

DATE: October 14, 1997

In re:

SSN: -----

Applicant for Security Clearance

ISCR OSD Case No.97-0410

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR THE GOVERNMENT

Michael H. Leonard, Esq.

Department Counsel

FOR THE APPLICANT

Pro se

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended by Change 3, issued a Statement of Reasons (SOR) dated June 6, 1997, 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 June 24, 1997, Applicant responded to the allegations set forth in the SOR and requested that his case be determined on the written record in lieu of a hearing. To his Answer, he attached a personal statement, letters of professional recommendation, and his performance evaluations. The Government submitted its File of Relevant Material on July 15, 1997, a copy of which was forwarded to Applicant with instructions to submit material in explanation, extenuation or mitigation within thirty days of receipt. Applicant elected not to file a response and the case was assigned for resolution to Administrative Judge Paul J. Mason on September 24, 1997. The following day, the case was transferred to the undersigned due to workload considerations.

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 29 year old senior engineer who has worked for his current employer (company A), a defense contractor, since June 18, 1990. He possesses a Secret security clearance which was granted to him on November 28, 1990, for his duties at company A. Applicant's employer requests Applicant be granted a Top Secret collateral clearance in connection with a special access program.

Applicant has consumed alcohol on occasion from about 1987 to at least June 1997. His drinking over this time frame has caused him legal difficulties, as follows:

On May 31, 1987, Applicant was arrested along with two companions in a local resort area and he was charged with drinking alcohol in public and minor transporting/carrying alcoholic beverages. The charges were continued without a finding on payment of \$100.00 costs and \$25.00 to the victim witness fund.

During his junior year of college, Applicant was pulled over for speeding on April 23, 1989. Smelling of alcohol and exhibiting red and glassy eyes, Applicant was administered field sobriety tests which he failed. Applicant was then arrested for operating under the influence (OUI) and speeding. During an inventory search, the officer discovered Applicant in possession of a driver's license bearing his correct name and address but a false birth date. A charge of falsifying motor vehicle document was added. In court on May 18, 1989, the falsifying motor vehicle document was reduced to alteration of driver's license. Applicant pleaded not guilty to all charges but was found to have admitted sufficient facts. Convicted of OUI, he was sentenced to one year probation (to May 7, 1990), to 45 days loss of driver's license, to pay \$25.00 to the victim witness fund, and to attend a sixteen week driver alcohol education program. The alteration of driver's license charge was continued without a finding to August 7, 1989 and the speeding charge was filed. Applicant completed the driver alcohol education program as required.

While on vacation on July 30, 1994, Applicant was cited with public drinking outside of the hotel where he was staying. He pleaded nolo and paid a \$100.00 fine.

On April 6, 1997, police working paid detail outside of a local nightclub observed Applicant step in front of oncoming traffic in the road. From the strong odor of alcohol on Applicant's breath, Applicant's unsteady gait and his need for assistance to stand up, the officer determined Applicant was intoxicated. Applicant was placed in protective custody for public drunk and retained in jail overnight. He thought his detention overnight was undeserved as he was only attempting to hail a taxi for a ride home.

Applicant was continuing to consume alcohol as of June 1997. He regrets the aforesaid alcohol-related incidents, especially the 1989 OUI.

Applicant has not allowed his off-duty use of alcohol to negatively impact his job performance at company A. Regarded as a talented and dedicated engineer, Applicant's work has consistently been rated as excellent. Twice awarded fellowships to pursue graduate studies, he has earned two Masters Degrees in engineering-related disciplines since commencing his employ with company A. Applicant holds two company patent awards.

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 under the influence. . .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:

(1) the alcohol related incidents do not indicate a pattern

* * *

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

Burden of Proof

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

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

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, this Administrative Judge concludes the following with respect to criterion G:

Applicant has a record of four alcohol-related incidents: the May 1987 drinking in public while still a minor, the April 1989 OUI, the July 1994 drinking in public and the recent April 1997 public drunk. Only in the cases of the OUI and public drunk is it clear that Applicant consumed alcohol to impairment.⁽¹⁾ While underage drinking is not condoned, there is no evidence in the record that Applicant was inebriated when he was caught with alcohol as a minor on May 31,

1987. Applicant submits in connection with the July 1994 public drinking, he was given a ticket along with many others. Notwithstanding he apparently was in violation of local laws or ordinances for drinking in public in front of his hotel, the Government did not prove that Applicant consumed alcohol to excessive levels on that occasion either. Applicant's OUI and public drunk offenses raise legitimate security concerns under Criterion G, however. Those to whom classified information is entrusted must be relied on to safeguard this material both during business and non-business hours. Ingestion of alcohol to the point of intoxication is incompatible with this duty due to the obvious potential for intentional or inadvertent disclosure when Applicant is under the influence. The nexus between Applicant's abusive use of alcohol and his fitness for access to classified information is not attenuated, moreover, by the fact his drinking has not negatively impacted his work performance.

In assessing the aforesaid security significance of Applicant's abusive use of alcohol, this Administrative Judge must consider the adjudicative guidelines set forth in Enclosure 2 to the Directive. Under the pertinent policy pertaining to alcohol consumption, disqualifying factor (DF) 1. (alcohol-related incidents) is applicable. Whereas the evidence supports findings that Applicant was intoxicated on the occasions of his 1989 drunk driving offense and the 1997 drunk in public, he is also deemed to have engaged in binge drinking on at least two occasions to the point of impaired judgment under DC 4. (2) Applicant's drunk driving is viewed as especially serious for it reflects a disregard for the health and safety of others. The public drunkenness is of particular concern because it occurred when Applicant was no longer a student, but instead gainfully employed as a senior engineer with significant security responsibilities.

In mitigation, the evidence of excessive drinking is limited to these two offenses. While Applicant has a record of repeated alcohol-related incidents, there is not enough of a pattern to the incidents to indicate a drinking problem. With the record silent as to quantities and frequencies consumed by Applicant, this Administrative Judge is left to conclude that the abuse of alcohol is an aberration. There is no evidence of Applicant reporting to work under the influence. Applicant indicates he informed his management when his security suitability was called into question. Whereas Applicant desires to retain his employment, it is not likely that he will jeopardize his job by abusing alcohol in the future. The fact that Applicant continues to consume alcohol is not itself security disqualifying. Nothing in Executive Order 10865 or the Directive prohibits drinking *per se*. While the favorable recommendations of his co-workers and supervisors are not controlling, there is nothing in his record which suggests Applicant would be unable to maintain responsible drinking in the future. Favorable findings are warranted as to subparagraphs 1.a., 1.b., 1.c., 1.d., 1.e. and 1.f. of the SOR.

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

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 regrets the 1989 OUI. While he continues to feel that the officer unfairly detained him following the April 1997 offense since he was trying to hail a taxi, he does not deny the fact of intoxication and recognizes he has no valid excuse.
2. 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).