**

**Administrative Judge**

1. The record discloses that there were five rounds of ammunition in the magazine, but does not disclose if a round had been chambered (p.3, Item # 6 of Gov. FORM).
2. The owner of the motorcycle had been "showing the victim how the choke on the bike was used" at--or immediately before--the time the assault occurred (Item # 6 Gov. FORM). The owner was not the victim of the assault.
3. It is not clear what medications were prescribed for Applicant at the time he was discharged from this facility. Two months later when he entered his plea of *nolo contendere* (Item # 8 of Gov. FORM), Applicant was taking procardia, zocor, prinivil, synthorid, glyburide, and lithium.
4. Mr. Z's notes were prepared on December 18, 1995, 10 days after Dr. X wrote his letter to the County Judge, Item # 9 of Gov. FORM).
5. According to Item # 9 of Gov. FORM, Applicant was considering reconciliation at the time of his arrest. The address on Item 2 is different from his address on the two Sheriff's Reports (Items # 6 & 7 of Gov. FORM); it is the same address as when he completed his National Agency Questionnaire in May 1993 (See Item # 4 of Gov. FORM).