DATE: January 15, 1998

In Re:

Applicant for Security Clearance

ISCR Case No. 97-0399

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Department Counsel

FOR 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, as amended by Change 3, issued a Statement of Reasons (SOR), dated July 1, 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 July 16, 1997, Applicant responded to the allegations set forth in the SOR and requested a hearing before an Administrative Judge. This case was assigned to me on September 9, 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. This Administrative Judge 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 E (Personal Conduct), Criterion J (Criminal Conduct), and Criterion G (Alcohol Consumption) allegations in the SOR:

* Applicant is a 65-year-old Senior Principal Engineer who works for a major defense contractor (Exhibit(Ex)1). He has had a security clearance for 37 years. (Response to the SOR).

* Applicant has consumed alcohol from approximately 1970 to the present. On occasion, he consumed alcohol to excess and to the point of intoxication.

* Applicant has been arrested and convicted four times for alcohol-related offenses:

(1) He was arrested in 1975 or 1976, in state A, and charged with Driving Under the Influence of Alcohol (DUI). He was fined $125.

(2) He was arrested in January 1983, in state A, and charged with DUI. He was found guilty, placed on three years probation, fined approximately $250, and referred to an alcohol clinic.

(3) He was arrested in June 1984, in state B, and charged with DUI. He pleaded guilty, was fined $404.50, and placed on probation.

(4) He was arrested on April 22, 1995, in state B, and charged with DUI. He forfeited bond of $505.

* Applicant falsified material facts on a Personnel Security Questionnaire (PSQ), dated March 9, 1990. Specifically, as to Questions 17.a ("Have you ever been arrested . . ."?); 17.b. ("Have you ever been convicted . . ."); 17.c. ("Have you ever been detained . . .?"); and 17.d. ("Have you ever been, or are you now, under suspended sentence. . .?"), Applicant answered "No" to all three questions, when he knew that he had been arrested in 1975/1976, 1982, and 1984, as cited above in (1), (2), and (3).

* Applicant falsified additional material facts on his March 9, 1990 PSQ. Specifically, as to Question 18.c. ("Has your use of alcoholic beverages ever resulted in your . . . arrest by police?"), Applicant answered "No," when he knew that he had been arrested on alcohol related charges, in 1975/1976, 1983, and 1984, as cited above in (1), (2), and (3).

* Applicant falsified material facts on his August 26, 1996 Security Clearance Application (SCA). Specifically, as to Question 24 ("Have you ever been charged with or convicted of any offenses related to alcohol or drugs?"), Applicant answered "Yes," but cited only the 1984 DUI arrest in state C for DUI. He knowingly did not mention the 1975/1976, 1982, and 1995 arrests.

* Applicant's false answers to Questions 17.a., 17.b., 17.c., 17.d., and 18.c., on the March 1990 PSQ and to Question 24 on his August 26, 1996 SCA were deliberate, and therefore violated the relevant provisions of the Directive, but were not made with the intent to deceive, and therefore did not violate the criminal provisions of 18 U.S.C. 1001.

POLICIES

General Policy Factors (Whole Person Concept)

The adjudication process established by DOD Directive 5220.6 is based on the "whole person" concept established in the Directive. 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 E, J, and G).

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

Personal Conduct (Criterion E)

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;

(5) A pattern of dishonesty or rule violations.

Conditions that could mitigate security concerns include:

(2) The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily;

(3) The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts;

(5) The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or pressure.

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:

(1) The criminal behavior was not recent;

(2) The crime was an isolated incident;

(5) There is clear evidence of successful rehabilitation.

Alcohol Consumption (Criteria G)

Excessive alcohol consumption often leads to the exercise of questionable judgment,

unreliability, failure to control impulses, and increases the 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 under the influence. . . ;

(4) Habitual or binge consumption of alcohol to the point of impaired judgment.

Conditions that could mitigate security concerns include:

(1) The alcohol-related incidents do not indicate a pattern;

(2) The problem occurred a number of years ago and there is no indication of a recent problem; and

(3) positive changes in behavior supportive of sobriety.

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. If the Government meets its burden (by an Applicant's admissions and/or by other evidence) and establishes conduct that creates security concerns 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 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

I note in this case that Applicant, in his response to the SOR, admitted the four alcohol-related arrests, in 1975/1976, 1982, 1984, and 1995. At the same time, he denied the allegations that he falsified material information in his 1990 PSQ and 1996 SCA (1.a, 1.b., and 1.c.). He also denied that his omission of specific information from the PSQ and SCA constituted violations of 18 U.S.C. 1001 (2.a.) and the allegations concerning his excessive consumption of alcohol (3.a., and 3.b.). In his hearing testimony, Applicant indicated that he was actually denying the "knowing" or "intent" aspect of the falsifications, rather than the fact that his answers to the Criteria D and E allegations were untrue (Transcript (Tr) at 49-52).

Having considered the evidence of record in light of the appropriate legal standards and factors, and having assessed the credibility of Applicant's testimony, I conclude that the Government has established its case as to all SOR Criterion E, J, and G allegations. I also find there is a nexus or connection between the proven allegations and Applicant's eligibility for security clearance, since security clearance worthiness is a twenty-four-hour a day, seven day a week requirement. The question remains whether Applicant has adequately mitigated or extenuated the impact of the Government's case. For the reasons discussed below, I conclude that Applicant has adequately demonstrated mitigation or extenuation.

Falsifications

As to the falsifications alleged in the SOR, Applicant's defense is that they were "done accidently" in that he "mis-read the questions and thought that new information was being asked for"(Response to the SOR). Applicant added that, "when questioned by the investigator, I supplied the information that is included" in the SOR. I never sought to conceal anything from the investigators. I have always provided s all information required. I misunderstood and erred if I actually said "No" to those questions. My recollection is that I had said Yes and the investigator asked for further information with regard to the arrests"(Id.).

Applicant testified at the 1996 hearing that he did not "intend to deceive" or "hide something" from the investigators in 1996 (Tr at 30, 32). He admitted that what he had done was "really stupid"(Tr at 37). Overall, there are only two ways to view what happened. Either Applicant knowingly lied with the intent to deceive the Government in order to obtain the security clearance he sought or he had a lapse of understanding when completing the PSQ and SCA. I note that he was

candid in providing detailed information when questioned by DIS in 1990 (Ex 4) and 1996 (Ex 3). The totality of the evidence leads me to conclude that the Applicant acted carelessly and "stupidly," (using his designation) rather than with an intent to deceive. Applicant testified at the hearing that he was thereafter granted a security clearance later in 1990 (Tr at 26). There is no evidence in the record contradicting this claim.

When he completed his August 26, 1996 SCA, his "Yes" response to Question 24, mentioned only the 1983 arrest and omitted the 1975/1976,1982, and 1995 DUI arrests. When questioned by DIS on February 7, 1997, Applicant did mention and discuss his April 1995 arrest and his three previous DUI arrests, in 1975/1976, 1983, and 1984 (Ex 3). There is no mention in this sworn statement as to why Applicant did not mention all of his DUIs when completing the SCA. At the hearing, Applicant testified that he did not mention the 1995 arrest "because there was no conviction" (Tr at 42), apparently because Applicant had received a citation and resolved the matter by forfeiting the $505 bail without ever appearing in court (Tr at 37, 38, 52). Applicant testified that he did not mention the 1975/1976 and 1982 DUI arrests because he believed that he only had to report arrests within the previous seven years (Tr at 55).

The basis for this belief was apparently that a seven-year period is cited in other Questions, e.g., 19, 20, and 29, although not in the specific language of Question 24, which asks "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?" (Tr at 25-27). There is a clear lapse in Applicant's reasoning on this point. He claims that the language of the SCA "confused me [and] I . . . incorrectly said no, when I should have said yes"(Tr at 26). As with the 1990 sworn statement (Ex 4), when interviewed by DIS in February 1997, Applicant provided extensive information about all of his DUIs (Ex 3).

Applicant's response to the SOR does not contain any explanation of why or how he misread the questions cited above to which he answered "No" on the 1990 PSQ and answered "Yes," but mentioned only the 1983 DUI arrest on his 1996 SCA. At the hearing, however, he clarified the overall sequence of events. As is corroborated by the documentary evidence, when applicant completed his March 9, 1990 PSQ, he did answer "No" to Questions 17.a-17.d., respectively (Ex 2). On October 18, 1990, when questioned by the Defense Investigative Service (DIS), Applicant admitted that he had "failed to list the following arrests [in March 1976, January 1983, and June 1984]." He then provided details of the circumstances of each arrest and why he did not mention them in the PSQ (Ex 3).

As to the 1996 SCA, the crucial questions are (1) whether Applicant knew about the information omitted, to which I conclude the answer is yes; (2) whether Applicant acted intentionally, rather than accidentally or negligently, to which I also conclude the answer is yes; (3) whether the omissions were "knowing and willful," as that term is used in 18 USC 1001; and (4) whether the information omitted was "material."

I note that Applicant provided to DIS in 1990, the information about the 1975/1976 and 1982 DUIs that were omitted from Applicant's 1996 SCA. Since that information had already been provided by Applicant to DIS, there seems little likelihood that its omission from the 1996 SCA was intended by Applicant to deceive anyone. Applicant's explanation about what he believed to be a seven year reporting period, is difficult to accept, but his contention is supported by his testimony that he reported the 1984 DUI (within seven years) while omitting the two earlier DUIs which, in 1990, were beyond the seven-year period Applicant thought to be controlling.

Likewise, his explanation for the omission of the 1995 DUI from the 1996 SCA is that he thought the incident did not "constitute an arrest because it was not a conviction" (Tr at 38). According to Applicant, he had consumed "five beers" at a bar and was stopped at an "ID roadblock on [his] way home. [He] was taken to the police station, held for an hour, and released with bail," which he paid for using a credit card (Ex 3 and Tr at 43, 44). He could not make the court appearance and resolved the matter by forfeiting the bail (Tr at 43, 44).

Based on my evaluation of all the record evidence, I conclude that Applicant did not intend to deceive the Government when he omitted the cited information about the 1995 DUI, and that the material omitted about the 1975/1976 and 1982 DUIs was no longer "material" because the information had already been provided to DIS in 1990. The fact that he admitted the 1985 DUI in his 1995 SCA, but not the others, suggests a lack of attempt to deceive. There seems little to be gained by Applicant in admitting one DUI but not the others, since Applicant must have known that a record check would likely have turned up the other arrests.

Alcohol Consumption

Applicant's four DUIs are certainly a serious factor in determining his security clearance eligibility. I evaluated the facts of the April 1995 DUI by itself and in connection with Applicant's past alcohol-related activity. Applicant is a 65-year-old man and should certainly know better than to drink and drive. At the same time, his fourth and last DUI occurred about 11 years after the third offense, 13 years after the second offense, and 21 years after the first offense.

There is no evidence that Applicant has been diagnosed as an alcoholic or alcohol abuser, although he had clearly abused alcohol on the occasions on which he was arrested. Applicant began drinking while in the U.S. Navy in about 1951 and admitted that he drank to excess on the occasions of his arrest (Tr at 47). He continues to drink in moderation. His last drink prior to the hearing was "a wine at home" on the previous weekend (Tr at 46).

These circumstances of the DUIs and falsifications, as discussed in the two sworn statements (Ex 3 and 4) and at the hearing, are considered in the context of a driving history of four to five decades and the apparent lack of any other substance abuse or other legal problems. Although each DUI, individually and collectively, reflected extremely poor judgment on his part, when evaluating them in late 1997, with the last DUI being some two years and nine months prior to the hearing, I conclude they do not constitute a currently continuing history or pattern of alcohol abuse.

In the context of his long life and the absence of any indication of other alcohol-related problems, including his driving history, I conclude that the four DUIs, although clearly serious and demonstrating poor judgment at the time, do not constitute "habitual or episodic consumption of alcohol to the point of impairment or intoxication" as cited in Alcohol Abuse Disqualifying Factor (DF) 1, specifically as that term is used in evaluating an individual's present security clearance worthiness.

Mitigation and Extenuation.

The purpose of the security clearance process that has concluded with these proceedings has always been not one of punishment but, rather, to predict likely future behavior based on past conduct *and* what has been learned as a result of the investigation and the hearing. In this light, while it is difficult to understand how Applicant could reasonably have responded to the 1990 PSQ and 1996 SCA in the manner revealed by the record evidence, it does not necessarily follow that he is likely to repeat the mistake in the future.

I have carefully considered what we know about Applicant's entire life, as is required by the "whole person" concept cited in the Directive. Applicant is now 65 years old. His professional life has been one of considerable achievement, as is made evident by the contents of the letters, memos, and other documents that comprise Ex B. While the documents from his professional colleagues do not directly address Applicant's relationship to classified information and material, it is clear that his competence and work ethic in dealing with predominantly military programs are held in high regard by both corporate and DoD officials. Ex A describes his history of recognition for his achievements and his leadership capacity, from at least 1987 until at least 1997.

His 37-year work history involving classified DoD programs shows impressive accomplishments. At the same time, there is an absence in the record evidence of any suggestion of problems dealing with Applicant's handling of classified information. In the context of this time span and otherwise praiseworthy career, I conclude that Applicant's four DUIs and two incidents of falsifying information about the DUIs, although obviously serious, are aberrations and not a substantive part of Applicant's overall character.

Individuals of Applicant's level of education and employment are not the norm in DOHA proceedings, but neither are they unusual. What is unusual is the combination of Applicant's age, accomplishments, and the cited alcohol-related misconduct that occurred in1975/1976, 1982, 1984, and 1995 (plus the falsifications in 1990 and 1996). The written record contained in the transcript does not entirely reflect Applicant's demeanor at the hearing. While Applicant's intelligence was evident, it also appeared to me that Applicant may have fallen into the trap of not fully considering the overall consequences of his past errors.

During the hearing, I observed a growing reaction from Applicant that showed concern and at least he beginning of a fuller understanding of his predicament. I conclude that if applicant did not understand the consequences of his errors in the past, he was compelled to do as a result of the conclusion of the hearing. In addition, his high level position and the

knowledge about his past problems by his company give him a great deal of incentive to avoid future relapses. Given the nature of his past misconduct and the consequences that have resulted therefrom, I find it unlikely that Applicant will allow himself to drink alcohol and drive in the future. Likewise, whatever was in Applicant's mind when he responded to the alcohol-related questions in the PSQ and SCA, I conclude Applicant is unlikely to misunderstand the question or respond improperly in the future.

In summary, I conclude that the Government's evidence provides *prima facie* support for each of the SOR allegations, but that Applicant's testimony and documentary evidence substantially explain, mitigate and/or extenuate the seriousness of the government's evidence in the context of his present judgment and reliability.

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 E For the Applicant

Subparagraph 1.a.(1) For the Applicant

Subparagraph 1.a.(2) For the Applicant

Subparagraph 1.a.(3) For the Applicant

Subparagraph 1.b. For the Applicant

Subparagraph 1.c. For the Applicant

Paragraph 2. Criterion J For the Applicant

Subparagraph 2.a. For the Applicant

Paragraph 3. Criterion G For the Applicant

Subparagraph 3.a. For the Applicant

Subparagraph 3.b. For the Applicant

DECISION

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

BARRY M. SAX

Administrative Judge