

DATE: November 1, 2001

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 00-0445

**DECISION OF ADMINISTRATIVE JUDGE**

**JEROME H. SILBER**

**APPEARANCES**

**FOR GOVERNMENT**

Matthew E. Malone, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Five alcohol-related incidents during 1990-99 and five other arrests during 1989-96 were unmitigated by positive changes in behavior supportive of sobriety or clear evidence of rehabilitation; deliberate falsification of security clearance application and in a Defense Security Service (DSS) interview less than three years ago were not extenuated by use of an arrest record more limited in scope than the questions posed. Clearance is denied.

**STATEMENT OF THE CASE**

On August 23, 2000, the Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), issued a Statement of Reasons (SOR) to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding 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 determine whether a clearance should be granted, continued, denied, or revoked. In a sworn written statement, dated October 4, 2000, the Applicant responded to the allegations set forth in the SOR and requested a hearing.

The case was assigned for a hearing and decision to Administrative Judge Metz on December 7, 2000. On January 8, 2001, a notice of hearing was issued, and Administrative Judge Metz held the hearing as scheduled on January 30, 2001. The Department Counsel presented eight exhibits ("exhs") and the testimony of one witness. The Applicant's case consisted of the presentation of 12 exhibits and his own testimony. Administrative Judge Metz received the transcript ("tr") of the hearing on February 16, 2001. Due to a procedural problem unrelated to the merits of the case, Administrative Judge Metz was unable to issue a decision in the case.

The undersigned Administrative Judge received the case reassignment on July 17, 2001, and he issued an order on the same date that gave the Applicant the opportunity to request a new hearing before the undersigned Administrative Judge. A telephone conference call among the Department Counsel, the Applicant, and the undersigned Administrative

Judge was held on August 16, 2001, to explain the July 17, 2001 order. On August 26, 2001, the Applicant waived his right in writing to a second hearing in his case, subject to the submission of some additional evidence. The Applicant submitted seven pages of documents ("exh. M") and three pages of documents ("exh. N") which were admitted into evidence without objection on September 12 and 13, 2001, respectively. The record in this case closed on September 13, 2001.

### FINDINGS OF FACT

The Statement of Reasons (SOR) consisted of allegations predicated on the following three guidelines: paragraph 1, Guideline G (alcohol consumption); paragraph 2, Guideline J (criminal conduct); and Guideline E (personal conduct). The undersigned Administrative Judge completely and thoroughly reviewed the evidence in the record, and upon due consideration of the same, makes the following Findings of Fact:

The Applicant is a 33-year-old radar instrumentation operator/repairer employed by a U.S. Government contractor since April 1999. The Applicant seeks to obtain a Top Secret personnel security clearance.

The Applicant enlisted in the U.S. Army in 1988 and was honorably discharged as an E-2 two years later. Exh. 5. He has never married. He was awarded an associate's degree in December 1998. Exh. 1. The Applicant's record discloses the following incidents:

1. June 1989 - Nonjudicial punishment for leaving the scene of an accident; age 21. *See* tr pages 66-67; exh. 5.
2. February 1990 - Nonjudicial punishment for drunk driving; age 21. *See* tr pages 68-69; exh. 5.
3. November 1990 - Arrest for retail theft of a case of beer while intoxicated; pretrial invention program; age 22. *See* tr pages 60-61, 87.
4. January 1991 - Arrest for driving under the influence (DUI) reduced to a conviction for reckless driving; age 22. *See* tr pages 62-63; exh. 2.
5. April 1991- Arrest for retail theft of vehicle tags; nolle prossed; age 22. *See* tr pages 61-63.
6. February 1993 - Arrest for DUI; conviction in April 1993 with driver's license suspended for one year. Exh. 2.
7. January 1994 - Arrest for driving on a suspended driver's license; conviction. *See* Exh. A.
8. December 1994 - Arrest for driving on a suspended driver's license and stolen vehicle tags; adjudication withheld. *See* tr pages 63-66; exhs. 3, 6.
9. July 1996 - Arrest for driving on a suspended driver's license and stolen vehicle tags; adjudica-tion withheld. *See* tr pages 58-60; exhs. 3, 7, and 8.
10. March 1999 - Arrest for DUI; conviction. Exh. 2.

The Applicant's sentence for the March 1999 DUI included a fine of \$1068, 40 hours of com-munity service, attendance at an alcohol educational course and a victim awareness program--both completed in October 1999, attendance at an HIV class in April 1999, and one year's probation completed in April 2000. Exhs. M and N; exh. 2. The Applicant admits that he started drinking alcohol in about 1986 and drank alcohol at times to excess until April 1999. Tr pages 71-72. He currently drinks about five or six 12 oz. bottles of beer in a four-hour period. Tr pages 73-78.

The Applicant was unemployed during the first quarter of 1999 after he graduated with an associate's degree. Exh. 1. In January 1999 he went to the local county courthouse to obtain a copy of his traffic and criminal arrest record from January 1, 1990 to December 31, 1995. <sup>(1)</sup> Exh. A. In-cluded on the record he received were the arrests listed above as #3, #4, #5, #6, and #7. Not included in the record were the arrests listed above as #1, #2, #8, and #9, which occurred outside the jurisdiction of the county, as well as those listed above as #1, #9, and #10 which occurred outside the 1990-

95 years specified by the Applicant in requesting the record search.

In April 1999 the Applicant completed and signed a security clearance application (SF-86). Exh. 1. In response to question #23 on the application which asked for pending criminal offenses, the Applicant listed his DUI arrest in March 1999 (listed above as #10)

In response to question #24 on the application which asked for all alcohol-related arrests, the Applicant listed his February 1993 DUI arrest (listed above as #6), but failed to list his drunk driving nonjudicial punishment in February 1990 or his DUI arrest in January 1991 (listed above as #2 and #4, respectively). In response to question #26 on the application which asked for other criminal arrests since April 1992, the Applicant listed his January 1994 arrest for driving with a suspended license (listed above as #7), (2) but failed to list his December 1994 arrest of driving on a suspended license and his July 1996 arrest for driving on a suspended license and stolen vehicle tags (listed above as #8 and #9, respectively).

Three days after he signed his security clearance application (SF-86), he was interviewed by a Defense Security Service (DSS) agent. Exh. 2. The Applicant brought his SF-86 and his January 1999 county record to the interview. He signed a statement for the agent that cited the arrests listed above as #3, #4, #5, #6, #7, #10. He concluded the statement by saying that he had not been involved in any other criminal conduct/alcohol or law enforcement related incidents except for minor traffic violations. However, he failed to cite his arrests listed above as #1, #2, #8, and #9. The latter two incidents were cited in a Defense Security Service (DSS) statement signed by the Applicant in May 2000. Exh. 3.

The Applicant claims that he thought his January 1999 county record covered all his arrests throughout the state rather than simply those within the county jurisdiction in the years 1990-95. He also said he thought that the nonjudicial punishments he received in the Army were not required to be listed on the application and that arrests occurring more than seven--or ten--years before the April 1999 SF-86 need not be listed. Tr pages 28, 38-41, 53-56, 67-71; exh. 3.

The Applicant has solicited numerous character reference letters that attest to his conscientiousness at work, his concern for security procedures and practices, his popularity with his co-workers, his honest work ethic, his professionalism, his good performance appraisal, and his strong oral and written communication skills. Exhs. B-N.

### POLICIES

Enclosure 2 of the Directive (32 C.F.R. part 154 appendix H) sets forth adjudicative guidelines which must be considered in evaluating an individual's security eligibility. The guidelines are divided into those that may be considered in determining whether to deny or revoke a clearance (Disqualifying Conditions or DC) and those that may be considered in determining whether to grant or continue an individual's access to classified information (Mitigating Conditions or MC). In evaluating this case, relevant adjudicative guidelines as set forth below have been carefully considered as the most pertinent to the facts of this particular case.

The guidelines, disqualifying conditions, and mitigating conditions most pertinent to an evaluation of the facts of this case are:

#### **GUIDELINE G - 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:**

[1st] 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;

**Conditions that could mitigate security concerns include:**

None applicable.

## GUIDELINE J - CRIMINAL CONDUCT

**A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.**

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

[1st] . . . criminal conduct, regardless of whether the person was formally charged;

[2nd] . . . multiple lesser offenses.

**Conditions that could mitigate security concerns include:**

[5th] Acquittal;

## GUIDELINE E - PERSONAL CONDUCT

**Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, 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:**

[2nd] 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;

[3rd] Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination;

**Conditions that could mitigate security concerns include:**

None applicable.

The Directive also requires the undersigned to consider, as appropriate, the factors enumerated in Section 6.3:

- a. Nature and seriousness of the conduct and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved.
- e. Absence or presence of rehabilitation.
- f. Probability that the circumstances or conduct will continue or recur in the future.

Enclosure 2 to the Directive provides that the adjudicator should consider the following factors:

The nature, extent, and seriousness of the conduct

The circumstances surrounding the conduct, to include knowledge-able participation

The frequency and recency of the conduct

The individual's age and maturity at the time of the conduct

The voluntariness of participation

The presence or absence of rehabilitation and other pertinent behavioral changes

The motivation for the conduct

The potential for pressure, coercion, exploitation, or duress

The likelihood of continuation or recurrence

Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security 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 may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record. Determinations under the Directive include consideration of the risk that an applicant may deliberately or inadvertently fail to safeguard properly classified information as that term is defined and established under Executive Order 12958, effective on October 14, 1995.

Initially, the Government has the burden of proving controverted facts alleged in the Statement of Reasons. The United States Supreme Court has said:

"It is difficult to see how the Board would be able to review security-clearance determinations under a preponderance of the evidence standard without departing from the 'clearly consistent with the interests of the national security' test. The clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials. Placing the burden on the Government to support the denial [of a security clearance] by a preponderance of the evidence would inevitably shift the emphasis and involve the Board in second-guessing the agency's national security determinations."

*Dept. of the Navy v. Egan*, 484 U.S. 518, 531 (1988). This Administrative Judge understands that Supreme Court guidance in its context to go to the minimum *quantum* of the admissible evidence that must be adduced by the Government in these proceedings to make its case, that is, substantial evidence but something less than a preponderance of the evidence--rather than as an indication of the Court's tolerance for error below. <sup>(3)</sup>

The burden of going forward with the evidence then shifts to the applicant for the purpose of establishing his or her security eligibility through evidence of refutation, extenuation or mitigation of the Government's case or through evidence of affirmative defenses. Assuming the Government's case is not refuted, and further assuming it can reasonably be inferred from the facts proven that an applicant might deliberately or inadvertently fail to safeguard properly classified information, the applicant has a heavy burden of persuasion to demonstrate he or she is nonetheless eligible to hold a security clearance. <sup>(4)</sup>

## CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility and demeanor of those who testified, the undersigned concludes that the Government established its case with regard to Guidelines G, J, and E.

The Applicant has had alcohol-related incidents in February 1990, November 1990, January 1991, February 1993, and March 1999. <sup>(5)</sup> He currently drinks about five or six 12 oz. bottles of beer in a four-hour period. This suggests that his pattern of alcohol-related incidents have not led him to make positive changes in behavior supportive of sobriety. SOR ¶ 1 (alcohol consumption) is concluded adversely to the Applicant.

With regard to criminal conduct, the Applicant has engaged in various criminal actions in 1989-96, some less serious than others. This evidence falls within the scope of DC #1 and DC #2, which are identified on page 5 *supra*. The charges in some instances have been nolle prossed, dismissed, or adjudication withheld, but there is persuasive evidence of his actual guilt of those charges. He admits that his deliberate lying on his security clearance application and in his subsequent Defense Security Service (DSS) interview constituted felonious conduct under 18 U.S.C. §1001. SOR ¶ 2 (criminal conduct) is concluded adversely to the Applicant.

With regard to personal conduct, the Applicant deliberately falsified his arrest record on his SF-86 application and in his subsequent Defense Security Service (DSS) interview in April 1999. His claims that he did not understand the scope of the questions posed and the scope of his January 1999 county traffic and criminal arrest record--covering only offenses within that county's jurisdiction in the 1990-95 period--are simply not credible, particularly given the strength of his oral and written communication skills attested to by his manager. Exh. C. SOR ¶ 3 (personal conduct) is concluded adversely to the Applicant.

Each clearance decision is required to take into consideration pertinent factors set forth in Section 6.3 of the Directive and in the adjudicative process discussion at enclosure 2 to the Directive. These factors are identified on pages 6-7 *supra*. The nature and extent of the Applicant's alcohol abuse and criminal conduct is serious. His age at the time the later arrests occurred is troubling. He has not shown clear evidence of rehabilitation and was willing to conceal portions of his past less than three years ago.

### **FORMAL FINDINGS**

Formal findings as required by Enclosure 1 of the Directive (see paragraph (7) of section 3 of Executive Order 10865, as amended) and the additional procedural guidance contained in item 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.: For Applicant

Subparagraph 1.f.: Against Applicant

#### Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: Against Applicant

Subparagraph 2.e.: Against Applicant

Subparagraph 2.f.: Against Applicant

Subparagraph 2.g.: Against Applicant

Subparagraph 2.h.: Against Applicant

Subparagraph 2.i.: Against Applicant

Subparagraph 2.j.: Against Applicant

Paragraph 3. Guideline E: AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

Subparagraph 3.b.: Against Applicant

Subparagraph 3.c.: Against Applicant

### DECISION

In light of all the circumstances presented by the record in this case, it is the determination of the undersigned that it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

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Jerome H. Silber

Administrative Judge

1. The certificate covering the record states:

"This search is **NOT** to be construed as a statewide or nationwide records search. If you are in need of a statewide or nationwide **CRIMINAL** records search, you may wish to contact a local law enforcement agency, the [State] Department of Law Enforcement and or the Federal Bureau of Investigation. **THIS RECORDS SEARCH IS LIMITED TO THE YEARS SPECIFIED AND WILL NOT REFLECT RECORDS OF ANY DISPOSITIONS AND/OR CONVICTIONS OCCURRING PRIOR TO OR AFTER THE SPECIFIED YEARS.**" Exh. A.

2. The application erroneously listed a February 1994 trial date and claimed the charge was nolle prossed.

3. The rule has been restated as requiring "that security clearances should be revoked [*sic*] if doing so is consistent with the national interest;" *Doe v. Schachter*, 804 F. Supp. 53, 62 (N.D.Cal. 1992). *Cf.* with regard to the *quantum* of evidence the DOHA Appeal Board analysis in DISCR OSD Case No. 90-1054 (July 20, 1992) at pages 3-5, and DOHA Case No. 94-0966 (July 21, 1995) at pages 3-4. The Directive establishes the following standard of review:

[Whether the] Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the [DOHA] Appeal Board shall give deference to the credibility determinations of the Administrative Judge.

Item 32.a. of the Additional Procedural Guidance (Enclosure 3 to the Directive). See also 5 U.S.C. §556(d).

4. While the Government has the burden of proving controverted facts, the Applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Items 14 and 15 of the Additional Procedural Guidance (Enclosure 3 to the Directive).

5. SOR ¶ 1.e. alleges that when arrested in December 1994 the Applicant had an open bottle of beer in his possession at the time. Accepting that to be true, it has little probative value in judging whether his alcohol consumption is of present security concern. Therefore, SOR ¶ 1.e. is concluded favorably to the Applicant.