

DATE: November 27, 2007

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In re: )  
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 ----- ) ISCR Case No. 06-23603  
 SSN: ----- )  
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 Applicant for Security Clearance )  
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**DECISION OF ADMINISTRATIVE JUDGE  
NOREEN A. LYNCH**

**APPEARANCES**

**FOR GOVERNMENT**

Daniel F. Crowley, Esq., Department Counsel

**FOR APPLICANT**

Ronald C. Sykstus, Esq.,

**SYNOPSIS**

Applicant has not mitigated security concerns arising from his alcohol consumption and criminal conduct due to the recency of the 2005 and 2006 incidents involving alcohol. Applicant's eligibility for a security clearance is denied.

## STATEMENT OF THE CASE

On August 30, 2005, Applicant completed his security clearance (SF 86) application.<sup>1</sup> On July 13, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant.<sup>2</sup> The SOR alleges security concerns under Guideline G (Alcohol Consumption) and Guideline J (Criminal Conduct) of the revised Adjudicative Guidelines (AG) issued on December 29, 2005, and implemented by the Department of Defense effective September 1, 2006. The revised guidelines were provided to Applicant when the SOR was issued. The SOR detailed reasons why DOHA could not make the preliminary finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On August 13, 2007, Applicant submitted a notarized response to the SOR allegations, and elected to have his case decided at a hearing. On September 4, 2007, the case was assigned to me.<sup>3</sup> A Notice of Hearing was issued on October 4, 2007.<sup>4</sup> At the scheduled hearing on November 1, 2007, the Government introduced Government Exhibits (GX) 1-2 into evidence without objections. Applicant testified and introduced Applicant Exhibits (AX) A-Q into evidence without objections from Department Counsel. He also had two witnesses testify in his behalf as indicated in the transcript. DOHA received the transcript (Tr.) on November 13, 2007.

## FINDINGS OF FACT

Applicant admitted allegations in subparagraphs 1.b -g, in his SOR response under Guideline G.<sup>5</sup> He denied allegations in subparagraphs 1.a and 1.h and subparagraph 2.a. After a complete review of the evidence in the record and upon due consideration, I make the following findings of fact:

Applicant is a 53-year-old employee of a defense contractor. After receiving his undergraduate degree in 1978 with a bachelors in mechanical engineering, he was employed in the field of government contracting specializing in research development.<sup>6</sup> He had a security clearance for a period of time in the 1990's. He is divorced with two grown children.<sup>7</sup>

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<sup>1</sup>GX 1(Application of Security Clearance (SF 86), dated August 30, 2005).

<sup>2</sup>This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

<sup>3</sup>Counsel for Applicant was not available in October for a hearing. Thus, the earliest date for both parties was November 1, 2007.

<sup>4</sup>Applicant, through his counsel, waived the 15 day notice requirement.

<sup>5</sup>Applicant's Answer to SOR, dated August 13, 2007.

<sup>6</sup>GX 1 (Application for Security Clearance (SF 86), dated August 30, 2005).

<sup>7</sup>*Id.*

On October 19, 1981, Applicant was arrested and charged with a DUI. He pled guilty and was sentenced to ten days in jail suspended and fined \$100. He was hang gliding on that day with a friend. He was 25 years old at the time. On the way back from the activity, he and his friend consumed a bottle of whiskey. He had not eaten and the alcohol had a powerful effect. When he arrived at his friend's apartment, he was not invited in. So he decided to drive home. He quickly realized he was not able to drive and pulled over to the side of the road. The police found him in his car and he was arrested for DUI.<sup>8</sup>

In December 1982, a year later, Applicant was arrested and charged with public intoxication. He had been drinking with friends at a game and drove after that. He veered to avoid a car coming toward him on the road and hit a curb. The police smelled alcohol and Applicant admitted he had been drinking. He was then charged with public intoxication.<sup>9</sup>

In 1998, Applicant was drinking beer on the job. His co-worker reported that Applicant had three to four beers. A representative of the company took Applicant for an alcohol test. He tested positive and was suspended from work for one month. At that time he attended counseling. He completed six sessions with a psychologist over a four-month period.<sup>10</sup>

In March 2004, Applicant was a manager on a research program working with subcontracts at their facilities. He returned one day from lunch after consuming three beers. His office partner reported Applicant to Human Resources after he smelled alcohol on Applicant's breath. Applicant then had to report for an alcohol test which rendered a positive result. He was sent home that day and received a termination letter approximately one month later for misconduct despite his exceptional work record.<sup>11</sup>

On June 23, 2005, Applicant was at home where he had been drinking a few beers. A friend called him and he decided to go out to meet her. He had an automobile accident when he swerved to avoid hitting a vehicle. The police who investigated the accident gave Applicant a Breathalyzer and the result initiated the charge of DUI. He pled guilty and was sentenced to 60 days in jail; suspended, one-year probation, suspended driver's license for 90 days and ordered to attend Highway Intoxication School. He was also fined \$600.<sup>12</sup>

On November 18, 2005, Applicant was arrested for a probation violation. He admits he was nervous about an incident that occurred the day before and could not sleep, so he had a few drinks to help him sleep. He arrived at the courthouse early the next morning to pay \$20 for the class he had

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<sup>8</sup>Tr. 39.

<sup>9</sup>Tr. 42.

<sup>10</sup>GX 2 (Interrogatories and attachments, dated June 15, 2007).

<sup>11</sup>*Id.*; Tr. 34-35.

<sup>12</sup>Tr. 43.

missed. He decided to schedule his probation visit then and when the probation officer arrived he could smell alcohol on Applicant's breath.<sup>13</sup>

On March 1, 2006, Applicant was home drinking some beer with his brother. He received a phone call from his probation officer why he had missed his visit the day before. Applicant thought he did not have scheduled visits. His probation officer ordered him down to the office that day. When Applicant arrived, the officer smelled alcohol on his breath and arrested him for a probation violation. He pled guilty and was sentenced to ten days in jail.<sup>14</sup>

From April 4, 2006 until July 26, 2006, Applicant received outpatient counseling for alcohol dependence. He quit drinking for approximately one year.<sup>15</sup> However, at the hearing, Applicant acknowledged that he enjoys a social drink. He believes he is in control of his drinking. He believes he had bad luck before, but now he will not drink and drive. He states he does not drink to excess. He also stated he only drinks beer.

However, one witness confirmed that he occasionally drinks a mixed drink.<sup>16</sup> Applicant did not acknowledge that he had received a diagnosis of Alcohol Dependence from the 2006 outpatient counseling by the staff psychologist. However, the documents in the record clearly state the diagnosis. Applicant, despite the recommendation from the counseling not to be around people who drink, volunteered that all of his friends are social drinkers. He also does not follow the recommendation to attend Alcoholics Anonymous (AA) after the counseling. When Applicant completed the interrogatory in June 2007, he answered "no" to a question about current drinking. Upon questioning, he claimed he started drinking shortly after completing the interrogatory.<sup>17</sup>

Applicant's friends attest to his responsibility as a social drinker, using good judgment where alcohol is involved. He is described as a good neighbor who is generous with his time.<sup>18</sup> Moreover, he expressed to friends how scared he became in the realization that he could have harmed innocent people while driving drunk. He is contrite, embarrassed and humiliated.<sup>19</sup>

Applicant has spent his entire career as an engineering scientist.<sup>20</sup> He has received seven patents for his inventions over the years.<sup>21</sup> Applicant has been recognized in his career for his ability

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<sup>13</sup>Tr. 46.

<sup>14</sup>Tr. 47.

<sup>15</sup>GX 2 (Treatment Center Records and Applicant's response to interrogatories, dated 2006).

<sup>16</sup>Tr. 67.

<sup>17</sup>Tr. 55-57.

<sup>18</sup>AX R (Affidavit, dated October 22, 2007).

<sup>19</sup>AX S (Affidavit, dated October 22, 2007).

<sup>20</sup>AX I (1995 Leadership Award); AX J (Letter of commendation 2005).

<sup>21</sup>AX A-G (U.S. Patent documents from 1982-2001).

and his many creative approaches to developing patents to fully develop into production.<sup>22</sup> He worked on the space shuttle at one point in his career. He was employed with one contractor for 19 years. He was working on a specific program but in 2001 the program was cancelled.

Applicant is currently an employee(Design/Engineering Manager). He loves the work and is very excited about this position. His current supervisor recommends Applicant for a security clearance.<sup>23</sup> He has exhibited clear judgment, reliability and trustworthiness in his work related activities. He was hired for his accomplishments in the field and his successful employment history.<sup>24</sup>

## POLICIES

The President has “the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information.”<sup>25</sup> In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information and determining trustworthiness within the executive branch.

To be eligible for a security clearance or access to sensitive information, an applicant must meet the security guidelines contained in the Directive. The revised Adjudicative Guidelines set forth potentially disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. Additionally, each security decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the adjudicative process factors listed in ¶ 6.3 of the Directive, and AG ¶ 2(a).

“The adjudicative process is an examination of a sufficient period of a person’s life to make an affirmative determination that the person is eligible for a security clearance.”<sup>26</sup> An administrative judge must apply the “whole person concept,” and consider and carefully weigh the available, reliable information about the person.<sup>27</sup> An administrative judge should consider the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable 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

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<sup>22</sup>AX H (Performance Evaluations)

<sup>23</sup>AX T (Letter from Deputy Manager of company, dated August 13, 2007).

<sup>24</sup>*Id.*

<sup>25</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

<sup>26</sup> Directive, ¶ E2.2.1.

<sup>27</sup> Directive, Revised Adjudicative Guidelines (AG) 2(a)(1)-(9).

continuation or recurrence.<sup>28</sup>

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information.<sup>29</sup> Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts.<sup>30</sup> An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.”<sup>31</sup> Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security.<sup>32</sup>

The scope of an administrative judge’s decision is limited. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determinations as to Applicant’s allegiance, loyalty, or patriotism.

### CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

#### **Guideline G: Alcohol Consumption**

*Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual’s reliability and trustworthiness.*

In this matter, the government provided substantial evidence that Applicant was arrested in 1981, 1982, and 2005 for alcohol-related incidents. His last alcohol incident was in 2006 for a probation violation, having consumed alcohol before meeting with his probation officer. Consequently, Alcohol Consumption Disqualifying Condition (AC DC) AG ¶ 22(a) *alcohol-related incidents away from work, such as driving under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent* applies.

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<sup>28</sup> *Id.*

<sup>29</sup> Directive, ¶ E3.1.14.

<sup>30</sup> Directive, ¶ E3.1.15.

<sup>31</sup> ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

<sup>32</sup> Directive, ¶ E2.2.2.

Applicant had two incidents while working involving alcohol. He drank alcohol during lunch and later returned to work and was suspended in 1998 and ordered to attend counseling. Again, in 2004, he consumed alcohol and was terminated for misconduct (violation of prohibition against drinking alcohol at work). AC DC AG ¶ 22(b) *alcohol related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent* applies in this case.

Applicant admitted consuming alcohol, at times to excess and to the point of intoxication, from approximately 1998 until at least May 2007. AC DC AG ¶ 22(c) *habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent* applies.

Applicant was diagnosed as alcohol dependent in the outpatient treatment program in 2006 by a licensed staff psychologist. Thus AC DC AG ¶ 20(d) *diagnosis by a duly qualified medical professional of alcohol abuse or alcohol dependence* and 20(e) *evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program* applies.

Applicant had two parole violations for alcohol use in 2005 and 2006. Thus, 20(g) *failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence* applies.

With the government's case initially established, the burden shifts to Applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him. I considered the Alcohol Consumption Mitigating Condition (AC MC) AG ¶ 23(a) *so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment*.

Applicant's 1981, 1982 and 1998 drinking are remote in time. Applicant asserted that his drinking no longer plays a necessary role in his life but an enjoyable part of his life. He does acknowledge that he drinks on a special occasion but does not drink and drive. His driving incident involving alcohol was in 2004 and 2005. He has since had a 2006 probation violation. Applicant's drinking has been a pattern over more than 20 years. Thus, 23(a) does not apply in this case.

Applicant acknowledged his mistakes with alcohol but also speaks about bad luck. His descriptions of each incident involving alcohol are somewhat phrased as rationalizations. He has consciously decided, against the recommendation of a treatment program, to continue to drink in moderation, and not abstain from alcohol or remain in an aftercare program. He is inconsistent in that his verbal statements do not match any evidence of steps to overcome his problem. He stated that he was not aware that he had an alcohol dependence diagnosis, although it was in his signed treatment plan. AC DC 23(b) *the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if alcohol abuser)* does not apply in this case.

Applicant successfully completed his 2006 outpatient treatment program but declines to follow the recommendation of abstinence. He did refrain from drinking for a period of almost one year, but has decided to modify his consumption. Thus 26(d) *the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with required aftercare, has demonstrated a clear and*

*established pattern of modified consumption or abstinence in accordance with treatment recommendation, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable diagnosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized treatment program) does not apply.*

## **Guideline J: Criminal Conduct**

*Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.*

Criminal Conduct Disqualifying Condition (CC DC) AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*) and CC DC AG ¶ 31(c) (*allegations or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*) both apply. Applicant admitted the alcohol-related driving offenses and the parole violations.

Criminal Conduct Mitigating Condition (CC MC) AG ¶ 32(a) (*so much time elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment*) does not apply in this case. Applicant's last alcohol-related driving incident was in 2005. He had more difficulty in 2006 with alcohol causing a parole violation.

CC MC AG ¶ 32(b) (*the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life*) does not apply. Although Applicant states he is now in a great job and has good friends he states alcohol is an enjoyable part of his life.

CC MC AG ¶ 32(d) (*there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement*) partially applies. Applicant completed alcohol treatment. He has been very successful in his work and garnered promotions and praise. He acknowledges mistakes and bad luck. However, the last criminal incident is in 2006. This is too recent to be mitigated.

## **Whole Person Analysis**

In all adjudications, the protection of our national security is the paramount concern. The objective of the trustworthy determination process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for assignment to sensitive duties. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I have considered all the evidence and the "whole person" in evaluating Applicant's security clearance determination. Applicant has an outstanding achievement record for more than 30 years. He is praised for his numerous accomplishments in the field of mechanical engineering, including seven



patents. He is highly respected in his field. Several friends and colleagues attest to his reliability and professionalism.

Applicant's alcohol consumption for more than 20 years has caused problems for him at work and in his personal life. Granted, several of his alcohol-related incidents were many years ago; however, in 2005 and 2006, Applicant again had arrests involving alcohol. Despite his outpatient counseling in 2006, he continues to drink. On separate occasions in 2006 and 2007 during his investigation, he stated he intended not to drink in the future. However, he has decided that he can responsibly modify his drinking and that his earlier mistakes will not be repeated. He has made a decision to not abstain from alcohol as the treatment recommended. He is adamant that the alcohol is not a necessary part of his life, but it is an enjoyable one. There are some inconsistencies in descriptions of what he drinks and the role of alcohol in his life. This may be true, but it is premature to conclude that Applicant has overcome doubts as to his ability to exercise the requisite judgment and discretion expected of one who holds a security clearance.

### **FORMAL FINDINGS**

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline G:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	Against Applicant
Subparagraph 1.i:	For Applicant
Paragraph 2. Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

### **DECISION**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant's request for a security clearance. Clearance is denied.

Noreen A. Lynch  
Administrative Judge