

DATE: January 22, 1998

In Re:

SSN:

Applicant for Security Clearance

ISCR Case No. 97-0347

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Department Counsel

FOR APPLICANT

Leonard A. Nahajski, Esquire

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, as amended by Change 3, issued a Statement of Reasons (SOR), dated May 19, 1997, to the Applicant that detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the interests of national security 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, denied or revoked.

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

On June 13, 1997, Applicant responded to the allegations set forth in the SOR and requested a hearing before a DOHA Administrative Judge. This case was assigned to me on August 13, 1997. A Notice of Hearing was issued on September 18, 1997, scheduling the hearing for October 7, 1997, on which date the hearing was conducted. The Government called Applicant as part of the Government's case, but presented no other witnesses. The Government offered 17 exhibits into evidence, by stipulation with Applicant's counsel. Applicant testified on his own behalf, but presented no other witnesses. Applicant submitted four exhibits at the hearing (A-D), and one other exhibit, after the hearing, pursuant to a stipulation between the parties (Ex E). [\(U\)](#) I received the transcript on October 20, 1997.

FINDINGS OF FACT

After a thorough review of all of the evidence in this case, including Applicant's responses to the SOR, and upon due consideration of all of the evidence in the case record, this Administrative Judge makes the following findings of fact as to the Criterion G (Alcohol Consumption), and Criterion J (Criminal Conduct) allegations in the SOR:

- Applicant is 35 years old and is employed as an Electronics Technician by a defense contractor.
- Applicant consumed alcohol from about 1975 to at least September 1996. At times, during the cited period, he consumed alcohol to excess and to the point of intoxication.
- Applicant was arrested on January 29, 1983, in state A, and charged with Driving While Intoxicated (DWI). He

- pleaded guilty and was sentenced to pay a fine of \$375.50, serve one year in jail, with 364 days suspended and ordered to attend Alcohol Information School for one night per week for four weeks.
- Applicant was arrested on November 21, 1987, in state A, and charged with (1) Driving While Under The Influence, (2) Hit and Run Unattended, and (3) Simple Assault. Count (1) was amended to allege Negligent Driving, to which Applicant pleaded guilty, and was fined \$128. Count (2) was dismissed. On Count (3), Applicant was given a 12-month deferred sentence and ordered to pay \$250 in costs, and to complete an Anger Management Program. On March 6, 1989, Applicant was found to have failed the Anger Management Program and was found in violation of his deferred sentence. He was then given a suspended sentence of 24 months, 90 days in jail suspended, and a \$250 fine.
 - Applicant was cited on June 25, 1989, in state A, for "Alcohol in Park." He had been drinking beer with a friend in a public park, and had more beer in a bag when approached by the police.
 - Applicant received treatment, from December 1, 1993 to December 23, 1993, at a clinic in state B, in an inpatient Alcohol Program. Upon discharge, Applicant was referred to a "Recovery Center" in state A for continuing care services for his alcoholism. He was first seen at the "Recovery Center" on December 28, 1993.
 - Applicant was arrested on May 31, 1996, in state A, for (1) Assault Fourth Degree - Domestic, and (2) Harassment - Domestic Violence. On June 5, 1996, Count (3) Malicious Mischief was added. Applicant was found guilty of Counts (1) and (2) and was sentenced to serve 365 days in jail, with 305 days suspended, to pay a \$300 fine, to complete two years probation, to serve 60 days in jail with home detention authorized, and to complete alcohol treatment and domestic violence treatments programs. Applicant told his probation officer on October 3, 1996, that he had been drinking alcohol prior to the incident that resulted in his arrest.
 - Applicant was cited on September 17, 1996, in state A, for "Aiming or Discharging a Firearm in a Public Place." He was granted two years deferred prosecution, and was ordered to complete an alcohol treatment program. Applicant told his probation officer on October 3, 1996, that every time Applicant had been involved with law enforcement, he had been drinking alcohol.
 - Applicant received treatment from September 21, 1996 to September 23, 1996, at a hospital in state A, for Alcohol Detoxification. The diagnosis was, in part, Alcohol Dependency and Alcohol Liver Disease. Applicant was released directly into the alcohol/drug recovery center at the hospital and was discharged from there on October 4, 1996.
 - Applicant was referred back to the same "Recovery Center" in state A where he had been treated in December 1993, for continuation of an "intensive outpatient program and relapse prevention program." Applicant then entered a two-year chemical dependency program on July 3, 1996. Applicant entered Phase II of the program on November 4, 1996, and has continued in treatment
 - Applicant was arrested on March 18, 1989, in state A, and charged with Possession of marijuana. He was found guilty, given a three-month deferred sentence, and was fined \$75. On September 15, 1989, a bench warrant was issued due to Applicant's failure to pay the fine. Applicant thereafter paid the fine plus additional fees totaling \$150.
 - Applicant was arrested on January 5, 1990, in state A, for "Assault 4th Degree. He was found guilty, and was sentenced to serve 30 days in jail, suspended, to pay a fine of \$1,000 with \$300 suspended, and was awarded two years probation.

POLICIES

General Policy Factors (Whole Person Concept)

The adjudication process established by DOD Directive 5220.6 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 that 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 circumstances or consequences involved; the age of the Applicant; the presence or absence of rehabilitation; the potential for coercion or duress; and the probability that the conduct will or will not recur in the future. (Directive 5220.6, Section F.3., as expanded in Enclosure 2, at page 2-1). I have considered and assessed each of the above factors in my overall evaluation of Applicant's security clearance suitability.

Each security clearance case presents its own 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. Even though 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 poor judgment, irresponsibility or emotionally unstable behavior.

Specific Criterion Factors

In addition to the General Guidance discussed above, an Administrative Judge must also evaluate the evidence under the specific Additional Procedural Guidance found at Enclosure 2 of the Directive (in this case, Criteria G and J). Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

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 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; and
- (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:

- (3) positive changes in behavior supportive of sobriety;
- (4) following diagnosis of alcohol abuse or alcohol dependence, the individual has successfully completed inpatient or outpatient rehabilitation along with aftercare requirements, participates frequently in meetings of AA or a similar organization, abstained from alcohol for a period of at least 12 months, and received a favorable prognosis by a credentialed medical professional.

Criminal Conduct (Criterion J)

A history or pattern of criminal activity creates doubts about a person's judgment, reliability, and trustworthiness.

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

- (1) any criminal conduct, regardless of whether the person was formally charged;
- (2) a single serious crime or multiple lesser offense.

Conditions that could mitigate security concerns include:

- (5) there is clear evidence of successful rehabilitation.

In addition, 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 by the Directive, the

Administrative Judge can only draw those inferences and conclusions that 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.

A person who seeks access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. When 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 or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the 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.

An Applicant's admission of the information in a specific allegation relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reason. In this case, Applicant's response to the SOR admits (with explanations) all of the allegations in the SOR, except for allegation 1.i., to which he did not respond.

Once the Government meets its initial burden of proof (by an Applicant's admissions and/or by other evidence) and establishes conduct that creates security concerns under the Directive (which I find to be the case), 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 conduct that falls within a specific criterion in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the Applicant.

CONCLUSIONS

In his response to the SOR, Applicant admitted all of the allegations in the SOR, except for 1.i., to which Applicant did not respond. Allegation 1.i. refers to Applicant's entry into a two-year chemical dependency treatment program on July 3, 1996. The totality of the record evidence, including applicant's hearing testimony, supports this allegation, and Applicant has not denied it. On this basis, all of the SOR allegations are found to be accurate.

Since security clearance eligibility is necessarily based on an Applicant's entire character, as demonstrated by conduct on and off the job, I also find there is a nexus or connection between the proven allegations of Applicant's history of serious misconduct in his personal life and his eligibility for security clearance. The question remains whether Applicant has adequately mitigated or extenuated the impact of the Government's case.

The substance of Applicant's history of problems with alcohol, his inability to control the temper that led to acts of anger and violence, and the facts and circumstances of his treatments and subsequent conduct, is clearly established by the record evidence. This 35-year-old Applicant began drinking alcohol at the age of "13 or 14" and "alcohol became a part of [his] life at about age 19 or 20" (Sworn Statement to DIS, December 18, 1996, Exhibit (Ex) 2 at 1). While there were "sometimes periods of months when [he] did not drink, when [he] did drink during the week, [he] usually consumed six to eight beers and, when [he] drank on the weekend, [he] might consume a 12 pack or more" (Id. at 2). As Applicant got older, the effect of the alcohol use was "one of depression" and "intoxication is having your thoughts impaired" (Id. at 2). As of November 1996, Applicant had been "intoxicated [100 times] in [the previous] year" (Ex 4).

Applicant's problems have generally involved alcohol and/or anger. Applicant claimed in his December 1996 sworn statement to DIS (Ex 2) that his last two problems with law enforcement (the May 1996 assault arrest involving his girlfriend and the September 1996 citation for firing a shotgun in a public place) did not involve alcohol (Id. at 2). However, at the hearing, Applicant admitted that he had been drinking earlier in the day of his assault arrest and "may still have had some alcohol in [his] system" when he went to his girlfriend's house around midnight and the assault occurred (Transcript (Tr) at 51). Moreover, a report from the domestic violence program, dated November 1, 1996, contains the statement that the assault occurred after Applicant called his "girlfriend. I asked her if she had another guy over there. She answered affirmatively . . . *I'd been drinking and I decided to go and talk to her. I was angry when I got to her house*" (Ex 4) (Emphasis added). The officer's report attached to the court documents indicates damage to the

door to victim's home (Ex 7).

As to the firearms violation, Applicant claimed he was just demonstrating his shotgun to a friend, by firing it into the ground near his home, which he says was in a rural area within the city limits (Ex 2). However, the police report indicates that several neighbors heard the shots and one neighbor called the police. When the police arrived, they found that Applicant had been shooting at furniture, which was seen to be damaged (Ex 4).

In context, these discrepancies add to the doubts that have arisen as to Applicant's reliability,

trustworthiness, and credibility. The hearing testimony and the documentary record establishes that this 35-year-old Applicant has a long history of acts of poor judgment that has brought him into contact with the law on seven known occasions, in 1983, 1987, 1989 (twice), 1990, and 1996 (twice). Most of the arrests (except for the 1989 marijuana arrest) occurred shortly after Applicant had consumed alcohol.

Judging from this factual history, and considering that Applicant is still only in his mid-30s, the evidence compels the conclusion that Applicant's misconduct is part of his overall character, and is not simply an aberration in an otherwise stable mind set and lifestyle. Applicant underwent treatment in 1993 and is still in treatment (beginning in mid-1996) for his alcohol abuse and to help him control his anger (Applicant had previously received anger management counseling in 1989 (Ex 11). Applicant is still on probation for his 1996 assault conviction. By any definition of security clearance worthiness, in the absence of clear evidence of rehabilitation, Applicant's conduct and problems have made him a questionable candidate for holding a security clearance.

Mitigation and Extenuation

Having concluded that the Government has proved a *prima facie* case and the existence of a nexus or connection between the proven misconduct in his private life and his security clearance eligibility, the question remains as to whether Applicant has carried the heavy burden of demonstrating rehabilitation to the extent that his any doubts about his integrity, judgment, reliability, and trustworthiness have been put to rest.

On this basis, I have carefully analyzed all of Applicant's testimony and exhibits (Ex A-E) *and* all of the Government exhibits. Ex C is a collection of awards and commendation given to Applicant during the period from 1989 to 1997. Ex D is a two-page resume of Applicant's work history, education, and licenses and certificates. Ex E consists of Applicant's October 1997 SCA and 1993 NAQ.

Although Exhibits C, D, and E are helpful in providing background information, Exhibits A and B speak most strongly to the issue of Applicant's rehabilitation, judgment, reliability, and trustworthiness. Of greatest interest on the issue of Applicant's present eligibility for access to classified information is Exhibit A, which is a letter, dated October 1, 1997 (a week prior to the hearing date), from the Recovery Center in state A, at which Applicant has been receiving outpatient treatment since July 1996. The letter references Applicant's earlier 21-day inpatient treatment in state B in 1993, after which applicant remained sober for only eight months before beginning to drink again.

The fundamental unresolved issue is whether Applicant has adequately demonstrated that the alcohol abuse, and outbreaks of anger and violence, are either cured or in remission, and that if the latter, that they are not likely to recur. Part of Government Exhibit 3⁽²⁾ is an Admitting Diagnosis (on September 21, 1996) of Chemical Dependency and a Discharge Diagnosis (on September 23, 1996) of "1. Alcohol Dependency and 2. Alcohol :Liver Disease." The M.D., who was the "Admitting Physician," assessed Applicant as suffering from "1. Alcoholism, [and] 2. Alcohol Dependence." The most recent part of the exhibit is a December 17, 1996 cover letter from a "CCDC," which I accept as meaning "Certified Chemical Dependency Counselor" (Tr at 149). This letter finds Applicant's "progress to be . . . good as indicated by [his] participation in group and educational sessions; by [his] attendance at 12-step meetings; and [his] obvious and demonstrated commitment to recovery." The remainder of Exhibit 3 consists primarily of unsigned notes about Applicant, his statements and condition.

Applicant's Exhibit A is a subsequent letter from the same recovery Center, dated October 1, 1997 (a week prior to the hearing). Signed by one of the CCDCs who was one of the signers of the 1996 Exhibit 3, the letter recites Applicant's

"suffer[ing] from the disease of alcoholism" as his entrance diagnosis in 1996, and goes on to state that: "in the last twelve months, [Applicant has made] excellent progress toward meeting his treatment goals and has shown a marked change in attitude and lifestyle." The author of the letter also sees an improvement in Applicant's personal life, as well as his job performance and cites Applicant's ending of destructive relationships, as well as continuing participation in AA. Applicant has now completed Phases I and II of the program and entered the third and final phase on June 16, 1997. This phase includes regular and random urinalysis both at the Recovery Center and at work. The author cites Applicant's intention to shortly enter a Relapse Prevention Group, in addition to his regular treatment, and the existence of a strong support system for applicant. The letter concludes by expressing the author's belief that "the likelihood of [Applicant's] returning to drinking at anytime in the future appears to be negligible and highly unlikely" (Ex A). However, as Department Counsel pointed out (Tr at 129), to the degree that Applicant has shown "indications of positive change," he showed the same indications after completing his 1993 treatment, but he began drinking again within a year.

Ex B is a letter, also dated October 7, 1997, from Applicant's work supervisor. The author states that Applicant had "informed [him] of the disease of alcoholism and was seeking professional help. . . Since his return [to work, after the inpatient treatment], Applicant has shown that he is still a valued employee. . . [and] is very trustworthy, honest, and very aware of security requirements."

Government Exhibit 3 and Applicant's Exhibits A and B are impressive testimony of Applicant's progress. However, Applicant is still on criminal probation, until September 1998 (Tr at 104), and continues to undergo treatment and random drug testing by his employer. Under these circumstances, it is impossible to ascertain, with any degree of certainty, whether Applicant has been genuinely rehabilitated or if he is simply responding to the possible consequences to his job and to his freedom, if he falls back into past patterns of misconduct (Tr at 105). This is not to say that Applicant's character may not have changed dramatically, despite his still being on probation and undergoing counseling. However, I am compelled, by the totality of the evidence, to conclude that it is simply too early to have the required level of confidence in Applicant's ability to properly handle the nation's secrets.

In summary, the record evidence clearly establishes that each of the allegations in the SOR is correct and that all of the Disqualifying Factors cited above are applicable. At the same time, nothing Applicant has said or done has adequately demonstrated either (1) an understanding of the concerns his history and pattern of misconduct have caused the Government in the context of his eligibility for access to classified information or (2) his rehabilitation from his abuse of alcohol and the serious effects of the anger-related problems that have recurred in the past. On this basis, I conclude that none of the possible Mitigating Factors found in the Additional Procedural Guidance provisions for Criteria G and J found in Enclosure 2 of the Directive are supported by evidence sufficient to overcome the weight of the Government's case.

For example, while Criteria G MFs (3) and (4) may apply in principle, I finally conclude that there is not yet enough evidence of demonstrated positive changes in behavior supportive of sobriety (MF (3)). I also conclude that as to MF (4), there is not yet enough evidence that Applicant has "successfully completed inpatient or outpatient rehabilitation along with aftercare requirements." As stated above, this is not to say that an individual can never qualify if still on probation or undergoing continuing counseling, attending AA, etc. In this case, the evidence compels the conclusion that Applicant has had serious and longstanding problems that, as logic and experience indicate, take significant time and care to overcome to the point of being worthy of the Government's confidence.

As is required by Executive Order 10865, I must make an "affirmative finding" that Applicant is eligible for access to the nation's secrets. This I cannot now do. There is still some doubt as to Applicant's ability to control his temper and his abuse of alcohol. As required by the Supreme Court, in Egan, supra, these doubts must be resolved against 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 H 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

Subparagraph 2.c. Against the Applicant

Subparagraph 2.d. Against the Applicant

Subparagraph 2.e. Against the Applicant

Paragraph 3. Criterion J Against the Applicant

Subparagraph 3.a. Against the Applicant

Subparagraph 3.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.

BARRY M. SAX

Administrative Judge

1. Exhibit E consists of copies of Applicant's May 28, 1997 Security Clearance Application (SCA) and September 1, 1993 Personnel Security Questionnaire (PSQ). I received the transcript on October 20, 1997.

2. Of the documents in this exhibit, several are signed by an M.D., a D.O., and two CCDCs (Certified Chemical Dependency Counselors (Tr at 149). The last individuals do not qualify as "credentialed medical professionals," as that term is used in Disqualifying Factors (DF) (3) and (5) and Mitigating Factor (MF) (4). Other documents in these exhibits are unsigned. Exhibits A and 3 have been considered and evaluated both under the cited DFs and MFs(4) *and/or* the generic provisions of Section F.3.(a) - (f) of the Directive, at page 7.