

DATE: May 27, 2004

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-09220

**DECISION OF ADMINISTRATIVE JUDGE**

**JAMES A. YOUNG**

**APPEARANCES**

**FOR GOVERNMENT**

Francisco J. Mendez, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant had four alcohol-related driving incidents between 1993 and 1998, but only listed the latest incident in his security clearance application. Applicant mitigated the security concerns raised by his alcohol consumption and criminal conduct. Applicant failed to mitigate the personal conduct security concerns raised by his deliberate omissions from his security clearance application. Clearance is denied.

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 29 September 2003, DOHA issued a Statement of Reasons (SOR)<sup>(1)</sup> detailing the basis for its decision-security concerns raised under Guideline J (Criminal Conduct), Guideline E (Personal Conduct), and Guideline G (Alcohol Consumption) of the Directive. Applicant answered the SOR in writing on 8 October 2003 and elected to have a hearing before an administrative judge. The case was assigned to me on 22 January 2004. On 22 March 2004, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on 30 March 2004.

**FINDINGS OF FACT**

Applicant is a 30-year-old senior graphics designer for a defense contractor. Ex. 1 at 1, 3. He is respected by his supervisor as an excellent worker who consistently provides "top-notch quality work." Ex. B.

Applicant started consuming alcoholic beverages at the age of 16. In college, he drank to the point of intoxication three or four times a week. After college, he usually limited his drinking to Fridays and Saturdays. He normally consumed three to five beers on these occasions, which he believes did not make him drunk. On special occasions he would also drink four or five shots of hard liquor. Ex. 2 at 6-7.

Applicant was arrested in State 1 on 2 April 1993 for driving under the influence (DUI). Ex. 3 at 1. Applicant was given two breath tests--one registered .20 and the other .19. *Id.* at 2. On 3 May 1993, he pled guilty to the offense, was fined, and ordered to complete DWI (driving while intoxicated) school. Answer.

Applicant was arrested in October 1994 in State 1 for criminal damage to property. He was intoxicated at the time of the offense. He was convicted of the offense and fined. Answer.

On 4 January 1997, Applicant consumed two beers and "a lot" of Southern Comfort while at a bachelor party. He later went to a club where he consumed two mixed drinks. Ex. 4 at 13. Applicant was injured in an accident in State 2 while driving home in his auto. A blood-alcohol test administered at the hospital registered .264 with a reading greater than .10 being a violation of state law. Applicant pled guilty to DUI and was sentenced to one year of unsupervised probation, ordered to perform 48 hours of public service, fined, and ordered to have an alcohol evaluation performed. Answer. Applicant kept driving even though his license was suspended. Ex. 2 at 6.

Applicant was arrested in June 1997, in State 2, for operating a vehicle without insurance, driving while his license was under restraint, and changing lanes improperly. In December 1997, Applicant pled guilty to driving while his license was under restraint. He was sentenced to 90 days in jail (suspended) and fined. Answer.

In August 1998, in State 2, Applicant was arrested for careless driving, failure to drive within marked lanes, failure to present proof of insurance, driving while his license was under restraint, DUI, and driving a vehicle with a blood alcohol content in excess of .10. In March 1999, he pled guilty to DUI and was sentenced to 12 months of supervised probation, fined, and ordered to serve 96 hours of public service, 45 days of home detention, and have an alcohol evaluation conducted with a Level II alcohol education program. Answer.

In November 1998, Applicant was arrested in State 2 for failing to drive in a single lane, driving when his license was under restraint, DUI, and failing to present evidence of insurance. The officer detected a moderate odor of alcohol coming from Applicant's breath and his eyes were bloodshot. Applicant asserted that he had consumed only one beer some five hours earlier. Applicant failed the field sobriety tests. Applicant declined to take a chemical test to determine the level of alcohol in his blood because his license had already been revoked. Applicant pled guilty to the reduced charges of driving while his ability was impaired (with a prior DUI), driving under suspension (alcohol related), and failing to produce evidence of insurance. He was sentenced to one year of supervised probation, 60 days in home detention, fined, and ordered to perform community service, complete a level II alcohol education program, complete level II alcohol therapy, and take Antabuse. Answer. Applicant's license was suspended until 2004. Ex. 2 at 5.

After his last arrest in November 1998, Applicant finally realized he needed to cut back on his consumption of alcohol, and he did so. He is now married, has a child, and does not consume alcoholic beverages very often. He drinks one to three beers on the weekend. Ex. 2 at 6-7. Applicant had a substance abuse evaluation conducted in March 2003 by a certified addictions counselor. The counselor administered three screening instruments and found Applicant's profile is consistent with individuals who do not have a high probability of having a substance abuse disorder or dependence, and that he was open and honest about his past and current use of alcohol. Ex. 10 at 1. The counselor found no evidence Applicant "has a current drinking problem that would effect (sic) his judgment." *Id.* at 2.

Applicant completed a security clearance application (SCA) on 26 January 2001. Ex. 1. Question 24 asked if Applicant had ever been charged with or convicted of any offense related to alcohol or drugs. Applicant answered yes and listed his conviction on 12 December 1999 for DUI. *Id.* at 7. No other offenses were listed. Applicant failed to list his other offenses because he was afraid he "would lose his job if [his] past was exposed." Answer; Tr. 39.

Question 26 of the SCA asked Applicant if, in the previous seven years, he had been arrested for, charged with, or convicted of any offense not listed in other modules of the SCA. Applicant answered "no."

## POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, 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." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

## CONCLUSIONS

### **Guideline J-Criminal Conduct**

In the SOR, DOHA alleged Applicant was convicted of the following offenses: DWI in May 1993 (¶ 1.a.), criminal damage to property for an arrest in October 1994 (¶ 1.b.), DUI for an arrest in January 1997 (¶ 1.c.), driving while license was under restraint (¶ 1.d.), DUI in March 1999 for an arrest in August 1998 (¶ 1.e.), and driving while ability impaired with prior DUI, driving under suspension, and no proof of insurance (¶ 1.f.). A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1.

The government established by Applicant's admissions the criminal conduct alleged in SOR ¶ 1. DC E2.A10.1.2.1; DC E2.A10.1.2.2. But the criminal conduct was not recent--the last offense was some six years ago when he was 25 years old. MC E2.A10.1.3.1. All of Applicant's alleged criminal offenses were alcohol-related. Although Applicant still consumes alcoholic beverages, he has curtailed his excessive consumption of alcoholic beverages and has not had a criminal incident since 1998. There is clear evidence of rehabilitation. MC E2.A10.1.3.6. I find for Applicant on SOR ¶ 1.

### **Guideline E--Personal Conduct**

In the SOR, DOHA alleged Applicant falsified material facts on his SCA by (1) failing to acknowledge all of his alcohol-related arrests and convictions in answer to question 24 (¶ 2.a.); and (2) failing to acknowledge his arrest and conviction for criminal damage to property in answer to question 26 (¶ 2.b.). Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

The Government established by substantial evidence and Applicant's admissions each of the allegations contained in SOR ¶ 2. Applicant deliberately concealed relevant and material facts from his SCA by failing to fully disclose the extent of his alcohol-related offenses and his other offense of criminal damage to property. DC E2.A5.1.2.2. Applicant claims he "did not know full disclosure was that important at the time" and "was scared [he] would lose [his] job if [his]

past was exposed." Answer. This is not the first time Applicant failed to truthfully advise authorities of his past. After his January 1997 arrest, he wrote to the court, and told a nurse who wrote the court on his behalf, that this was his first offense, when in fact it was his second. Ex. 4 at 14, 16. During a 1999 alcohol evaluation, Applicant denied he had ever used illegal drugs. Ex. 8 at 6. Yet on his SCA he admitted using marijuana once in 1994. *See* Ex. at 8. None of the listed mitigating conditions apply. After considering all of the evidence, Applicant has not convinced me he is sufficiently trustworthy to be granted a security clearance.

### **Guideline G--Alcohol Consumption**

In the SOR, DOHA alleged Applicant consumed alcohol to the point of intoxication from the age of 16 to the present (¶ 3.a.), was involved in the alcohol-related offenses set forth in ¶¶ 1.a., 1.b., 1.c., 1.e., and 1.f. (¶ 3.b.), and continues to consume alcohol on weekends (¶ 3.c.). 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. Directive ¶ E2.A7.1.1.

The Government established by substantial evidence and Applicant's admissions each of the allegations contained in SOR ¶ 3, except ¶ 3.a. Applicant has not admitted, and there is no other record evidence to support a conclusion, he still drinks to the point of intoxication. The allegation in ¶ 3.c. does not establish a disqualifying condition. Just because Applicant has had problems with alcohol in the past does not mean that he has to abstain from consuming alcohol. There is no requirement that even an alcohol dependent applicant completely abstain from consuming alcoholic beverages. ISCR Case No. 96-0869, 1997 DOHA LEXIS 665 \*10 (App. Bd. Sep. 11, 1997).

Applicant's numerous alcohol-related incidents away from work are disqualifying. DC E2.A7.1.2.1. Applicant was involved in binge consumption of alcohol to the point of impaired judgment (*see* Ex. 4 at 13). DC E2.A7.1.2.5. Consumption of alcohol subsequent to a diagnosis of alcoholism is a disqualifying condition. DC E2.A7.1.2.6. Although Applicant was diagnosed as a problem drinker, and his doctor found Applicant had "persistent elevated liver enzymes" and recommended "[h]e should not drink any alcohol," there has been no diagnosis of alcoholism or alcohol dependence. Ex. 6 at 14. In fact, Applicant had an alcohol assessment performed in March 2003 that states there is no evidence Applicant has a current drinking problem that would effect (sic) his judgment and discretion necessary to handle and protect classified defense information." Ex. 10 at 2. Applicant's alcohol problem occurred a number of years ago--the last incident was in 1998. MC E2.A7.1.3.2. And Applicant has made positive changes in his behavior supportive of sobriety. MC E2.A7.1.3.3. I find for Applicant on ¶ 3.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline J: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Paragraph 3. Guideline G: For Applicant

Subparagraph 3.a.: For Applicant

Subparagraph 3.b.: For Applicant

Subparagraph 3.c.: For Applicant

**DECISION**

In light of all of 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. Clearance is denied.

**James A. Young**

**Administrative Judge**

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.