

DATE: August 3, 2001

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-02601

**DECISION OF ADMINISTRATIVE JUDGE**

**JEROME H. SILBER**

**APPEARANCES**

**FOR GOVERNMENT**

Kathryn Antigone Trowbridge, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Four DUIs in less than 12 years, a diagnosis of alcohol dependence, outpatient alcohol counseling four years ago, and one year's AA attendance was not mitigated because the Applicant is still drinking; voluntary correction of falsification was not prompt because it occurred over a year and a half after the falsification occurred. Clearance is denied.

**STATEMENT OF THE CASE**

On January 16, 2001, 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 February 12, 2001, the Applicant responded to the allegations set forth in the SOR and requested a hearing.

The undersigned Administrative Judge received the case assignment on May 17, 2001, and a notice of hearing was issued on June 4, 2001. The undersigned held a hearing on July 10, 2001. The Department Counsel presented six exhibits ("exhs"), but no witnesses. The Applicant's case consisted of the presentation of seven exhibits and his own testimony. The record in this case closed on July 10, 2001. The undersigned Administrative Judge received the transcript ("tr") of the hearing on August 1, 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 E (personal conduct); and paragraph 3, Guideline J (criminal 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 54-year-old technical/logistical analyst employed by a U.S. Government contractor since April 1995. The Applicant seeks to obtain a Secret personnel security clearance.

The Applicant served on active duty with the U.S. Army during 1965-68 and 1972-90 and retired as an E7. He was married in 1969 and was divorced in 1992. He has two adult children and two grandchildren. Exh. 1; tr page 105. His ex-wife had objected to the Applicant's drinking, but he had nevertheless continued to drink, causing more marital difficulties. Exh. 6, pages 2, 4, 6.

The Applicant first drank enough alcohol to get drunk when he was 17 years old in 1963. Exh. 6. He has been arrested for Driving Under the Influence (DUI) in December 1989, February 1996, May 1996, and January 1997.<sup>(1)</sup> SOR answer. After his latest DUI incident, he was diagnosed with alcohol dependence by an alcohol counselor (1997). Exh. 6. He continued to drink, albeit moderately for the most part (two drinks average a week), as recently as August 2000. Exh. 5; tr page 114. He was last intoxicated in July 2000. Tr pages 115, 118. He now drinks irregularly, having had "a couple of beers" the night before the hearing, watching baseball. Tr pages 98-99. The Applicant first smoked marijuana when he was 21 years old (about 1967), smoked it altogether half a dozen times when it was offered him, and last smoked it in December 1996; he also used cocaine twice, once in about 1991 when he was 45 years old, and again in the summer of 1992. Exh. 6, page 3; tr pages 88-89. He received nonjudicial punishment in 1973 for possession of marijuana and used marijuana after his 1990 retirement two or three times. He never purchased illegal drugs and does not intend to use them in the future. Exh. 5.

The Applicant signed a Questionnaire for National Security Positions (SF-86) in December 1998. Exh. 1. In response to the question whether he had ever been charged with or convicted on a criminal offense related to alcohol or drugs, he listed his 1973 nonjudicial punishment for marijuana possession and a February 1994 DUI.<sup>(2)</sup> In response to a question on other offenses, he listed a July 1997 fine for reckless driving and a September 1997 fine for failure to obey a stop sign. These latter two convictions correlate to associated DUI charges made in May 1996 and January 1997. Exh. 5; exh. A; tr pages 71-73. He had forgotten at the time about the December 1989 DUI conviction. Exhs. 2, 4; tr pages 65-66.<sup>(3)</sup> He also identified his 1997 alcohol treatment on the SF-86.

His answer is, however, indistinct in response to question #27 on the SF-86 that asked whether he had used marijuana, cocaine, or other controlled substances since 1991. Exh. 1, page 8. He denied the relevant allegation of falsification in SOR ¶ 2.b in his SOR answer, but admitted in that answer that his answer on the SF-86 to question #27 was "no." Tr pages 86-87. However, he volunteered his drug history to a Defense Security Service (DSS) agent in August 2000 before he was confronted with the facts. Tr pages 71-72; exh. 5.

The Applicant has received good performance annual appraisals in his present position. Exh. B. He has numerous letters of character reference attesting to his good behavior without specific mention of any alcohol-related issues. Exh. E. He had a security clearance for about 18 of the 21 years of his military service and had no record of compromising classified information. Tr pages 61-62. The Applicant admits that he is an alcoholic. Tr page 99. He does not recall that he was told during the 1997 treatment program that he should establish a "long-term sobriety program prior to release" and believes that sobriety for him includes the ability to take one drink of alcohol. Tr pages 101-103; exh. 6, page 13. He attended Alcoholics Anonymous (AA) meetings once a week for over a year, starting in about March or April 1997, during which period he was alcohol-abstinent. Tr pages 109-113, 116-118.

## **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;

[4th] Evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program;

[6th] 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 include:**

[2nd] The problem occurred a number of years ago and there is no indication of a recent problem;

[4th] Following diagnosis of alcohol abuse or alcohol dependence, the individual has successfully completed inpatient or outpatient rehabilitation along with after-care requirements, participates frequently in meetings of Alcoholics Anonymous or a similar organization, has abstained from alcohol for a period of at least 12 months, and received a favorable prognosis by a credentialed medical professional or licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

## **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;

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

[3rd] The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts;

## **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] A single serious crime or multiple lesser offenses.

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

[1st] The criminal behavior was not recent;

[2nd] the crime was an isolated incident;

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. [\(4\)](#)

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. [\(5\)](#)

### CONCLUSIONS

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

The Applicant has had four DUIs in less than 12 years, a diagnosis of alcohol dependence by an alcohol counselor, outpatient treatment for alcoholism, attendance at AA meetings for over a year, and still continues to drink alcohol. This falls within the scope of DC #1, DC #4, and DC #6, which are identified on page 4 *supra*. In mitigation, his latest DUI occurred about 4½ years ago; MC #2 would be applicable if there were no indication of a recent problem. Unfortunately for the Applicant, his continued drinking--despite the diagnosis and treatment advice he has received-- indicates the existence of a current alcohol problem. Furthermore, MC #4, also identified on page 4 *supra*, cannot be supported by the record as applicable to the Applicant. There is no reason to justify a deviation from the Mitigating Conditions under Guideline G in his favor. Therefore, SOR ¶ 1 (alcohol consumption) is concluded adversely to the Applicant.

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

SOR ¶ 2 (personal conduct) alleges that the Applicant falsified his SF-86 in two regards: (a) by concealing his alcohol-related offenses and (b) by denying his use of illegal drugs since 1991. The evidence, however, does not support the allegation in SOR ¶ 2.a because he listed the offenses in the SF-86 that correlate to all but the earliest DUI 12 years ago. If he were *deliberately* concealing his alcohol-related offenses, it would be rather improbable that he would identify all the more recent offenses, albeit with some errors in dates listed. On the other hand, there is little to dispute that he failed to identify on the SF-86 his prior illegal drug use, as relatively minor as it was. This falls within the scope of DC #2 under Guideline E, which is identified on page 5 *supra*. In mitigation, the Applicant volunteered the corrected information about his prior drug history to a DSS agent before he was confronted with the facts in August 2000. He cannot, however, take refuge in MC #3, which is also

identified on page 5 *supra*, because he did not correct the SF-86 omission "promptly," *i.e.*, more than a year and a half had elapsed between the signature of the SF-86 and the DSS interview. Therefore, ¶ 2.b is concluded adversely to the Applicant.

With regard to Guideline J, SOR ¶3 charges that the Applicant's falsification constitutes criminal conduct (18 U.S.C. §1001). Conduct violative of that Act of Congress is a Federal felony. [\(6\)](#) The undersigned concludes that the Applicant did knowingly and willfully falsify, conceal, or cover up his post-1991 illegal drug history on his SF-86, which falls within the scope of DC #1 and DC #2 under criminal conduct identified on page 5 *supra*. The single act of falsification, however, occurred some 2½ years ago. This criminal behavior was both isolated and not recent (MC #1 and MC #2). *See* tr pages 126-127. Therefore SOR ¶3 (Guideline J) is also concluded favorably 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 page 6 *supra*. The nature and extent of the Applicant's alcohol problem is more serious than he believes, particularly at his age, with the extensive history he has of excessive alcohol consumption, and with a four-year-old diagnosis of alcohol dependence. The absence of a solid rehabilitation without relapse presents particular security concerns.

### **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.: Against Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: Against Applicant

Subparagraph 1.h.: Against Applicant

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

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: Against Applicant

#### Paragraph 3. Guideline J: FOR APPLICANT

Subparagraph 3.a.: For 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 Applicant received outpatient alcohol treatment in the Army's ADAPAC Program (1989) and volunteered for similar ADAPAC Program treatment (March 1997 to October 1997) once a week while his DUI conviction was on appeal. SOR answer. All four arrests were alcohol-related incidents, although the DUI charges in the 1996 and 1997 incidents were ultimately dismissed. Tr pages 65-66, 78-83.

2. The Applicant mistakenly thought his February 1996 DUI arrest occurred two years previously. Exh. 5; tr pages 108-

109.

3. The Applicant received nonjudicial punishment for the December 1989 civil DUI conviction. Exhs. 2 and 4; *but see* tr pages 65-66, 90-94.

4. 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).

5. 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).

6. *Compare* exh. 8. The cited provision now provides:

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than five years, or both.

Such an offense is classified as a Class D felony in accordance with 18 U.S.C. §3559(a); with regard to the maximum fine authorized, *see* 18 U.S.C. §3571.