

DATE: November 18, 1999

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 99-0166

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On May 12, 1999, 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) 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 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 a clearance should be granted, denied or revoked.

On June 7, 1999, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made by a DOHA Administrative Judge on the basis of the written record, i.e., without a hearing. In late August 1999, Applicant received a letter from DOHA stating that the case had been assigned to a DOHA Administrative Judge for a decision. By letter dated September 13, 1999, Applicant indicated a change of mind and requested a hearing before an Administrative Judge.

The case was assigned to me for resolution on September 21, 1999. On September 29, 1999, a Notice of Hearing was issued, setting the matter for October 28, 1999, on which date the hearing was conducted.

At the hearing, the Government did not call any witnesses, but offered 11 exhibits. These exhibits were marked for identification as Government's Exhibits (GX) 1 - 11. Both parties stipulated to the admissibility of all 11 exhibits (Transcript (Tr) at 11, 12) and they were added to the case record. The written stipulation as to the admissibility of the Government's exhibits was marked and admitted into evidence as GX 12. Applicant testified in his own behalf and offered 7 exhibits. These were marked for identification and, without objection by Department Counsel (Tr at 25, 26), were admitted into evidence as Applicant's Exhibits (AX) A - G. The transcript was received at DOHA on November 15, 1999.

The Government opposes the Applicant's request for a security clearance, based on the 21 alcohol-related allegations

under Criterion G (SOR 1.a. - 1.u.) of the attached SOR; 7 personal conduct-related allegations under Criterion E (SOR 2.a.(1), 2.b.(1), (2), (3), and (4), 2.c., 2.d., and 2.e.); and one criminal conduct-related allegation under Criterion J (SOR 3.a.).⁽¹⁾

In evaluating the evidence, in addition to the general guidelines found in Section F.3 of the Directive, and the specific guidelines found in Enclosure 2 to the Directive, I considered the following points: (1) whether the evidence supports each and every SOR allegation; (2) whether the evidence comes within one or more of the Directive's three adjudicative guidelines cited in the SOR; (3) whether the evidence establishes a nexus or connection with Applicant's security clearance eligibility; and (4) whether Applicant has established mitigation and/or extenuation as to any or all of the allegations.

FINDINGS OF FACT

After a thorough review and analysis of Applicant's response to the SOR, in which he "admits" all 21 allegations under Criterion G, and "denies" the remaining allegations; all the hearing testimony and exhibits from both parties; and closing arguments by both parties as to how the record evidence should be viewed, I make the following findings of fact⁽²⁾

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CRITERION G (ALCOHOL)

SOR 1.a. - Applicant consumed alcohol, at times to excess and to the point of intoxication, from approximately 1965 to at least October 1998, as alleged in the SOR. I also find that Applicant's consumption of alcohol to excess and to the point of intoxication has continued up to the present and there is no evidence of an intent to end such conduct (Transcript (Tr) at 64) (Currently one and a half 24-can cases of beer on Thursday night and Friday).

SOR 1.b. and 1.l - Applicant was terminated by his employer in 1982 due to his alcohol-related problems and in 1989 for reporting to work with alcohol on his breath on two occasions.

SOR 1.c. 1.q. and 1.s. - Applicant was arrested on alcohol-related charges in 1982, 1996, and 1997.

SOR 1.d., 1.e., 1.f., 1.g., 1.h., 1.i., 1.j., 1.k., 1.m., 1.n., 1.o., 1.p., 1.r., and 1.t. - Applicant received treatment for alcohol-related problems (diagnosed variously as alcohol dependence, alcoholism, and/or alcohol abuse) in 1984 (twice); 1986 - 1987 (six times); 1989; 1990; 1991 - 1992; and 1996- 1998 (twice). On a number of occasions, Applicant failed to complete the treatment or left against medical advice (SOR 1.f. and 1.m.). On one occasion, Applicant's continued use of alcohol was determined to be a violation of probation (SOR 1.s.).

SOR 1.u. - Applicant continued to consume alcohol after and despite the 14 periods of treatment alleged in the SOR. As of his response to the SOR, Applicant intended to continue consuming alcohol. As of the hearing date, Applicant was still drinking heavily and made no commitment to stop.

CRITERION E (PERSONAL CONDUCT)

SOR 2.a. - Applicant falsified material facts on his May 28, 1998 Questionnaire for National Security Positions (SF 86) in that as to Question 21 by failing to mention his February 1997 treatment for a condition diagnosed, in part, as Post Traumatic Stress Disorder and Major Depression without Psychotic Features.

SOR 2.b. - Applicant falsified material facts in his May 28, 1998 SF 86 in response to Question 23.d. by failing to mention:

- (1) his November 15, 1970 arrest and being charged with Possession of Marijuana.
- (2) his July 13, 1973 arrest and being charged with Possession of Stolen Property and Possession of Dangerous Drugs.
- (3) his March 9, 1992 arrest and being charged with Failure to Obey Traffic Signal, Possession of Marijuana, and

"Exceed Speed."

(4) his December 1982 arrest and being charged with Public Intoxication, as alleged under SOR 1.c.

SOR 2.c. - Applicant falsified material facts in his May 1998 SF 86 (GX 7) at Question 25, by failing to mention his February 14, 1997 treatment for alcohol abuse, as cited in SOR 1.t

SOR 2.d. - Applicant falsified material facts in his October 19, 1998 sworn statement to the Defense Security Service (DSS) (GX 9) by failing to mention the alcohol-related treatments cited in SOR 1.e., 1.f., 1.g., 1.m., 1.n., 1.o., and 1.p.

SOR 2.e. - Applicant falsified material facts in his November 4, 1998 sworn statement to DSS by failing to mention the alcohol-related treatment cited in SOR 1.n., 1.o., and 1.p.

SOR 3.a. - Applicant's falsifications, as cited in paragraph 2, above, violated Title 8 United States Code section 1001.

The record evidence as to the alleged falsifications is not altogether clear. The fact of Applicant's omissions, as alleged under SOR 2.a. - 2.e., is established. The "intent" aspect is not completely clear, as is discussed below.

Applicant is aware of the negative impact his past conduct has on his security clearance eligibility. "He would never [have] applied for or accepted this job I'm filling right now which requires a security clearance if I had known that it required a security clearance" (Tr at 35, 36). Applicant was not aware of the necessity of his competing a SF 86 until he was so advised at work (Tr at 37). Applicant testified as his state of mind at that time:

I went ahead and filled it out. And I filled it out truthfully. But as I filled it out and I read - you know - the questionnaire doesn't leave any room. You know, it makes quite clear what's going on here and what kind of information is wanted. . . . [I had a] sinking feeling, but I went ahead and did it anyway (*Id.*)

Applicant does not deny his drinking history. "I drank seriously for about 20 years. . ." (Tr at 40), particularly since his return from Viet Nam (GX 9). He made a decision to quit drinking in 1990 and underwent a month-long period of treatment in the summer of 1990 (Tr at 40). He did not drink again for about six years (Tr at 41). In mid-1996 he began drinking again and received the Driving While Intoxicated alleged in SOR 1.q. (*Id.*)

His problems are not all alcohol-related. A 1998 medical evaluation (GX 6) shows an admission diagnosis as including Post Traumatic Stress Disorder (PTSD) (apparently related to his service in Viet Nam), alcohol addiction, and "some schizoid personality problems" (GX 6). On that occasion, Applicant also self-referred himself for "anger" and described himself as having problems with a "meaningful relationship" with the opposite sex and maintaining a good relationship with his coworkers (*Id.*). Applicant also considered suicide in early 1997 (GX 9 at 2). Although not separately alleged in the SOR, these problems do have an impact on any analysis of his alcohol-related problems and his suitability for access to classified information. Applicant has a 50 percent disability pension from the VA for his Viet Nam-related PTSD (Tr at 41).

As of October 1998, Applicant was consuming "two cases of beer (24 cans [in] each [case]) over the course of a [two-day] weekend" and he admits feeling "intoxicated every weekend in drinking that amount" and intended to continue drinking unless it became apparent that his job performance was suffering (GX 9 at 3). As of the hearing, Applicant was still consuming beer, but at the slightly lower rate of one and a half cases a weekend and intends to continue consuming alcohol (Tr at 59). He attended AA (Alcoholics Anonymous) for a period of time but is not doing so at the present time, despite his continued heavy drinking (Tr at 59).

Applicant has charted his position in his company (AX A), and is thought highly of by a coworker (AX B). He has received mostly "outstanding" recent job evaluations (AX C and F) and company awards (AX D and E). Applicant has also documented his effort to expunge at least some of his past convictions (AX G).

POLICIES

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, as amended by Change 4, sets forth specific adjudicative guidelines that must be carefully considered according to the pertinent criterion in making the overall common sense determination required.

In addition, each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence. In the present case, none of these nine factors, individually or together, are favorable to Applicant's position.

Because each security case presents its own facts and circumstances, it should not be assumed that the factors cited above 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 specific adjudicative guidelines to be most pertinent to this case:

Condition G (Alcohol Consumption)

The concern of this criterion is that "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;
2. Alcohol-related incidents at work such as reporting to work or duty in an inebriated or impaired condition, or drinking on the job;
3. Diagnosis by a credentialed medical professional . . . of alcohol abuse or alcohol dependence;
4. Habitual or binge consumption to the point of impaired judgment;
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:

None - e.g., the record clearly indicates a pattern (1.); the problem continues to the present (2.); No positive changes in behavior have been demonstrated (1.3.3.); and Applicant has not successfully completed a rehabilitation program *and* abstained from alcohol consumption (1.3.4.).

Condition E (Personal Conduct)

Conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness

to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

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

2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire . . . or similar forms used to . . . determine security clearance eligibility. . . .;

3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator . . . or other official representative in connection with a personnel security or trustworthiness determination;

5. A pattern of dishonesty or rule violation (specifically falsification on SF 86 and in sworn statements and of company rules re alcohol use).

Conditions that could mitigate security concerns include:

4. Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel and the previously omitted information was promptly and fully provided.

Condition J (Criminal Conduct)

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 offenses.

Conditions that could mitigate security concerns include:

None - In particular, Applicant's criminal behavior remains recent and was not an isolated incident (MC (1) and (2)); nor is there any evidence of successful rehabilitation.

Other possible mitigating conditions are not applicable under facts of this case.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination required by the Directive, the Administrative Judge is not permitted to speculate, but 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.

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted on to safeguard classified information and material twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for a security clearance may be involved in conduct that demonstrates poor judgment, untrustworthiness, or unreliability on the part of an Applicant. These concerns include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

An Applicant's admission of the information in specific allegations 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 Reasons. If the Government meets its burden (either by an Applicant's admissions 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 specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the applicant.

A person seeking 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 he or she is nonetheless security worthy. As noted by the U.S. Supreme Court in *Department of the Navy V. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates security clearance determinations should err, if they must, on the side of denials." As I understand the Court's rationale, doubts are to be resolved in favor of the Government.

CONCLUSIONS

Alcohol Consumption

The evidence of Applicant's longstanding abuse of alcohol and the problems caused thereby is overwhelming. Applicant's response to the SOR admits all allegations and his hearing testimony makes it clear that the problem continues, only slightly abated. His March 1999 arrest for public intoxication indicates a continuing lack of good judgment and his failure to commit to future abstinence raises even more questions about his suitability for access to classified material. There is simply no evidence of rehabilitation, or any indication of an understanding of his predicament and the consequences of not conforming his conduct to the requirements of the position for which a security clearance for Applicant is being requested. Applicant's testimony early in the hearing that he knew his alcohol-related problems were not compatible with holding a clearance is not by itself a negative factor but, when considered in the context of Applicant's continuing abuse of alcohol, indicates he has not yet made the decision as to what is more important in his life, i.e., whether working in a job requiring a clearance is more important to him than continuing to abuse alcohol.

Personal Conduct

The falsifications on the SF 86 and his statements to DSS are clearly established, but Applicant's evidence raises some question about whether they were deliberate. As to the omissions on his SF 86, Applicant has consistently claimed he had not remembered the omitted information under Questions 21, 23.d., and 25 because he had either forgotten the information or believed it was covered under his response to other questions (Response to SOR and Tr. at 42, 43). For example, at the hearing, Applicant pointed out that while he had not reported February 1997 treatment under Question 21, he reported it Question 25 (Tr at 43 and GX 7).

As to his sworn statements to DSS, Applicant has consistently claimed that he had simply not recalled the periods of treatments omitted from the sworn statements or believed that he had previously provided the information to DSS (GX 9 10, and 11, Response to SOR).

Applicant also indicted some carelessness that led him to follow the literal differences between the "Have you ever" and the "In the last seven years" language of the Questions. I am not persuaded by this explanation, since he went on to sign the SF 86, certifying the accuracy of the information thereon, but I find significant that Applicant did report some of the treatment dates and other information required. Considering Applicant's treatment history, in which earlier treatments are often listed, a person seeking to conceal his problems does not gain much advantage by listing some treatments and omitting others of the same basic type. This suggests that Applicant was not seeking to deceive and that his omissions were likely not "deliberate," in the sense of being intended to deceive.

Criminal Conduct

For the reasons stated above as to Personal Conduct, I conclude the omissions in questions were not deliberate and therefore do not violate Title 18 U.S.C. 1001.

Under the overall facts and circumstances of this case, I conclude that Applicant has not established mitigation or extenuation of his alcohol consumption problems, *but* has adequately mitigated and/or extenuated the falsification-related personal conduct and criminal conduct allegations. Applicant's exhibits, while helpful, do not address Applicant's continuing alcohol use and abuse of alcohol and do. Applicant's alcohol-related problems, as substantiated by SOR allegations 1.a. - 1.u. are, by themselves, sufficient to disqualify him from holding a security clearance. Under the Directive, Applicant can reapply for a security clearance one year after the date of this decision and would likely be

eligible if he can demonstrate that he has overcome his alcohol abuse.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

GUIDELINE G (Alcohol Consumption) Against the Applicant

Subparagraph 1.a - 1.u. Against the Applicant

GUIDELINE E (Personal Conduct) For the Applicant

Subparagraph 2.a. - 2.e. For the Applicant

GUIDELINE J (Criminal Conduct) For the Applicant

Subparagraph 3.a. For 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. In his response to the SOR, Applicant noted, and I confirmed, errors in a number of SOR allegations, specifically 1.s., 1.u., 2.b., 2.c., 2.d., and 2.e., in that references to previous allegations were miscited. The mistakes and correct references were clear and Applicant had previously detected them, so there was no surprise. Applicant did not object to the amending of the SOR to conform to what all parties agreed was the correct correlation of SOR allegations. The changes correcting the record were made in blue ink on the SOR in the case file.

2. As is made clear in the transcript, the SOR includes some allegations that contain cross-citations to other allegations. In each case, the correct citations were identified and the SOR in the case file was amended by me, without objection, to conform to the evidence. The SOR contains these corrections in blue ink.