

DATE: July 18, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-07292

**DECISION OF ADMINISTRATIVE JUDGE**

**JOAN CATON ANTHONY**

**APPEARANCES**

**FOR GOVERNMENT**

Catherine Engstrom, Esq., Department Counsel

Peregrine D. Russell-Hunter, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant admits to a pattern of drinking heavily on weekends over a period of many years. He denies problems with drinking, even though he reports that his supervisor advised him that his consumption of alcohol was affecting his dependability as he sometimes reported late for work after weekend drinking. Applicant was arrested for driving under the influence of alcohol in February 1991 and November 2000. In October 1998 he was arrested for public drunkenness. Applicant did not disclose his 1991 arrest on his Security Clearance Application. Applicant's 1998 and 2000 arrests occurred while he held a security clearance. While Applicant admits he drinks too much, he denies he has an alcohol problem and he declines to adjust his drinking. Clearance is denied.

**STATEMENT OF THE CASE**

On September 19, 2002, pursuant to Executive Order No. 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant that specified reasons why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

In the SOR the Government alleged that Applicant was disqualified from obtaining a security clearance because of alcohol consumption (Guideline G) and personal conduct (Guideline E). In a sworn statement, dated October 22, 2002, Applicant responded to the SOR and requested a hearing. The case was initially assigned to Judge Roger Willmeth, but due to caseload considerations, was subsequently assigned to me on March 17, 2003. A notice of hearing was issued on March 25, 2003, and I held a hearing in this matter on April 8, 2003. During the course of the hearing, the Government

presented eight documentary exhibits. Applicant submitted no exhibits. The transcript (Tr.) was received April 14, 2003.

## FINDINGS OF FACT

In his answer to the SOR Applicant admitted the factual allegations as set forth in sub- paragraphs 1.b., 1.c., and 1.d., involving Guideline G, Alcohol Consumption. Applicant also admits to consuming alcohol from approximately 1975 to the present. Applicant's admissions are incorporated as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant, who is 47 years old, is employed as a test engineer by a government contractor.

On September 15, 1998, Applicant signed and certified a Security Clearance Application, Standard Form 86 (SF 86) on which, he responded "no" to Question 24, which reads as follows;

### **Your Police Record - Alcohol/Drug Offenses.**

Have you ever been charged with or convicted of an offenses(s) related to alcohol or drugs? For this item report information regardless of whether the record in your case has been "sealed" or other wise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607.

Applicant responded "no" to Question 24, even though he had been arrested on January 26, 1991 for driving under the influence of alcohol, reckless driving, and refusal to take a blood or breath test. Applicant was found guilty of reckless driving and ordered to pay a fine. His driver's license was suspended for six months.

Applicant has a history of alcohol consumption on weekends. In a signed, sworn statement dated January 31, 1990, Applicant reported that his supervisor had advised him that he felt Applicant's consumption of alcohol on weekends was affecting his dependability since Applicant would sometimes report late for work on Mondays. In a signed sworn statement dated February 24, 1999, Applicant stated that he usually consumes about 12 beers or 10 mixed drinks on a weekend. He stated further that "[u]sually once each weekend my alcohol consumption causes me to feel the [e]ffects of the alcohol to the point I will not drive." Applicant also stated in the February 24, 1999, signed sworn statement that he believes he drinks more than he should but believes he is control of his alcohol consumption. In a signed sworn statement dated June 26, 2002, Applicant stated that he had never received treatment for his use of alcohol and was not participating in Alcoholics Anonymous or taking Antabuse to help him abstain from drinking. He stated further that he intended to keep drinking alcoholic beverages. He also stated that he had been diagnosed with high blood pressure and was taking medication which required him to reduce his consumption of alcohol. Applicant testified that in the summer of 2002, after receiving the diagnosis of high blood pressure, he was drinking six beers and four to five ounces of bourbon per week. (Tr. 28-29.)

The record shows Applicant's three arrests involving alcohol took place on weekends. The arrest on January 26, 1991 was on a Saturday. The arrest on November 25, 2000 was also on a Saturday. The arrest on November 1, 1998 occurred at 5:17 am on a Sunday morning.

Applicant denies excessive alcohol consumption on weekends and denies that his consumption of alcohol has rendered him untrustworthy, unreliable, lacking in candor or unwilling to comply with rules an regulations. He denies providing a false answer to question 24 on his SF-86. He states that his 1991 arrest for drunken driving was reduced to reckless driving and he did not think he was required to include the reckless driving conviction in his answer to Question 24.

## 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 the 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. Order No. 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. *See* Directive, Enclosure 2.

An evaluation of whether the applicant meets the security guidelines includes consideration of the whole person criterion, comprised of the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 the participation; (6) the presence or absence of rehabilitation and other behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation or duress; and (9) the likelihood of continuation or reoccurrence. Directive, E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Exec. Order No. 10865 § 2. *See* Exec. Order No. 12968 § 3.1(b).

Adjudicative Guidelines G, Alcohol Consumption, and E, Personal Conduct, are most pertinent to this case. The relevant provisions of Guideline G which apply to this case are:

E2.A7.1.1 *The 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.

The following conditions could raise a security concern in this matter and could be disqualifying:

E2.A7.1.2.1: Alcohol-related incidents away from work, such as driving while under the influence; and

E2.A7.1.2.2. Alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition;

E2.A7.1.2.5: Habitual or binge consumption of alcohol to the point of impaired judgment.

Guideline G identifies conditions that could mitigate security concerns deriving from excessive alcohol consumption. Mitigating conditions relevant in the instant case are:

E2.A7.1.3.1. The alcohol-related incidents do not indicate a pattern;

E2.A7.1.3.2. The problem occurred a number of years ago and there is no indication of a recent problem;

E2.A7.1.3.3. Positive changes in behavior supportive of sobriety.

The security issues identified under Guideline E which apply to the facts of this case are:

E2.A5.1.1. *The Concern*: 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 security concerns and may be disqualifying are

E2.A5.1.2.2. 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;

In this case, the following conditions could mitigate security concerns :

E2.A5.1.3.1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability;

E2.A5.1.3.2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily.

Under the Directive, a decision to grant or to continue an applicant's 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 commonsense determination required, the administrative judge can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. *See* Directive, 5 and 6.

### **Burden of Proof**

Initially, the Government has the burden of proving any controverted fact alleged in the SOR. The standard of proof is less than a preponderance of the evidence. If the Government meets its burden and establishes conduct cognizable as a security concern under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of criterion conduct, it is clearly consistent with the national interest to grant or continue his security clearance. Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. *See* Directive, Enclosure 2, Section E2.2.2.

A person who seeks access to classified information enters a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government or admitted by the Applicant raise doubts about Applicant's judgment, reliability, or trustworthiness, Applicant has a heavy burden of persuasion to demonstrate that he is nevertheless security worthy. In *Department of the Navy v. Egan*, *supra*, at 531, the Supreme Court concludes that "[t]he clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." Accordingly, I interpret the Court's guidance to mean that doubts against an Applicant's security worthiness are to be resolved against the Applicant.

### **CONCLUSIONS**

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to each allegation set forth in the SOR:

Subparagraph 1.a. of the SOR under Guideline G, Alcohol Consumption, alleges that Applicant has consumed alcohol with varying frequency, at times to excess and at times to intoxication, from 1975 to the present. Subparagraph 1.b. of the SOR alleges that Applicant was arrested in November 2000 for driving while intoxicated. Subparagraph 1.c. of the SOR alleges that in November 1998, Applicant was arrested for public intoxication. Subparagraph 1.d. of the SOR alleges that Applicant was arrested in January 1991 for driving under the influence of alcohol, reckless driving, and refusal to take a blood or breath test. The SOR further alleges that, pursuant to the 1991 arrest, Applicant was found guilty of reckless driving, paid a fine, and had his driver's license suspended for 6 months.

Subparagraph 2.a. of the SOR, under Guideline E, Personal Conduct, alleges that Applicant falsified a material fact on the SF-86 he executed on September 15, 1998, when he failed to disclose in his answer to Question 24 that, on January 26, 1991, he had been arrested for driving under the influence of alcohol, reckless driving, and refusing to take a blood or breath test.

The record shows that Applicant is 47 years old and admits to consuming alcohol for all of his adult life. In the way he has used alcohol away from his workplace, Applicant has raised a security concern under subparagraph E2.A7.1.2.1 of Guideline G. His weekend use of alcohol over a period of many years has resulted three arrests, one for public drunkenness and two for driving under the influence of alcohol. Two of the arrests occurred while Applicant held a security clearance.

Applicant has stated that for many years his weekend consumption of alcohol has been sufficient to cause him, at least once each weekend, to feel unable to operate an automobile safely and responsibly. Additionally, Applicant's supervisor observed that his use of alcohol on weekends caused him to be late for work on Mondays and impaired his dependability on the job, raising concerns under subparagraphs E2.A7.1.2.2 and E2.A7.1.2.5.

While Applicant denies excessive use of alcohol or impairment of his abilities as the result of his alcohol use, his public conduct and the observations of his supervisor argue otherwise. Despite these warning signals, Applicant has not sought an evaluation of his alcohol use by a credentialed medical professional, nor has he deemed it necessary to curtail the amount of alcohol he drinks.

Applicant denies excessive alcohol use. He has identified his current alcohol use at six beers and 4 to 5 ounces of bourbon per week, the equivalent of approximately 14 to 16 drinks per week. A person who consumes 2 or more alcoholic drinks per day---or 14 or more alcoholic drinks per week---is considered to be a heavy drinker. Excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, and failure to control impulses, thereby increasing the risk of unauthorized disclosure of classified information due to carelessness.

Applicant has put forward no facts which would mitigate the Guideline G security concerns. While the alcohol related arrests identified in subparagraphs 1.b., 1.c., and 1.d. of the SOR occurred a number of years ago in 1991, 1998, and 2000, they suggest a pattern: all arrests occurred on weekends after Applicant had been drinking, Applicant continues the pattern of weekend drinking, and Applicant offers no evidence of behavioral changes that would make similar episodes in the future unlikely. *See* Guideline G, ¶¶ E2.A7.1.3.1, E2.A7.1.3.2; E2.A7.1.3.3. Accordingly, allegations in subparagraphs 1.a. through 1.d. of the SOR are concluded against Applicant.

With respect to Guideline E, Personal Conduct, the Government has also established its case. In subparagraph 2.a. of the SOR the Government alleges that, in executing his response to Question 24 on the SF-86, Applicant deliberately failed to disclose his 1991 arrest for driving under the influence of alcohol, reckless driving, and refusal to take a blood or breath test. Applicant states that he did not disclose the arrest because the charge was reduced to reckless driving and he did not think he was required to list reckless driving in response to Question 24.

Applicant admitted that the initial charge was driving under the influence of alcohol, reckless driving, and refusal to take a blood or breath test. He also acknowledged that he completed the certification at the end of the SF-86 and attested, by his signature, that his responses to all questions on the form were true, complete, and correct to the best of his knowledge and belief and that he understood that a knowing and willful false statement made in response to any of the questions was punishable under section 1001 of Title 18, United States Code.

Two mitigating conditions under Guideline E might be applicable to the instant case. The security concern raised by Applicant's disqualifying conduct could be mitigated under E2.A.5.1.3.1 if the information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability. However, because the information was substantiated and was pertinent to a determination of the Applicant's judgment, trustworthiness or reliability, mitigating condition E2.A5.1.3.1 does not apply to the facts of Applicant's case. Mitigating condition E2.A5.1.3.2 also is inapplicable, for while the falsification was not recent, it was not an isolated incident and the Applicant did not provide correct information voluntarily. Accordingly, the allegation in subparagraph 2.a. of the SOR is concluded against the Applicant.

In my evaluation of the record, I have carefully considered each piece of evidence in the context of the totality of evidence and under all of the Directive guidelines that were generally applicable or might be applicable to the facts of the case. Under the whole person concept, I conclude that Applicant has not successfully overcome the Government's case opposing his request for a DoD 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, Alcohol Consumption (Guideline G): AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

Subparagraph 1.d.: Against the Applicant

Paragraph 2, Personal Conduct (Guideline E): AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant.

### **DECISION**

In light of all 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 the Applicant. Clearance is denied.

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Joan Caton Anthony

Administrative Judge