

DATE: March 29, 2002

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-05555

**DECISION OF ADMINISTRATIVE JUDGE**

**ROGER C. WESLEY**

**APPEARANCES**

**FOR GOVERNMENT**

Kathryn A. Trowbridge, Department Counsel

**FOR APPLICANT**

Anthony L. Montagna, Jr., Esq.

**SYNOPSIS**

Applicant who was involved in two alcohol-related offenses (DuIs in 1997 and 1999), but has manifested no other security significant problems with alcohol and, accordingly, mitigates the Government's alcohol concerns, enough to justify Government's restoration of trust and reliability in his holding a security clearance. Clearance is granted.

**STATEMENT OF THE CASE**

On October 29, 2001, 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, issued a Statement of Reasons (SOR) to Applicant, which 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 Applicant, and recommended referral to an administrative judge to determine whether clearance should be granted or continued.

Applicant responded to the SOR on November 21, 2001, and requested a hearing. The case was assigned to this Administrative Judge on December 18, 2001, and was scheduled for hearing on January 23, 2002. A hearing was convened on February 22, 2002, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny or revoke Applicant's security clearance. At hearing, the Government's case consisted of four exhibits; Applicant relied on three witnesses (including himself) and no exhibits. The transcript (R.T.) of the proceedings was received on March 15, 2002.

**PROCEDURAL ISSUES**

At hearing, Applicant objected and took exception to an evidentiary ruling permitting Department Counsel to inquire of Applicant's drinking in high school, which was not covered in the specific allegations in the SOR. Government relied on the expressed central concern of the predicate of Guideline G. Over the course of the past twelve years, technical pleading rules extant at DOHA have been liberalized to permit Government inquiry of facts that fall beyond the scope of the specific allegations, and which have not been opened by the Applicant. Pleading evolution can be traced from the

stricter inquiry practices imposed on Department Counsel in earlier Appeal Board cases (*e.g.*, DISCR Case No. 87-0491 (Oct. 11, 1989); DISCR Case No. 90-1054 (July 20, 1992)) to the opening of permissible inquiry in a variety of contexts not specifically covered by the SOR in issue. Liberalized inquiry examples include: DISCR Case No. 89-1587 (August 22, 1991) (where conduct is relevant to evaluating an applicant's evidence of extenuation, mitigation and changed circumstances) and DISCR Case No. 92-0721 (Sept. 23, 1993) (to evaluate an applicant's claims of success in rehabilitation).

More recently, our Board has held in a string of cases that Department Counsel may inquire into areas of uncharged conduct to test an applicant's credibility (ISCR Case No. 91-0144 (Feb. 11, 2000), to explore an area generally placed in issue, such as criminal conduct (ISCR Case No. 99-0557 (July 10, 2000), and to pursue areas not technically covered in an SOR, where there has been fair notice of the gravamen of the Government's security concerns (ISCR Case No. 99-0554 (July 24, 2000)). Permission to explore areas generally covered by Guideline G in this case meets our Appeal Board's more recently expressed permissible areas of appropriate inquiry guidelines. This does not mean that there are no limits: Certainly, any embarkation on subject matter unrelated to the Guideline in issue, or excessive fishing for facts to shore up an otherwise thin or uncertain case would be subject to imposed limits (*see* R.T., at 16-17). Fair hearing and fair notice rules are not mutually exclusive, but integrally intertwined: Break the second rule and the first is placed in jeopardy. It is sufficient to say, though, that Department Counsel did not exceed established parameters of permissible inquiry in this case: Actual or at the very least constructive notice was afforded Applicant. Applicant's objection was, accordingly, overruled and noted.

### STATEMENT OF FACTS

Applicant is a 30-year old welder for his defense contractor who seeks a security clearance.

#### **Summary of Allegations and Responses**

Applicant is alleged to have been arrested for alcohol-related incidents on two occasions: He was arrested in May 1997 for DuI, to which he pled guilty and was fined \$300.00 plus costs, had his driver's license suspended for six months and was ordered to attend an alcohol awareness and safety course (ASAP), and he was arrested in January 1999 for DuI, to which he pled guilty as a first offender and was fined \$250.00 plus costs and suffered the suspension of his driver's license for six months.

For his answer to the SOR, Applicant admitted his DuI arrests and convictions.

#### **Relevant and Material Factual Findings**

The allegations covered in the SOR and admitted to by Appellant are incorporated herein by reference adopted as relevant and material findings. Additional findings follow.

Applicant began drinking during his high school years. Before his two DuI arrests and convictions in 1997 and 1999, respectively, he had no history of abusive drinking. He has completed all of the court imposed conditions relative to his two DuI convictions. The ASAP course prescribed for him by the court hearing his 1997 case was a three-day education program, which he satisfactorily completed the same year, with no alcohol diagnosis of any kind (*see* ex. 1; R.T., at 19-20). He was offered a choice to continue with Alcoholics Anonymous (AA), but was not urged to do so. He chose not to.

Currently, Applicant consumes beer at home two to three times a week to relax after work, with no recollected instances of drinking to abusive levels. His consumption level varies with each sitting from a six-pack to three beers: the amount he consumed at home the night before his hearing (*see* R.T., at 25). His current drinking pattern is one he has maintained since his last DuI arrest in 1999, and to the best of his knowledge has not entailed his ever drinking to intoxication. Other than his two DuI arrests, his use of alcohol has caused him no problems at home, at work, or in public. He likes to keep busy with fishing and work on old cars in his spare time (*see* R.T., at 26)

Applicant is considered reliable and trustworthy by his supervisors who are charged with administering a zero tolerance drinking policy on the work site. Applicant's efforts since his most recent alcohol-related incident (*i.e.*, in 1999) are

restorative and sufficient to reflect an emergent pattern of sobriety.

## **POLICIES**

The Adjudicative Guidelines of the Directive (Change 4) lists "binding" policy considerations to be made by Judges in the decision making process covering DOHA cases. The term "binding," as interpreted by the DOHA Appeal Board, requires the Judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the Judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E2.2 of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

### **Alcohol Consumption**

*Concern:* 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.

#### **Disqualifying Conditions:**

DC 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.

#### **Mitigating Conditions:**

MC 1 The alcohol-related incidents do not indicate a pattern.

MC 2 The problem occurred a number of years ago and there is no indication of a recent problem.

MC 3 Positive changes in behavior supportive of sobriety.

### **Burden of Proof**

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate the facts proven have a nexus to the applicant's eligibility to obtain or maintain a security clearance. The required showing of nexus, however, does not require the Government to affirmatively demonstrate the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of accessible risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of proof shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

## **CONCLUSIONS**

Applicant is a respected employee of his defense contractor who bears two convictions for alcohol-related incidents: one in 1997 and the other in 1999. With no history of abusive drinking before his two DuI incidents, he completed his prescribed ASAP education course and cut back on his drinking (mainly beer) at home, two to three times a week, but never to abusive levels. He is amply corroborated by his supervisors in his claims he never drinks at work, or in any way abuses alcohol around the work place, where his company maintains a zero tolerance drinking policy.

Assessment of Applicant's alcohol-related incidents must reflect the entire evidentiary record developed to date, not merely the information developed during his investigation. And in making an overall assessment of Applicant's clearance eligibility, major emphasis must be accorded his most recent drinking history, performance and supervisor endorsements.

By his actions and improved understanding, Applicant demonstrates he has taken the necessary restorative and corrective measures to ensure he does not repeat the same or similar judgment lapses associated with his prior problems with alcohol abuse. His mitigation efforts not only reflect important seasoning without any further incidents or problems in this covered area, but manifest impressive and sustaining positive steps to ensure he does not experience any alcohol abuse relapses or recurring problems with law enforcement authorities. It is noteworthy that Applicant's moderate drinking pattern over the past four years has not netted him any problems with either law enforcement authorities or his supervisors. Applicant's efforts to remedy his cited instances of alcohol abuse provide sufficient demonstrative indications of sustained mitigation to overcome any residual security risks associated with his past judgment lapses. Based on his demonstrated restorative efforts to date, he may take advantage of several mitigating conditions of the Adjudicative Guidelines for alcohol: MC 1 (no indication of a pattern), MC 2 (problem occurred a number of years ago) and MC 3 (positive changes in behavior supportive of sobriety).

Considering the record as a whole, Applicant makes a convincing showing he has the maturity and resource support to avert recurrent problems associated with alcohol abuse to warrant safe predictions he is no longer at risk to judgment impairment associated with such conduct. Favorable conclusions warrant with respect to the judgment impairment allegations covered by Guideline G.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the factors and conditions enumerated in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive.

### **FORMAL FINDINGS**

In reviewing the allegations of the SOR in the context of the FINDINGS OF FACT, CONCLUSIONS and the FACTORS and CONDITIONS listed above, this Administrative Judge makes the following separate FORMAL FINDINGS with respect to Appellant's eligibility for a security clearance.

GUIDELINE G (ALCOHOL CONSUMPTION): FOR APPLICANT

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: FOR APPLICANT

### **DECISION**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's security clearance.

Roger C. Wesley

Administrative Judge